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The Bid to Impose "Tax Reporting Standards" on American Employers

JUNE 7, 2023

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A publication of the National Taxpayers Union

Introduction

In the American tax and financial system, each institution has a vital role to play. Lawmakers, being elected representatives of the people, are supposed to set policies such as tax rates, credits and deductions, and appropriate funds for administration of the tax system. Rulemakers, being members of the executive branch, are supposed to provide the administrative framework for the execution and implementation of laws. Judicial actors, being set apart from these two branches of government, are supposed to arbitrate disputes and bring clarity to both lawmaking and rulemaking. Standard-setters, being professionals in highly specialized fields of expertise, are supposed to develop the conventions that the private sector puts into everyday practice for compliance with laws and rules.

This system doesn't always work as neatly as it should. Like concentric rings, these institutions are intended to have various levels of insulation from the political process. Voters are, in theory at least, able to hold members of the legislative branch directly accountable for their decisions.

But among standard-setters, politics should have far less influence. These bodies are intended to provide the neutral foundation upon which entire professions must depend for guidance. So it is with the Financial Accounting Standards Board (FASB), which may soon issue burdensome tax reporting requirements that left-wing activists and politicians have long pushed through other means. Known as public Country-by-Country Reporting (CBCR) rules, these dictates would require large multinational companies to calculate and regularly disclose and disaggregate their revenues, number of employees, effective tax rates, and other tax data for the numerous countries where they operate.

Although a limited form of CBCR *from companies to governments* has been in effect for several years, and many companies report to shareholders on *certain aspects* of their tax liabilities, the latest crusade for *expanded*, *publicly disclosed* CBCR can ironically be driven by less-than-transparent intentions. This disturbing development should give public officials reason to stand up for FASB's independence and ensure that these requirements receive further scrutiny through the larger public policy process instead.

The Independence of Standard-Setters Is Vital

Now in its 50th year of operation, FASB has served as a non-profit, non-governmental entity "that establishes financial accounting and reporting standards for public and private companies and not-for-profit organizations that follow Generally Accepted Accounting Principles (GAAP)."[1] FASB is recognized by the U.S. Securities and Exchange Commission (SEC), as well as the American Institute of Certified Public Accountants and state accountancy boards, as "authoritative."[2] Its operations are underwritten and overseen by the Financial Accounting Foundation, and are funded primarily through "accounting support fees" mandated by the Sarbanes-Oxley Act of 2002.[3]

Although Congress created the SEC to serve as a government regulatory agency with the power to establish and enforce standards of accounting that affect public companies, it has effectively entrusted FASB with the technical development of those standards. SEC, in turn, is funded through securities transaction fees that are designed to cover all its operations without an infusion of tax dollars.[4] Despite this fact, SEC's budget receives an annual Congressional review as if it were a general appropriation request.

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[1] FASB. "About the FASB." Retrieved from: https://www.fasb.org/facts/.
[2] *Ibid*.
[3] Financial Accounting Foundation. "FAF, FASB, GASB: How Were Funded." Retrieved from: https://accountingfoundation.org/page/pageContent?pageId=/overview-accounting-and-standards/howwerefunded.html#:~:text=FASB%20accounting%20support%20fees%20are%20assessed%20on%20and%20collected%20from,market%20capitalization%20of%20each%20issuer..
[4] "SEC Funding." CFA Institute. Retrieved from: https://www.cfainstitute.org/en/advocacy/issues/sec-funding#sort=%40pubbrowsedate%20descending.

Thus, the relationship between SEC, a regulator, and FASB, a standard-setter, is necessarily built on trust. With both drawing financial resources from outside the federal government, and only one of the two entities subject to a formal, periodic budget-style oversight process, political actors face a delicate balance: avoid the appearance of excessively interfering with accounting standard-setting, while at the same time ensuring that others don't do the same from within or without.[5]

Key to FASB's effectiveness is its perceived independence in the accounting, investing, and other sectors of the financial world. A new proposed accounting standard, called 2023 ED-100, is FASB's latest attempt in the past several years at promulgating public CBCR. It reflects, however imperfectly, the Board's attempts to balance a variety of stakeholder interests. Yet, it is also another departure from the way FASB and SEC have traditionally interacted. As Brian Garst of the Center for Individual Freedom writes:

> It's not unusual for the FASB to be responsive to government requests from the SEC, which has statutory authority to set requirements for financial statements but has chosen since the FASB's establishment in 1973 to rely on the accounting industry to maintain those standards. However, the purpose of those requests was ostensibly to clarify or improve reporting standards for the benefit of investors, per FASB's mission. The new tax disclosure rules would have the opposite effect. ... Imposing significant compliance costs to accommodate disclosure requirements that fail to benefit investors is not within the scope of the FASB's or SEC's authority.[6]

[5] Sprouse, Robert T. "Accounting Horizons." Sarasota Publishing, December, 1987. Retrieved from: https://www.proquest.com/openview/8f2d499a5cca76d80e8d2704e187b10b/1?pq-origsite=gscholar&cbl=3330.

