Embracing Sunlight: The Case for the Public Tax Policy Document

by Heléna Klumpp

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In this report, Klumpp describes the external pressures that should lead every large multinational to consider investing the time and expertise necessary to craft a well-thought-out public tax policy document. She explains the key elements of that document and offers suggestions for getting started on one.

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I. What Is It?

A public tax policy document is an organization's declaration of its policies and procedures toward all things tax — or maybe just a few things tax, depending on the authoring organization's comfort level with disclosure. Tax policy disclosures come in all shapes and sizes (more on that later), but their key elements include discussions of a company's attitude toward tax risk, its use (or nonuse) of tax havens and shelters, and its relationship with tax authorities.

II. Why Have It?

If the corporate tax director at even the most transparent and compliant of taxpayer companies is used to having her decisions shrouded in the secrecy of the corporate tax return, she may find it anathema to post to the internet, for all to see, a description of how her department manages risk and what drives tax-related decision-making within her organization.

Until recently, there was no reason for most companies to go above and beyond the level of tax disclosure required in financial statements.[1] But in the past several years — a period in which tax-motivated inversions flourished, tax authorities began to "grade" taxpayers on their compliance and tax risk management processes, EU state aid cases began to threaten long-standing tax incentives, and the OECD's base erosion and profit-shifting initiative took flight — the environment in which multinationals make tax decisions has changed significantly. These

[1] Companies in financial and extractive industries are exceptions to this rule. The laws and industry standards on government payments that are specific to them are beyond the scope of this report.

changes to the tax environment are what make a public tax policy document an increasingly important piece of a company's public profile.

In some cases, the benefit of a public tax policy is defensive: Having a document in hand before the media picks up on a critical new report from a high-profile nongovernmental organization, for example, saves an organization's tax, government affairs, and communications teams from having to make a last-minute scramble to draft a statement in response. The melee could produce a suboptimal response in the limited time available to reply during the news cycle (assuming the right decision-makers can even be reached in that time).

At other times, the benefit of a public tax policy is offensive: Having a document in hand demonstrates how the tax department positively contributes to an organization's sustainability profile.

And, for an increasing number of taxpayers, a public tax policy document is now required by law.

A. New U.K. Requirement: First Shoe Dropped?

Under rules enacted in the United Kingdom's Finance Act 2016, companies with a substantial presence in the United Kingdom are required to annually post to the internet a public document that describes their organization's tax strategy regarding their U.K. operations.[2]

The requirement applies broadly to individual U.K. companies, partnerships, groups (defined by reference to 51 percent ownership relationships), and subgroups — including subgroups of non-U.K.-domiciled parents — that have either £200 million in annual sales or balance sheet assets exceeding £2 billion.[3] A group with members in multiple countries is also subject to the requirement if it is subject to U.K. country-by-country reporting requirements or would have been subject to them if the head of the group were a U.K. tax resident — a standard that applies to groups with £750 million in annual sales.[4]

The document must be posted to the internet by the end of the first financial year that begins after September 15, 2016, to avoid the risk of financial penalties.[5] It must cover the following four topics:

- the group's approach to risk management and governance in relation to U.K. taxation;
- the group's attitude toward tax planning, to the extent it affects U.K. taxation;
- the level of risk in relation to U.K. taxation that the group is prepared to accept; and
- the group's approach toward its dealings with HM Revenue & Customs.[6]

Although not required, the legislation invites companies to discuss "other information relating to taxation (whether U.K. taxation or otherwise)."[7] It also explicitly leaves the door open to future regulations requiring public CbC reporting as part of the tax strategy document.[8]

A policy paper issued by HMRC in December 2015 explains that the measure is designed to:

> Ensure greater transparency around a business's approach to tax to HMRC, shareholders and consumers. And board level oversight of those strategies will embed tax strategy in existing corporate governance processes. Taken together this should drive behaviour change around tax planning and therefore enhance tax compliance.[9]

Notably — but perhaps unsurprisingly, given this anticipated effect — HMRC associated an

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[2] U.K. Finance Act 2016 (Finance Act), section 161.

[3] *See generally* part 1 of Finance Act, Schedule 19.

[4] For a helpful discussion of the U.K.'s updated CbC reporting rules, see the HM Revenue & Customs website. Note that there are many areas in which application of the new disclosure rules may be unclear. For example, does the requirement apply to a U.K. subgroup that has more than £200 million in annual sales but is also part of a larger group that doesn't hit the £750 million threshold and thus isn't required to file a CbC report?