[6] Garst, Brian. "Accounting Board Should Resist Politicizing Tax Disclosure Rules." InsideSources DC Journal, May 1, 2023. Retrieved from: https://dcjournal.com/accounting-board-should-resist-politicizing-tax-disclosure-rules/.

Key Facts:

The Financial Accounting Standards Board (FASB) may soon require multinational businesses to publicly report tax data on a regular basis for each country they do business in.

This is a burdensome standard called public Country-by-Country Reporting (CBCR) rules, and they could be imposed by a standard-setting institution that should be immune from politics. Standard-setters must remain independent if they are to retain their legitimacy.

Complying with public CBCR rules would be incredibly costly in both time and money for multinational businesses, as they would regularly present stakeholders with an incomplete look at a company's tax treatment.

Instituting public CBCR rules would harm investors and have serious downstream effects on millions as the economy suffers and they see their investments losing value.

FASB should prioritize better cost-benefit analysis by consulting with both government and nongovernmental organizations to gain a more comprehensive understanding of how these rules will affect far more people than just a company they wish to punish.

Unfortunately, whatever the intentions of FASB's skilled team may be in formulating 2023-ED100, it would be a mistake to ignore the subtle yet still-present political pressure that elected officials have recently attempted to exert upon the Board in tax disclosures.

Political Pressure – and Motives – Are Colliding Over CBCR

In a 2019 letter to FASB Chair Russell G. Golden, 13 U.S. Senators led by Chris Van Hollen (D-MD) urged that the Board embrace aggressive country-by-country reporting mandates. While purportedly writing to Chair Golden out of investor interests, the signatories to the letter made clear another motive: "public country-by-country disclosure is necessary for policymakers to examine economic trends and address important public policy issues. For example, as Congress considers the effect of the recent international tax change, policymakers need to know whether - and how - the new law is encouraging tax avoidance."[7] In a previous communication to FASB from 2017, House Members expressed admiration for how the Board's standards could be placed in service to policies supposedly intended to "combat tax avoidance."[8]

Self-styled activist organizations that support massive increases in taxes on businesses (which, ironically, are passed through to investors, workers, and consumers) likewise make no secret of why they support country-by-country reporting. To give just one example, Oxfam notes, in support of public CBCR:

> US companies have resisted the public country-by-country reporting of key financial information that is necessary for adequate tax transparency. ...
>
> When big corporations pay their fair share of taxes, schools can hire enough teachers, hospitals can provide high-quality medical care, and governments can invest in much-needed climate action. Sadly, many companies around the world shirk this responsibility through aggressive (if still often legal) tax planning to avoid paying taxes. Even worse, many big corporations are so secretive about their tax information that the public has no way of knowing if they're being short changed.[9]

This argument reveals a much broader set of complaints than any shareholder interested in more financial information for wiser investing would likely have. It also makes many assumptions about the level and incidence of corporate taxes, in the United States, with which many analysts would disagree:

- "Fair share" is in the eye of the beholder, but in the four years since passage of the Tax Cuts and Jobs Act (TCJA) – which reduced the corporate tax rate to 21 percent and made numerous other changes – corporate income tax revenues as a share of U.S. gross domestic product have risen, exceeding pre-TCJA levels.[10]

- The Congressional Budget Office (CBO) has revised its projections of post-TCJA corporate income tax revenue upward for the long-term, another indication that "fair share" is a subjective definition not necessarily supported by facts.[11]

- Aside from revenue impacts corporate tax rate reductions can also deliver economic benefits, not just to shareholders but workers as well. As a Tax Foundation summary of a major study from the National Bureau of Economic Research pointed out, "[i]n the

[7] Sen. Chris Van Hollen (D-MD). (September 30, 2019). "Van Hollen, Democratic Senators Urge Greater Transparency in Tax Disclosures." https://www.vanhollen.senate.gov/news/press-releases/van-hollen-democratic-senators-urge-greater-transparency-in-tax-disclosures.
[8] See copy of letter at: https://thefactcoalition.org/country-by-country-reporting-letter/.
[9] Hirschel-Burns, Tim. "Two US companies commit to tax transparency. When will others make the move?" Oxfam, October 6, 2022. Retrieved from: https://politicsofpoverty.oxfamamerica.org/two-us-companies-finally-commit-to-tax-transparency-when-will-others-make-the-move/.
[10] Goodspeed, Tyler and Hassett, Kevin. "The 2017 Tax Reform Delivered as Promised." Wall Street Journal, May 8, 2022. Retrieved from: https://www.wsj.com/articles/the-2017-tax-reform-delivered-as-promised-predictions-jobs-act-economic-data-boost-11652036657?mod=opinion_lead_pos5.
[11] *Ibid*.

long run, [corporate tax reductions] incentivize firms to invest in capital, especially R&D, which raises the productivity of their workers and increases their incomes. And these economic impacts are larger and more persistent than changes in personal income tax rates."[12]

- Those concerned about "offshoring jobs" should take note that since TCJA, major corporate "inversions" have decreased to zero. "The average annual dollar value of acquisitions by U.S. companies of foreign assets in 2018 and 2019 was 50 percent higher than in the two preceding years, while acquisitions of U.S. assets by foreign companies declined by 25 percent."[13]

- Many studies have estimated that a significant portion of the corporate income tax's incidence is borne by labor. Even CBO conservatively attributes 25 percent of the corporate income tax burden to workers when conducting revenue-impact calculations.[14]

Despite these misperceptions about the role of large businesses in the tax system, public CBCR did manage to pass through the U.S. House of Representatives in 2021, but by the thinnest of margins – 215-214. The Senate declined to vote on the legislation. Tellingly, this bill (HR 1187) was named the "Corporate Governance Improvement and Investor Protection Act," because it contained much more than just the text of a CBCR bill (HR 3007, called the "Disclosure of Tax Havens and Offshoring Act"). HR 1187 seemed to have a much broader agenda behind it, including public reporting requirements for:

- Environmental and Social Governance metrics established by the SEC with the recommendations of a new "Sustainable Finance Advisory Committee";

- "[E]xpenditures for certain political activities";

- "[C]limate change-related risks, including direct and indirect greenhouse gas emissions and fossil fuel-related assets" (including use of controversial social cost of carbon calculations);

- "[W]orkforce management policies, practices, and performance" (including "investments," demographics, and benefits connected to employees);

- "[I]ncidents of workplace harassment and retaliation"; and

- "[T]he demographic composition of the board of directors and executive officers."[15]

Aside from the obvious legislative and regulatory activities this information could support and encourage,[16] the public tax disclosure requirements in the bill likewise carried the same congressional

[12] Durante, Alex. "New Research Shows Positive Long-Run Effects from Corporate Tax Cuts." Tax Foundation, July 26, 2022. Retrieved from: https://taxfoundation.org/corporate-tax-cuts-effects/.
[13] Goodspeed, Tyler and Hassett, Kevin. "The 2017 Tax Reform Delivered as Promised." Wall Street Journal, May 8, 2022. Retrieved from: https://www.wsj.com/articles/the-2017-tax-reform-delivered-as-promised-predictions-jobs-act-economic-data-boost-11652036657?mod=opinion_lead_pos5.
[14] Lautz, Andrew. "What's the Deal with the Corporate Income Tax?" National Taxpayers Union Foundation, September 9, 2021. Retrieved from: https://www.ntu.org/publications/detail/whats-the-deal-with-the-corporate-tax.
[15] H.R.1187 - Corporate Governance Improvement and Investor Protection Act. (2021). Retrieved from: https://www.congress.gov/bill/117th-congress/house-bill/1187.
[16] See, as examples, on NTU's and NTU Foundation's website Aiello, Thomas. "NTU Writes in Opposition to the "Climate Risk Disclosure Act" Ahead of Committee Markup." National Taxpayers Union, May 11, 2021. Retrieved from: https://www.ntu.org/publications/detail/ntu-writes-in-opposition-to-the-climate-risk-disclosure-act-ahead-of-committee-markup; Lautz, Andrew. "Initial Reactions to the 130-Country, 15% Corporate Minimum Tax Agreement." National Taxpayers Union, July 1, 2021. Retrieved from: https://www.ntu.org/publications/detail/initial-reactions-to-the-130-country-15-corporate-minimum-tax-agreement; Lautz, Andrew. "Build Back Better's International Tax Provisions Could Hurt U.S. Competitiveness." National Taxpayers Union, January 10, 2022. Retrieved from: https://www.ntu.org/publications/detail/build-back-betters-international-tax-provisions-could-hurt-us-competitiveness.

agenda described above in the letters to FASB from lawmakers. The dissenting view to the House Financial Services Committee report on HR 3007 noted that Committee "Chair Waters (D–CA) acknowledged during the markup that H.R. 3007 'is about corporations who enjoy substantial profits in the United States paying their fair share.'"[17]

But political agendas notwithstanding, how difficult, on a practical level, would public CBCR be? The answer depends upon the precise nature of each proposal, but as far as FASB's version of this concept goes, many troubling questions have arisen.

Compliance Costs of 2023-ED100 Are Not Minor

FASB has proposed public CBCR in the form of a new "standard" – 2023-ED100 – for accountants to follow. The Board is currently soliciting views on this standard, which in summary:

> [W]ould require that public business entities on an annual basis (1) disclose specific categories in the rate reconciliation and (2) provide additional information for reconciling items that meet a quantitative threshold (if the effect of those reconciling items is equal to or greater than 5 percent of the amount computed by multiplying pretax income [or loss] by the applicable statutory tax rate).[18]

Supporters of public CBCR contend that the compliance burdens of 2023-ED100 are minimal because they are marginal. For example, the disaggregation of tax data it would require is a simple exercise of breaking down tax information already available at the corporate level. But FASB's own issuance of the standard and comment request, comprising 38 pages, demonstrates that there is much more to 2023-ED100 than the paragraph above would suggest.[19]