[5] Penalties start at £7,500 for an initial six-month foot fault and then accrue at the rate of £7,500 for each month the report is delinquent. *See* Finance Act, Schedule 19, part 2, para. 18.

[6] *See id.* at para. 17(1).

[7] *Id.* at para. 17(2).

[8] *Id.* at para. 17(6) ("The Treasury may by regulations require the group tax strategy to include a country-by-country report").

[9] HMRC Policy Paper, "Tax Administration: Large Businesses Transparency Strategy" (Dec. 9, 2015).

increasingly positive revenue effect with the measure, scoring it to raise £40 million in 2016-2017 and £625 million in 2020-2021.[10]

Any company subject to the new requirement should be working on its strategy documentation. But even organizations without a substantial U.K. presence should view the requirement as a warning shot. As news of this measure and its potential revenue effect spreads, and as more and more companies post documents online in response to the U.K. requirement, it is perhaps inevitable that other jurisdictions will implement their own versions of the rule. All it takes is for one legislator to propose it. Then, as happened with codification of the economic substance doctrine, no one will want to be viewed as the lawmaker who opposes a measure designed to support greater transparency among large taxpayers.

This "copycat" potential is perhaps greatest in the United States, where tax legislation is a distinct possibility in the coming months. A revenue score associated with a U.S. version of the requirement is likely to be even greater than projections in the United Kingdom, considering the large number of companies and multinational groups headquartered in the United States.

B. Tax as a Sustainability Issue

It is difficult to find a large organization that doesn't pay some lip service to the notion of corporate social responsibility or sustainability on its public website. Although there are many definitions of sustainability, it generally refers to the notion of doing business in a manner that both meets the needs of current consumers and supports the availability of resources for future generations.[11] It is beyond the scope of this report to address whether those initiatives are rightly within the purview of corporations, but there is at least a perception that a desire to do business with "good corporate citizens" influences the behavior of investors, employees, and customers.[12]

Metrics have developed in this relatively new area of analysis to give stakeholders a view to exactly which companies are truly good corporate citizens. The Dow Jones Sustainability Indices (DJSI) were created in 1999 as a tool for investors "who have recognized that sustainable business practices are critical to generating long-term shareholder value." The indices evaluate the sustainability of participating companies (3,500 invitees, culled from the 10,000 companies on the S&P Global Broad Market Index). They rank the companies by industry, using factors such as corporate governance, climate change mitigation, and supply chain standards — standards designed to indicate a company's ability to respond to shifting factors that influence its competitive environment. Greater agility, according to the website of data partner RobecoSAM, bodes well for long-term shareholder value.

At least in academic circles, debate may continue about the extent to which corporations have a duty to avoid overly aggressive tax planning as an element of corporate social responsibility.[13] But in 2014 the DJSI took the step of adding questions about tax to the questionnaire that companies must complete to be considered for inclusion in one of its indices.

A key theme in the tax sustainability area concerns the availability of a company's public tax policy statement. On a sample of the questionnaire completed by DJSI candidates, the first tax-related question asks whether the responding company maintains a tax policy statement:

> Does your company have a tax policy/ principles/strategy in place which indicates your approach towards

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[10] *See* Table 2.1 of HMRC Summer Budget 2015 (July 8, 2015).

[11] *See* Environmental Protection Agency website.

[12] For a discussion of how millennials approach brand loyalty with an eye toward sustainability, see Daniel Mahler, "An Emerging Retail Trend Is Key for Attracting Millennials," Business Insider, Oct. 27, 2015. Who wouldn't be tempted to shell out $8 to enjoy a bath bomb from Lush Fresh Handmade Cosmetics, whose website explains, "Lush wants our customers to have a safe living environment, to have access to good education and efficient healthcare services — and we know that taxes are needed for this"?