Prior to 2023-ED100, rate reconciliation information could be published either as a dollar amount or a percentage. Businesses could therefore choose which method provided the best disclosure to shareholders, while controlling the paperwork burden that would inevitably have to be passed along to consumers, workers, or those very same shareholders. The new standard would eliminate that choice and require both methods to be reported.[20]

Other sources of concern include the following:

- Producing data for the purposes of books and publication of financial statements can be far different than producing data for tax purposes. Countries' financial and accounting conventions have various measuring periods and requirements for the closing of accounting books versus the filing of tax returns. Companies deal with these matters now by adjusting back and forth to satisfy accounting and tax requirements. How can a public reporting regime reconcile those changes in a sufficiently robust form, preserving internal controls, to satisfy FASB and investors? The answer remains to be determined, except that new processes, consuming employee time and effort, will be necessary.

  Louis Sanford, Chief Financial Officer of a Texas-based historic hotel company, walked through how much more difficult 2023-ED100 would make these processes in comments to FASB, and provided a stunning estimate of the costs:

  > For a public company, there is a timeline for reporting financial statements

[17] See House Financial Services Committee. Report on HR 3007, Disclosure of Tax Havens and Offshoring Act. H Rpt 117-52. https://www.congress.gov/congressional-report/117th-congress/house-report/52/1.

[18] FASB. (Updated 2023). "Proposed Accounting Standards Update, Income Taxes (Topic 740), Improvements to Income Tax Disclosures." 2023-ED100, p.4. Retrieved from: https://www.fasb.org/Page/PageContent?PageId=/projects/exposure-documents.html.

[19] *Ibid*.

[20] "FASB issues new-and-improved proposal on income tax disclosures." Rehmann, April 4, 2023. Retrieved from: https://www.rehmann.com/resource/fasb-issues-new-and-improved-proposal-on-income-tax-disclosures/.

> [and] related SEC filings. I would venture that all companies file extensions on their tax returns as the specific information needed can't be ready in those timelines. To provide such information, would in essence require the completion of ALL tax returns for an entity, something that is not practical at this time. This information would have to be audited to be included in the financial statements, and would require tax professionals to be involved, rather than normal auditors. Yes, there is currently some tax review done as it related to current auditing and accounting standards, but this is an extreme increase, especially if the tax preparers are not with the same firm. Costs for an audit will have to increase substantially. My guess is that the audit costs themselves will increase by at least 30%, in addition to normal tax preparation costs.[21]

- Although 2023-ED100 is intended to apply to U.S. multinational companies, the standard itself must rely on basic accounting definitions that may be different abroad versus here. In testimony regarding the Pillar 1 and 2 international tax frameworks from the Organization for Economic Cooperation and Development (OECD), which also contemplates a version of CBCR, the Global Federation of Insurance Associations illustrated several ways that problems could arise. Under Generally Accepted Accounting Principles in each country, the income from certain investment assets that are commonly held within long-term insurance policies is classified as revenue, whereas under separate criteria known as the International Financial Reporting Standard it may not be. This has a direct bearing on whether some companies' operations would fall under the new global taxation threshold of 750 million euros of "revenue."[22]

- The dissenting view to HR 3007 mentioned earlier also has a bearing on the basic contents of 2023-ED100, which attempts to distill information from many countries' tax laws into a publicly digestible, comparative format. As the dissenting Committee members noted, this is easier said than done:

  > [Such] disclosures will tell an incomplete story of a company's tax treatment. By not taking into consideration the differences in tax codes and accounting standards across all jurisdictions, these disclosures have the potential to mislead investors and will ultimately be useless for analyzing companies for investment purposes.[23]

- "Transfer pricing arrangements," defined by Investopedia as "an accounting and taxation practice that allows for pricing transactions internally within businesses and between subsidiaries that operate under common control or ownership,"[24] present additional complications. A company under such an arrangement may have bilateral agreements with other countries' tax authorities on how intercompany adjustments are made that are not the same as conventional tax laws. How are those agreements to be adequately and accurately explained in public disclosures? Many of these matters under transfer pricing arrangements have been concluded between businesses and governments using proprietary information. What will the costs to businesses (and indeed to governments) be, if this sensitive data can be derived or "reverse-engineered" from new public disclosures? Both private-sector competitors and hostile regimes will gladly test this proposition.

- Regarding competition, will state-owned companies ever face similar calls for "public

[21] Sanford, Louis W. Letter to: FASB. March 20, 2023. "RE: Income Taxes (Topic 740) –Improvements to Income Tax Disclosures." Retrieved from: https://fasb.org/Page/ShowPdf?path=TAXDISC.ED.001.LOUIS%20W.%20SANFORD.pdf&title=TAXDISC.ED.001.LOUIS%20W.%20SANFORD.