[13] *See, e.g.*, Reuven S. Avi-Yonah, "Corporate Taxation and Corporate Social Responsibility," 11 *NYU L&B* 1 (2014), arguing that under any legal theory of the corporation, corporations have the duty to avoid overly aggressive tax structures.

taxation? Please indicate if this policy is publicly available and provide supporting evidence.[14]

The sample survey explains that the question is designed to determine if a company has a transparent plan in place to address "sensitive or high-risk tax issues," including:

- compliance with the spirit as well as the letter of the tax laws and regulations in countries where the company operates;
- the payment of taxes according to where value is created;
- the use of structures intended for tax avoidance;
- the company's approach to transfer pricing; and
- the use of secrecy jurisdictions or so-called tax havens.[15]

PRI, the institutional author of "Six Principles for Responsible Investment," has also flagged tax as a sustainability issue. PRI consists of representatives from an international network of investor-side financial institutions. It describes itself as a "truly independent" organization:

> It encourages investors to use responsible investment to enhance returns and better manage risks, but does not operate for its own profit; it engages with global policymakers but is not associated with any government; it is supported by, but not part of, the United Nations.[16]

PRI's six principles are designed to give investors a framework for incorporating so-called ESG factors (environmental, social, and governance) into their investment decisions. In 2015 its members came together to discuss the tax-specific elements of these decisions, which culminated in an extensive report on how investors should engage with investee companies on tax issues. The report outlines key elements of aggressive tax strategies, explains the various business and societal risks that ensue from them, and teaches investors how to plumb financial statements, media reports, and sustainability documentation for red flags in a company's tax profile.

Importantly, the report notes that the absence of a public tax policy document increasingly appears to be a harbinger of a company's tax risk:

> Disclosure of how the company perceives and addresses tax-related risks, including information on overarching policies and governance of the issue, is critical. While many companies still do not provide any meaningful narrative or disclosure beyond numbers in their annual reporting, examples of good practices in this regard have emerged. Leading MNEs should be expected to follow this model.[17]

The report also includes a list of questions to be posed to management regarding a company's tax risk profile. The very first question asks if the organization has "considered publishing a tax policy/principles to indicate [its] approach towards taxation."

Even country-specific groups are getting into the tax-sustainability act. VBDO, the Dutch Association of Investors for Sustainable Development, is now in the second year of its "transparency benchmark" study of 68 listed Dutch companies. Like the DJSI, the VBDO report was born of concern about "the adverse effects of . . . aggressive tax strategies" and the resulting truism that favorable business environments are unsustainable when value creation and tax collections fail to align.[18]

The 66-page 2016 report ranks companies based on their assessment of six "good tax governance" principles. The first of these is, "define and communicate a clear tax strategy."[19]

With tax well on its way to reaching the level of importance that labor and environmental issues hold within the corporate sustainability community, more and more tax directors will find

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[14] *See* RobecoSAM sample questionnaire for diversified consumer services, at 37-40.

[15] *Id.* at 38.

[16] *See* PRI's mission statement on its website.

[17] PRI, "Engagement Guidance on Corporate Tax Responsibility," at 17. *See also id.* at 31-32, discussing reasons offered by some conferees regarding their reluctance to increase the level of voluntary tax disclosure.

[18] *See* VBDO's 2016 Tax Transparency Benchmark report, at 6.

[19] *Id.* at 10. The other five are: "B. Tax must be aligned with the business and is not a profit centre by itself. C. Respect the spirit of the law. Tax compliant behavior is the norm. D. Know and manage tax risks. E. Monitor and test tax controls. F. Provide tax assurance."

themselves on the receiving end of a corporate sustainability officer's phone call to inquire, "What have you done for me lately?" Given the significance that the maintenance of a transparent corporate tax policy has gained in this area, drafting such a statement is an important way that a corporate tax department can contribute to a company's sustainability goals.

C. Media Attention

If you run a Google search for "Google and tax," you get about 231 million results — 111 million if you search Google News.

It's hard to know whether the public is really more interested in tax now or if the increasing media attention on multinationals' tax rates and strategies is a logical outgrowth of the 24-7 news cycle. Regardless of the cause, events such as the release of the Panama papers and the decision in the EU state aid case involving Apple have clearly pushed taxes further into the public consciousness. Companies such as Starbucks, Apple, and Facebook have found themselves scrambling to respond to public outcry following damning media reports about their taxes.[20]

The risk of unhelpful media attention becomes even more prevalent in the face of mounting support for expanded public dissemination of CbC tax reports. While the United States remains steadfastly opposed to publicizing the reports, the European Commission has gone so far as to adopt a proposed directive on public CbC reporting.[21]

It's well understood, but it bears repeating: The information in these reports is likely to be misunderstood by a layperson, absent some sort of explanatory narrative.

A well-crafted tax policy statement is one way a company can respond in advance to an impending public relations crisis brought about by an unhelpful media reference to its taxes. As noted above, the very existence of a public tax policy document signifies a taxpayer that is bathed in the helpful light of transparency.

Moreover, it can be difficult for a company to marshal all the necessary resources with the appropriate authority to speak on the company's behalf (tax and corporate communications personnel, at the very least) in time to meaningfully respond to a reporter's inquiry by deadline. Having a policy document in place will give the team a ready place to go for a quick response, because they've already done the legwork — for example, they've already calculated all taxes paid by the organization or have written a public-facing statement about its approach to transfer pricing.

D. Critical NGO Reports

As multinationals and the investor community have started to pay attention to tax as a sustainability issue, and as media interest has risen commensurately, nongovernmental organizations' interest in tax has continued to track correspondingly upward.

Tax has made interesting bedfellows in the NGO community, linking the expected organizations like Citizens for Tax Justice with groups like Oxfam, Christian Aid, and U.S. PIRG. The organizations have launched into the debate on overly aggressive corporate tax planning with reports highlighting the social justice ramifications of the behavior.[22] Of necessity, reports issued by these organizations rely on publicly available information culled from SEC filings, government websites, and lobbying disclosures, as they attempt to draw conclusions on complex issues like deferred taxes, effective rates, and the amorphous notion of paying one's "fair share" of tax. Some of the organizations have voiced support for public CbC reporting.[23] Others

[20] *See, e.g.*, BBC News, "Facebook Paid £4,327 Corporation Tax in 2014" (Oct. 12, 2015); and Leonid Bershidsky, "How Apple Calculates and Pays Its Taxes," Bloomberg View, Sept. 1, 2016.

[21] The proposal goes beyond the current public reporting requirements for some industries. A helpful summary of the status of the issue can be found at the European Commission banking and finance webpage.

[22] *See* Christian Aid, Oxfam, and ActionAid, "Getting to Good: Towards Responsible Corporate Tax Behavior" (Nov. 2015).

[23] *See* Andres Knobel and Alex Cobham, "Country-by-Country Reporting: How Restricted Access Exacerbates Global Inequalities in Taxing Rights," Tax Justice Network (Dec. 2016).

have linked increased lobbying expenditures with lower tax rates.[24]

The authors of these reports often use the effective technique of "naming names," ostensibly on the theory that a report on corporate tax avoidance is infinitely more interesting — and thus more likely to gain traction in the mainstream media — if it refers to familiar and popular companies. The more ubiquitous a company's presence in the fabric of everyday life, the better — think Apple and Google.[25]

If the timing is right (perhaps a slow news cycle, with an easy tie-in available to other news like a product launch), this type of report can gain media traction and create a potential PR problem for any company the report mentions by name. It can become a problem for others, too, if an inquisitive reporter for a local news site attempts to extrapolate the report's conclusions to a large employer in her coverage area, for example.

With all eyes on potential U.S. corporate and international tax reform, it is reasonable to expect that NGOs will seize the opportunity to step up their fight for media attention and that the cadence of their reporting on corporate taxes will increase. A company that has done the pre-work of drafting a good tax policy statement may be able to avoid the need for a last-minute scramble to respond.

III. Drafting an Effective Tax Policy Statement

As anyone who's ever tried to draft a policy statement knows, quite a bit of artistry can be involved in selecting precisely the right words, or even deciding precisely the right elements of an area to address. Tax policy statements are no exception to that rule. In fact, the complexity of the underlying subject exacerbates the difficulty in creating one.

If the document is designed to respond to a particular call to action — ticking a box on the DJSI questionnaire or complying with the new U.K. rules, for example — the path is that much clearer. But even within the four corners of those requirements, it can be difficult to determine the appropriate depth and scope of the statement.

A critical first step in crafting a statement is to determine who should (or must) be involved. Like most documents that espouse corporate policy, a tax policy statement should be the product of collaboration among myriad internal stakeholders (tax, corporate communications, and investor relations). In many cases, the effort should fall to the same group that typically responds to the type of ad hoc, tax-related PR crises described above — with the benefit that the group will typically enjoy the luxury of time for careful choice of words, in contrast to the defensive PR scrambles they're used to making. If the document is drafted with an eye toward sustainability initiatives, the company's sustainability team should also be represented in the working group.