[22] For further detail, see: GFIA. "Comments to the OECD on the Global Anti-Base Erosion Proposal (GloBE) (Pillar 2) 'Tax Challenges Arising from the Digitalisation of the Economy.'" July 31, 2020. Retrieved from: https://gfiainsurance.org/publications/324/gfia-comments-to-oecd-on-globe-pillar-2.

[23] See House Financial Services Committee. Report on HR 3007, Disclosure of Tax Havens and Offshoring Act. H Rpt 117-52. https://www.congress.gov/congressional-report/117th-congress/house-report/52/1.

[24] "Transfer Pricing: What It Is and How It Works, With Examples." Investopedia, updated May 28, 2023. Retrieved from: https://www.investopedia.com/terms/t/transfer-pricing.asp#:~:text=Transfer%20pricing%20is%20an%20accounting%20and%20taxation%20practice%20that%20allows,as%20well%20as%20domestic%20ones.

disclosure" from activists or politicians here in the United States? Signs from other multinational tax pacts are not encouraging. FASB can do little to nothing about this glaring inconsistency, but 2023-ED100 could indirectly worsen it. As former House Ways and Means Committee senior staff member Aharon Friedman recently wrote in the *Wall Street Journal* concerning OECD Pillars 1 and 2:

> [T]he complex rules benefit low-margin companies and exempt governmental entities carrying out so-called governmental functions. According to the OECD, that's supposed to be a "broad term," including public infrastructure and defense. The practical effect of these exemptions is to favor companies that emphasize social activism over profits, as well as state-owned enterprises, at the expense of capitalist competitors. This will benefit countries that take a broad view of government power, especially China, where President Xi Jinping is expanding state-owned enterprises under a plan known as "the state advances, the private sector retreats."[25]

Taxpayers and investors in the U.S. can be forgiven for thinking that this unlevel playing field could be made all the more so by accounting standards that our companies would have to follow, but other "companies" funded by governments would not.

- How would 2023-ED100 address public disclosures of "cash tax payables to date" annually? A company's books may have items that look like taxable profits and liabilities, but these are subject to change based on anticipated settlements with local tax authorities, loss carryforwards claimed later on a tax return, or deferral of future payments. How do companies reconcile these situations resulting from non-cash-flow activity, and portray them to the satisfaction of not only investors, but also FASB, SEC, and IRS?

- The magnitude of "educated guesses" about the meaning and direction of tax policies will increase under public reporting, even if the level of "education" is no better than before. As one case in point, the new clean energy credits in the Inflation Reduction Act have recently undergone a whole range of revisions to their estimated impact – currently, from $570 billion to over $1 trillion.[26] What number should a company choose as the "material" one to report to investors, who are counting on more, not less, certainty? Will companies be held liable for guessing wrong about U.S. Congressional action on extending key portions of TCJA, which has baffled even the most seasoned political observers for more than two years? In its comments submitted to FASB, the firm Ivins, Phillips, & Barker neatly described this quandary:

> It would be impossible even for us, as tax experts, to draw any meaningful conclusions from the information required to be disclosed by the proposed ASU about (1) the likelihood that a revenue authority in a particular jurisdiction will effectively challenge a company's tax positions in that jurisdiction, or (2) planning opportunities in a jurisdiction. If we, as tax experts, are unable to draw meaningful conclusions from the data presented, we seriously doubt that ordinary investors will draw any meaningful conclusions about risks and opportunities.[27]

- As currently written 2023-ED100 chooses a "qualitative" as opposed to "quantitative"

[25] Friedman, Aharon. "Yellen's Global Minimum Tax Is a Boon for Beijing." *Wall Street Journal*, March 8, 2023. Retrieved from: https://www.wsj.com/articles/yellens-global-minimum-tax-would-be-a-boon-for-beijing-european-union-state-owned-exemption-defense-china-aa33350 (paywall).

[26] McBride, William and Bunn, Daniel. "Repealing Inflation Reduction Act's Green Energy Tax Credits Would Raise $570 Billion, JCT Projects." Tax Foundation, April 26, 2023. Retrieved from: https://taxfoundation.org/inflation-reduction-act-green-energy-tax-credits-analysis/#:~:text=Though%20the%20JCT%20score%20of,%241%20trillion%20over%2010%20years.

[27] Ivins Phillips Barker. Letter to: Salo, Hillary H. (Technical Director, FASB). May 25, 2023. "Re: File Reference No. 2023-ED100: Improvements to Income Tax Disclosures." Retrieved from: https://fasb.org/Page/ShowPdf?path=TAXDISC.ED.007.IVINS%20PHILLIPS%20BARKER%20CHARTERED%20SEE%20LISTED.pdf&title=TAXDISC.ED.007.IVINS%20PHILLIPS%20BARKER%20CHARTERED%20SEE%20LISTED.

standard for disclosing state and local tax liabilities – a welcome admission to the difficulties of reporting from that level, but by no means "easy." As RSM, a financial accounting company explained in its comments to FASB:

> Many public business entities file for automatic six-month extensions to the federal, state and local income tax filing deadlines, and therefore do not prepare their tax returns and the related detailed supporting documentation on a jurisdiction-by-jurisdiction basis prior to their SEC reporting deadlines. Consequently, affected entities may need to either accelerate the completion of their tax returns or perform additional work and compile incremental documentation to support the qualitative description(s) of the state and local tax jurisdictions that contribute to most of the effect of the state and local income tax category. In addition, the degree of additional work effort and documentation necessary to prepare and support the proposed disclosure would vary depending on several factors, including the number of tax jurisdictions involved, the tax rates and rules in those jurisdictions and the extent to which the entity's operations in each jurisdiction contributes to the entity's overall taxes.[28]

- Companies will need to spend more time and expense monitoring changes in business patterns, market conditions, or government policies that could cause the firms' activities in a particular country to fall on "side" of the 5 percent threshold for disaggregating tax burdens. According to a comment on 2023-ED100 from the Chair of the Accounting Principles and Auditing Standards Committee of the Florida Institute of CPAs, the requirement is "unduly burdensome for these companies as it is believed that investors would only receive a limited benefit in this information." This is but one item that would go into the recurring costs of producing and auditing individual tax jurisdiction information.[29]

- Although FASB has asked for opinions on the usefulness of expanding 2023-ED100 to private companies as opposed to larger, public firms, such a request overlooks the fact that small, private firms will be burdened by this exercise even if they are not directly folded into the standard. Depending upon how 2023-ED100 is finalized, these businesses may need to provide more information, with greater timeliness and detail, about how their operations might contribute to the revenue, employment, and overall tax picture of the larger multinational enterprise. To give one example, possibly the new and higher definitions of future tax risks required by 2023-ED100 may have to include positions taken by the large businesses' smaller partners. According to statistics cited in the *Harvard Business Review*, "[c]ompanies with fewer than 500 employees make up 98% of supply chain firms and over 20% of U.S. private employment."[30] Most of these companies are small or medium-sized enterprises. Will 2023-ED100 rope in small businesses for its tax risk and prediction reporting requirements? Perhaps, perhaps not. Unfortunately, the question is not settled at this point in time.

According to a longstanding annual compendium of tax system complexity from National Taxpayers Union Foundation (NTUF), American firms alone spent a combined 952 million hours complying with

[28] RSM. Letter to: Salo, Hillary H. (Technical Director, FASB). May 24, 2023. Retrieved from: https://fasb.org/Page/ShowPdf?path=TAXDISC.ED.006.RSM%20US%20LLP.pdf&title=TAXDISC.ED.006.RSM%20US%20LLP.

[29] Hancock, Genevieve. Letter to: Letter to: Salo, Hillary H. (Technical Director, FASB). May 10, 2023. Retrieved from: https://fasb.org/Page/ShowPdf?path=TAXDISC.ED.004.FICPA%20APAS%20COMMITTEE%20GENEVIEVE%20HANCOCK.pdf&title=TAXDISC.ED.004.FICPA%20APAS%20COMMITTEE%20GENEVIEVE%20HANCOCK.

[30] Mills, Karen G, Reynolds, Elisabeth B, and Herculano, Morgane. "Small Businesses Play a Big Role in Supply-Chain Resilience." *Harvard Business Review*, December 6, 2022. https://hbr.org/2022/12/small-businesses-play-a-big-role-in-supply-chain-resilience.

the U.S. business income tax regime – not including at least another 1.5 *billion* hours on employment tax, depreciation, and other tasks related to the profit tax. State and local tax filing obligations, as well as those of other countries, would add hundreds of millions of hours more. The value of this time, according to NTUF analysis of government estimates, could easily exceed $150 billion annually.[31] How would FASB's requirements impact this burden, or more to the point, how can these costs be properly measured? In its comments RSM summed up the variability in challenges that could face just one group of stakeholders affected by 2023-ED100:

> For practitioners, the one-time and recurring costs to audit or review the proposed disclosures may vary significantly depending on multiple factors including, but not limited to:
>
> - Size and complexity of the reporting entity's legal and tax structure;
> - Nature and type of taxable income;
> - Number of taxable jurisdictions involved and the extent to which the tax rates and laws vary;
> - Whether the entity's financial systems and processes necessary to capture, record, and extract the appropriate level of disaggregated information are properly designed, and the extent to which such financial systems and processes are automated; and
> - Design and operating effectiveness of the entity's internal controls over financial reporting.[32]

It bears mentioning here that the cost and complexity problem is compounded by the fact that FASB is not alone in being pressured to embrace country-by-country reporting standards. This only creates more costs for businesses to comply with multiple systems, and more confusion among investors seeking consistent information that can be fairly compared across multiple sources of disclosure. As the National Foreign Trade Council and others have explained, there are numerous types of bases on which a company could calculate its Effective Tax Rate, such as OECD's Pillar 2, GAAP utilized by local subsidies, or GAAP utilized by the parent company.