C-suite and board approvals indicate helpful — and, depending on corporate approval matrices, necessary — support at the highest levels of the organization and demonstrate commitment to pursuing sound tax policy at the most senior level of the enterprise.

Outside advisers can also serve a critical role in this process. A set of fresh ears and eyes can provide external perspective and offer a good channel to translate the company's objectives into words that a layperson will be able to understand. A useful outside consultant will have a strong tax background and perhaps some communications or government relations experience. He should be familiar with the universe of corporate tax policy statements that have already been published, and he should be sensitive to external factors that will affect the audience's perspective (and that should thus influence the drafting of the document).

Once the team has been assembled, the drafting begins. Without any sort of template, it can be difficult to know where to start. For companies that are subject to the new U.K. requirement, a careful review of the U.K. Finance Act and commentary on the rule (possibly in consultation with outside experts) is going to be the most logical starting place.

Based on my review of the literature in this area, I offer the following tips to help launch the process.

[24] *See, e.g.*, Oxfam America, "Rigged Reform" (Apr. 12, 2017).

[25] *See, e.g.*, U.S. PIRG Education Fund, Citizens for Tax Justice, and Institute on Taxation and Economic Policy, "Offshore Shell Games: The Use of Offshore Tax Havens by Fortune 500 Companies" (Oct. 2016) (calling out Apple, Google, Nike, and other companies for their use of entities in so-called havens).

A. Hit the Top Three Core Issues

A useful tax policy document will address an organization's views on at least three key (and somewhat overlapping) areas: transparency and relationships with tax authorities, compliance, and governance and risk management.

1. Transparency generally and in relationships with authorities.

How does the organization interact with tax authorities in the jurisdictions in which it does business? Does the company participate in any special audit regimes reserved for particularly transparent taxpayers, like the U.S. compliance assurance process or Dutch horizontal monitoring? Does it have a view on transparency initiatives like CbC reporting? How about public disclosure of CbC reports? Does it participate in or have a view on discussions regarding the OECD BEPS initiatives?[26] Does the company operate in tax havens?

The tax policy statement of Dutch company Royal DSM, the top-rated company on VBDO's 2016 tax transparency benchmark rankings, hits on many of these themes and offers examples. For example, it states that the company "supports the idea of a global solution for fair tax policies and systems" and then points out that it walks the talk: "Thus, DSM closely monitors and provides input on the OECD initiative on Base Erosion and Profit Shifting, including topics such as country-by-country reporting."[27] The document goes on to explain that DSM "is transparent towards tax authorities" and describes the CAP-like Dutch horizontal monitoring process in layperson-friendly terms.

2. Compliance.

Virtually all tax policy statements contain a boilerplate declaration that the authoring company complies with all the tax laws in the countries in which it does business. Many are careful to point out that the company complies with both the spirit and the letter of the law — an apparent acknowledgement of the company's distaste for exploiting loopholes.

It's instructive to discuss potential disputes as well. Are there areas of frequent disagreement or potential instances of double taxation, and if so, how does the company handle them? Does the company do anything to minimize disputes?

Obviously, there is some overlap between a taxpayer's attitude toward compliance and its approach to dealing with tax authorities. For example, the tax policy statement of Rabobank, ranked sixth on VBDO's tax transparency list, explains that reasonable minds can disagree on concepts like "a reasonable application of the law" and "economic substance."[28] As such, it explains, "Rabobank transparently presents the choices it has made and any potential points of doubt to the tax office."

3. Governance and risk management.

A tax policy document should explain where within the company responsibility lies for tax-related decisions. To what extent does the board oversee or review tax decisions? What processes are in place to ensure that all transactions are captured and reported properly for tax purposes?

This can be a good opportunity to describe in the document the people who work in the tax department. How many are there? Are they situated in one location or integrated throughout the group's operating sphere? Are responsibilities clearly delineated, and do they align with expertise? Is there a companywide or tax-specific code of ethics or conduct that employees are bound to follow, and, if so, how is their behavior monitored and measured against it? Under what circumstances will the company engage an outside adviser?

The tax policy statement of Unilever, ranked second on VBDO's list and touted as a good example in PRI's report, goes into great detail on how the company manages tax risk, explaining how the company's "Tax Risk Framework" monitors the greatest tax risks and establishes mechanisms to mitigate them, with examples. The document explains the company's worldwide tax provision process and notes that the company

[26] Lush Ltd., discussed in greater detail later in this report, provides CbC reporting in its annual financials — all the more surprising given that it is privately held.

[27] "Taxation at DSM," at 2.

[28] Rabobank tax policy statement, at 1.

tries to minimize open audit years as a key element of its risk-mitigation strategy.

B. Write Clearly, Think Defensively

An organization's tax policy statement will be the first place a reporter goes when that organization's name arises in an unhelpful context. As such, a tax strategy document is most useful if it foresees and addresses the issues that are most likely to pop up. It must give the reader answers to their as-yet-unasked questions about the organization's "tax DNA" — its governing principles in the tax area. The tax policy statement is self-serving in that the organization is controlling the discussion of itself, but it also needs to be honest. The more examples a strategy document can (comfortably) provide, the better for the statement. They will demonstrate that the document isn't just words on a page: The organization acts according to well-thought-out policies.

An effective tax strategy document should explain complex issues in simple terms, to preempt one of the biggest headline risks: Corporate tax is complicated, and numbers can be misleading. For example, consider the public outrage that occurs when a media outlet or NGO reports that a company paid "zero" tax last year, despite earning millions in "profits." As tax professionals know, there can be perfectly legitimate reasons for a result like that.[29] A tax policy document offers a forum to explain those reasons.

In addition to the three pillars discussed above, possible topics to address in the policy document include the following.

1. Taxes paid or collected — all taxes, that is.

With all the attention being paid in the United States to corporate income tax, it's easy for the public to lose sight of the other levies to which multinationals are subject and those that companies are required to collect and remit from other parties. The tax policy document provides a perfect forum for a reminder of all the payroll, value added, property, sales, and other taxes to which large companies are subject. They are all channels through which companies contribute financially to the societies in which they do business.

When all the various payments a company makes are added up, the number can be quite impressive, and thus helpful to a company that is attempting to swat away claims that it does not pay its "fair share" of tax. Deloitte UK's tax policy disclosure includes a bar chart that shows an estimate of the total taxes paid by Deloitte UK and its members in each of the last five years, as well as the taxes collected by Deloitte on behalf of others, broken down into the various categories of tax.[30] Rabobank's report offers a nonexhaustive list of taxes it paid in its most recent financial year, including nonrecoverable VAT, payroll taxes, and bank tax.[31]

DSM goes even further, incorporating into its report a concept of "economic value distributed," which measures the company's "contribution to society" as the amount spent on "employee benefits, goods and services purchased from other suppliers, customs duties and other payments to governments including taxation."[32] The report goes on to dissect the €0.94 billion tax contribution, breaking it into direct and indirect buckets as well as regional ones (highlighting the top countries).

2. Incentives.

Followers of the recent drama surrounding the European Commission's state aid investigations will understand why incentives can be a harbinger of tax risk for a company. Most recently, the commission's competition directorate-general ruled that an incentive granted by Ireland to Apple constituted an undue benefit and ran afoul of EU state aid rules. Apple and Ireland have both appealed the decision, which, according to the European Commission

[29] *See id.* at 3-4 for a particularly effective discussion of the difference between tax and book. Unilever's tax discussion includes a layperson-friendly explanation of concepts like timing differences and deferred tax.

[30] "Deloitte LLP – UK Tax Policy," at 3.

[31] *See* Rabobank tax policy statement, *supra* note 28, at 4.

[32] *See* DSM report, *supra* note 27, at 4-6.

press release announcing the decision, could result in a clawback of up to €13 billion in tax from Apple. Meanwhile, Amazon and McDonald's await decisions on similar actions opened by the commission against Luxembourg in their honor.

In light of the fervor surrounding these cases and the headline risk they present, companies that benefit from special tax incentives may wish to consider addressing them in their tax policy statement. (State or local incentives should also be considered for any headline risk they may present.[33]) In some cases, the incentive discussion may overlap with information provided in financial disclosures related to the duration or the impact on rate. But the tax policy statement can go into greater detail and explain the policy behind the incentive: What behavior was the incentive designed to reward? How has the incentive helped the jurisdiction achieve its goals — by bringing X number of jobs or Y percentage of economic growth to the jurisdiction? Depending on the facts, it may be helpful to include a discussion of the company's historic presence within the jurisdiction.