Therefore, this problem has a longer lineage. In 2020, NTU warned about OECD's own attempt to impose new country-by-country edicts, and their expensive implications:

> Though the Pillar Two agreement includes country-by-country IIR [Income Inclusion Rule] calculations, we believe that neither global negotiators nor the Biden administration have given sufficient thought to the increased complexity, compliance, and tax burdens that country-by-country GILTI and foreign tax credit calculations will impose on U.S. MNCs, costs that will be diverted away from more productive investments in workers and economic growth. Even the [Inclusive Framework for Pillars One and Two] has contemplated the complexity and compliance burdens of country-by-country reporting, given all four of the Pillar Two Blueprint's proposed "Simplification options" pertain to this very topic ... .
>
> NTU discussed these challenges in our December [2020] comments to the OECD as well, [noting that] inherent complexity has also materialized when calculating GILTI [Global Intangible Low-Taxed Income] with consolidated tax groups, with net operating

[31] Brady, Demian. "6.5 Billion Hours, $260 Billion: What Tax Complexity Costs Americans." National Taxpayers Union Foundation, April 17, 2023. Retrieved from: https://www.ntu.org/foundation/detail/65-billion-hours-260-billion-what-tax-complexity-costs-for-americans.

[32] RSM. Letter to: Salo, Hillary H. (Technical Director, FASB). May 24, 2023. Retrieved from: https://fasb.org/Page/ShowPdf?path=TAXDISC.ED.006.RSM%20US%20LLP.pdf&title=TAXDISC.ED.006.RSM%20US%20LLP.

> losses, and for state taxation (where 24 states have decoupled from GILTI, 14 states have a deduction that applies to GILTI, and 6 states have taxed 50 percent or more of GILTI). U.S. companies are spending countless hours and dollars complying with this set of rules, which are nonetheless less onerous than a country-by-country or entity-by-entity approach.[33]

Note that the tract above refers to administrative overhead, not the actual heavier tax burden on American firms. Although 2023 ED-100 is concerned with *country-by-country public reporting*, the use of *country-by-country calculations* in service to a new tax regime, as Pillars One and Two would create, imposes financial consequences as well:

> PWBM also models the country-by-country calculation as a key factor in the tripling of the U.S. tax rate on foreign profits under Pillar Two (and the six-fold increase in the U.S. tax rate on foreign profits under the administration proposal), and Tax Foundation estimates that country-by-country reporting will raise U.S. 62 corporate tax liabilities by $102.3 billion over a decade.[34]

The additional cost of new data reporting mandates from bodies such as FASB, including those outlined above, should not be dismissed or discounted as trivial. What remains unknown is exactly how much more than trivial they are.

But What About Investors?

An entirely distinct set of costs from public CBCR is indirect, yet still economically palpable. According to a ZEW-Centre for European Economic Research study of market reactions immediately after promulgation of the European Union's 2021 public CBCR rule, investors do not uniformly benefit from this type of disclosure. The researchers determined:

> By employing an event study methodology, we find a significant cumulative average abnormal return (CAAR) of -0.699%, which translates into a monetary value drop of approximately EUR 65 billion. We conclude that investors evaluate reputational risks arising from public scrutiny and competitive disadvantages to outweigh potential benefits of an extended information environment or more sustainable corporate tax strategies. … Furthermore, our cross-sectional results indicate that the market reaction is stronger for firms operating in industries with high growth in market participants, providing an initial indication for the role of the competitive environment as an additional channel.[35]

The study's findings that the worst fiscal impacts occurred in the most competitive business environments would seem to conflict with one of public CBCR advocates' aims – namely, to increase competition and "investor choice." It would seem counterproductive for advocates of CBCR, who often claim to be acting in the interests of investors, to be clamoring for the very policies that can harm investors' financial well-being.

[33] Lautz, Andrew. "Treasury, Congress Should Keep U.S. Businesses and Workers at Front of Global Tax Talks." National Taxpayers Union, August 24, 2023. Retrieved from: https://www.ntu.org/publications/detail/treasury-congress-should-keep-us-businesses-and-workers-at-front-of-global-tax-talks; Sepp, Pete. "Comments to the OECD Centre for Tax Policy and Administration." National Taxpayers Union, December 14, 2020. Retrieved from: https://www.ntu.org/publications/detail/comments-to-the-oecd-centre-for-tax-policy-and-administration.
[34] Lautz, Andrew. "Treasury, Congress Should Keep U.S. Businesses and Workers at Front of Global Tax Talks." National Taxpayers Union, August 24, 2023. Retrieved from: https://www.ntu.org/publications/detail/treasury-congress-should-keep-us-businesses-and-workers-at-front-of-global-tax-talks.
[35] Müller, Raphael, Spengel, Christoph, and Weck, Stefan. "How Do Investors Value the Publication of Tax Information? Evidence From the European Public Country-By-Country Reporting." ZEW, May 25, 2023. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3949860.