3. Effective tax rate reconciliation.

As noted in the PRI report's discussion of how to engage with companies on tax issues, investors can back into a foreign effective tax rate using data found in a company's public financial reports. A potential red flag arises, notes PRI, if this rate is significantly lower than the weighted average of statutory rates in the countries in which the company does business.[34]

To help aid public understanding of any such discrepancy, it may be helpful to include an effective tax rate reconciliation in the organization's tax policy statement. Like a discussion on incentives, the information may well be available from other sources (such as financial statements), but as DSM's thorough report points out, taxes are "not always easy for non-specialists to understand," and thus it would be a service in itself for an organization to offer a document that "brings together all the relevant information that [an organization] makes public on taxation, from policies to payments, in one central resource."[35]

4. Shareholder value.

While at one level the purpose of a tax policy document may be to shine up the company's halo of good citizenship, part of being a good corporate citizen is creating value for investors. A company can address this point by drawing a connection between prudent tax policy and long-term shareholder value. The DJSI questionnaire makes clear why the link is worth addressing. The report says that "aggressive corporate tax strategies" may lead to reputational risk and decreased brand value, the erosion of relationships with in-country officials, the prompting of even stricter tax regulations to combat abuses, and the potential for base erosion to become extensive enough to put economic development at risk in key operating markets.[36]

5. Lobbying.

As noted above, some NGOs have reported on a link between lobbying expenditures and companies' low effective tax rates. Although it's easy to obtain public data on how much a company spends on lobbying, without more detail it's impossible to tie specific percentages of those expenditures to lobbying on specific issues such as tax (or any sub-issue thereof).[37] Unfortunately, the damage is done when headlines imply what the available facts can't confirm: Spending on lobbying equates with saving on taxes.

Many aspects of a thorough tax policy document can respond to this type of attack — total taxes paid or collected or an effective tax rate reconciliation, for example. But it may also be helpful to take a calculated risk and include an explicit discussion of some of the tax policy issues on which the company engages. For example, the document could discuss whether a company

[33] *See, e.g.*, Michael J. Berens and Ray Long, "Illinois Businesses Get Lucrative EDGE Tax Breaks, Fall Short of Job Goals," *Chicago Tribune*, Oct. 2, 2015.

[34] *See* PRI 2015 report on tax discussions, *supra* note 16, at 15-16.

[35] *See* DSM report, *supra* note 27, at 1.

[36] *See* sample questionnaire, *supra* note 13, at 38.

[37] A recent report by Oxfam attempts to make such an allocation for each company in the *Fortune* 50 by computing a percentage based on the relative numbers of tax-to-nontax issues on which it lobbied (disclosed on required Senate filings) and applying that percentage to the total amount the company spent on lobbying. This, of course, is imprecise at best. *See supra* note 23, at 24.

supports the OECD's transparency initiatives and is weighing in on that ongoing debate, or whether it supports tax initiatives designed to advance popular policy objectives, such as increasing the number of U.S. manufacturing or research jobs.

6. Transfer pricing and other intercompany issues.

Although this probably falls outside the comfort zone of most multinationals, at least one company offers details of its intellectual property holding structure in its public tax document. Lush Ltd., the parent of Lush Fresh Handmade Cosmetics UK (as noted earlier, known in the United States for its luxurious $8 bath "bombs"), explains in its tax policy document that Lush Cosmetics Ltd. serves as a holding company for the "businesses that develop, manufacture and retail" its products, and "a company called Cosmetic Warriors sits outside the group for accounting and tax purposes but for transfer pricing purposes it is a connected party and transactions with Lush companies are at arm's length." The report goes on to explain that Cosmetic Warriors creates and holds the group's IP rights for its product, charging a license fee to affiliates for use. Notes the company, "As long as our inventors continue to live and invent our products in the UK, the company holding their patents and trademarks will reside and be taxed here too."[38]

Although this level of disclosure is rather unique, many companies take the issue of transfer pricing head-on in their documents, if only to dispel public perception that "transfer pricing" is by definition a bad thing. Although tax professionals understand that the term is neutral, many laypersons — and alas, reporters — may inextricably link it to improper tax avoidance behavior.

A few words explaining the concept of transfer pricing can go a long way toward establishing a clear defense against external criticism. For example, Unilever's tax policy document succinctly defines transfer prices as "the prices paid on transactions between companies in the Unilever Group." The report goes on to explain that while the company's global transfer pricing policy is set up to ensure that transfer prices accurately reflect value creation, some tax authorities may disagree with some of the judgement calls the company is sometimes required to make. Different jurisdictions may have different ideas on who has the right to tax the same item of income, which opens the company up to the possibility of double taxation, the report notes.

C. Size Matters, 'Fairness' Doesn't

Like most good writing, a tax policy document doesn't need to be long to be effective. In fact, simple and concise language can carry the day when it comes to offering clear explanations of a complicated subject.

That said, if the document is to be at all useful, there is perhaps such a thing as being overly brief. The taxation policy statement of Adobe Systems, for example, weighing in at two paragraphs long, offers the obligatory nod toward the company's contributions to the communities in which it operates, explains that the company's 25 percent effective tax rate is in line with that of its peers, and states that it manages its tax affairs "responsibly and in compliance with all applicable tax rules." Declarations of that nature can provide at least a superficial response to a difficult PR situation. But without additional detail to back up those statements, the document lacks the kind of insight into the organization's tax DNA that makes a well-written tax policy statement truly effective. It is also unlikely to win friends in the corporate social responsibility department if sustainability is one of the goals.

Drafters would also be wise to avoid meaningless phrases. For example, what constitutes a "fair share" of tax is in the eye of the beholder. Thus, like NGO reports that criticize companies for failing to pay their fair shares of tax, a corporate tax policy document that espouses only the company's commitment to paying its fair share of tax leaves the reader completely uninformed. Without additional explanation — that a fair share of tax takes into account risks, legal compliance, and OECD-compliant transfer pricing policy, for example — the phrase amounts to wasted ink.

[38] This level of disclosure is particularly notable given that Lush is privately held. *See* Lush Company Tax Policy.

D. When in Doubt, Follow a Leader

While every company will have its own views on what should go into a tax policy statement (and its own comfort level about the depth into which it should discuss those issues), it is helpful to plumb external sources for ideas on possible topics to cover.

Surveying what other companies have done can help start the brainstorming process. There are plenty of good examples of organizational tax policy documents in circulation on the internet (many are cited in this report), and more will come online as the clock continues to tick on the U.K. Finance Act requirement.

Other helpful starting points include:

- *PRI investors' recommendations on corporate income tax disclosure.* This investor-side sustainability organization, discussed above, offers a concise one-pager of its recommendations on what constitutes a level of tax disclosure in line with its objectives. For those with an appetite for a longer discussion, PRI's "Engagement Guidance on Corporate Tax Responsibility," discussed above, contains a more fulsome discussion of the view from the investor community and may provide additional points to consider addressing in a tax policy document.
- *BIAC statement of tax principles for international business.* The Business and Industry Advisory Committee, which labels itself as "the voice of business at the OECD," issued a September 2013 outline of recommended tax principles for multinational companies. Its list, which includes tax planning, transparency, and reporting principles, was drafted "to promote and affirm responsible business tax management by international business." As such, it makes a good starting point for internal discussions about appropriate content for an organization's tax policy document.
- *OECD guidelines for multinational employers.* While not devoted exclusively to tax issues, this classic OECD document includes helpful commentary on key principles that reflect an organization's commitment to global standards of corporate good conduct and governance.[39]
- *VBDO and DJSI.* For any company drafting a tax policy statement that is primarily motivated by sustainability issues, both organizations offer helpful resources that outline the issues to be discussed. The VBDO report in particular contains a helpful discussion of its six "Good Tax Governance principles," which may help generate internal discussion.
- *Media mentions and NGO reports.* If the organization's tax policy statement will be designed with an eye toward responsiveness to unhelpful NGO reports or media mentions, what better place to start than those very sources? Obviously, past reports and articles don't entirely predict future ones, but they will offer a sense of the issues that are typically presented in these forums — for example, earnings-taxes discrepancies, lobbying expenditures, special incentives, and the like.

IV. Conclusion

As legendary rocker David Bowie once said, "Tomorrow belongs to those who can hear it coming." What's coming in tax seems clear. As demands for increased tax transparency and disclosure continue to mount and tax-related attacks by the media and NGOs become more frequent, corporate taxpayers would be wise to get ahead of these trends and add a carefully drafted tax policy document to their suite of publicly available disclosures. ■

[39] OECD, "OECD Guidelines for Multinational Enterprises," at 25, 53-54 (2011).