Rarely do studies of this type contain a direct warning to policymakers, but the authors went on to say:

> Our inferences are of particular importance in light of the current ongoing debates on similar disclosure rules (particularly in the United States; cf. "Disclosure of Tax Havens and Offshoring Act") as well as for sustainability standard setters. ... When considering the introduction or particular design of comparable public CBCRs, legislators and standard setters should be aware that mandatory public tax transparency results in substantial non-tax costs. Against this background, decision-makers should carefully consider the merits of such public disclosure schemes.[36]

Some activists might celebrate this study's findings as proof that companies will be "punished" when tax burdens judged to be "too low" are brought to light. But tens of millions of families and retirees who don't share this political agenda will be left to suffer financially if their investments diminish in value according to the pattern the authors identified. These investors in mutual funds, retirement arrangements, and dividend reinvestment plans in the U.S. and around the world have been repeatedly told that public CBCR is for their own benefit. How is a loss of value in their lifetime of patient, and often difficult investments a "benefit" to them?

NTU's concerns about public CBCR and 2023-ED100 are primarily motivated by the financial consequences for taxpayers, governments, and investors. Yet, in several comments to FASB, another theme was made clear – the questionable utility of all this information to investors. For one, quantity of information may not be as important as quality. The Florida Institute of CPAs wrote, "It is in our opinion that investors do not analyze 10Ks and other annual reports for tax analysis. Tax issues are assumed to be h andled by tax professionals and outside experts. Investors are more concerned with the operating results of companies."[37]

Louis Sanford wrote – with a more regretful but still realistic attitude that:

> Sadly, my observations are that investors claim that they need more information and detail, yet history has shown that they either ignore the information, don't understand the information, or are 'unable to connect the dots'. Let us look at some examples. Take leases, especially operating leases. For years, they were noted on the notes to financials. Yet, these investors/analysts could not see that some entities had lease commitments over time that were greater than a business operating cash flows (think of America West Airlines). More recently, look at SVB. Right on the financials, were reflected in other comprehensive income, large unrealized losses. Yet, they did not see the issue.[38]

Ultimately, the publication of more tax data could even obscure some of these fundamental financial issues that savvy investors need to find on company balance sheets. Attempting to boil down what is arguably the most complex, unpredictable, and variable parts of those balance sheets – taxes – will require much more effort from many parts of the lawmaking, rulemaking, and standard-setting sectors than FASB alone can provide from 2023-ED100.

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[36] *Ibid*.

[37] Hancock, Genevieve. Letter to: Letter to: Salo, Hillary H. (Technical Director, FASB). May 10, 2023. Retrieved from: https://fasb.org/Page/ShowPdf?path=TAXDISC.ED.004.FICPA%20APAS%20COMMITTEE%20GENEVIEVE%20HANCOCK.pdf&title=TAXDISC.ED.004.FICPA%20APAS%20COMMITTEE%20GENEVIEVE%20HANCOCK.

[38] Sanford, Louis W. Letter to: FASB. March 20, 2023. "RE: Income Taxes (Topic 740) –Improvements to Income Tax Disclosures." Retrieved from: https://fasb.org/Page/ShowPdf?path=TAXDISC.ED.001.LOUIS%20W.%20SANFORD.pdf&title=TAXDISC.ED.001.LOUIS%20W.%20SANFORD.

Recommendations – Time for a Different "Standard"

What will this "much more effort from ... from many parts of the lawmaking, rulemaking, and standard-setting sectors" look like? The following are some starting points for the work that is needed ahead.

FASB Must Proceed More Cautiously. In NTU's opinion, the third time for proposed U.S. accounting standards, through 2023-ED100, should not prove to be a charm. Too many questions still exist (and some would argue more have arisen) for 2023-ED100 to be implemented now. While conceptually, public CBCR should be far more critically explored at the lawmaking levels, at a minimum FASB must absorb and take heed of the warnings that have already been expressed in public comments at the time of this publication (and the other comments that will undoubtedly be published soon). Immediate problems to be address would be:

- The retrospective nature of 2023-ED100. While some large public companies may not find a two-year retroactive reporting cycle too difficult, this should not be a universal assumption for all business sectors. With major tax compliance issues already facing American companies from the Inflation Reduction Act, and quite possibly Pillars One and Two, businesses need a pause on indeterminate new information collection burdens, especially those that require looking backward.

- Simplification of the rules. While not universally expressed among commenters on 2023-ED100, many voiced concern over whether the 5 percent threshold for disaggregation of tax burdens was set too low, and how the calculation for the 5 percent threshold would be calculated in the first place. Other matters, such as the timing between financial statements and tax statements, deserve much greater scrutiny (and specific guidance) than has heretofore been provided. Whether one opposes or supports the concept of public CBCR, of all levels in the tax community, the standard-setters such as FASB can exercise the most important leadership in providing clearer, more consistent, and effective guidance.

- Dispute resolution. No undertaking as ambitious as 2023-ED100, even if it were to be made simpler and clearer, will be free of controversies over specific facts and circumstances of taxpayers who will attempt to put it into practice. FASB, along with other private and public entities, have a variety of consultation, arbitration, mediation, and other dispute resolution models from which to provide assurance that taxpayers acting in good faith will receive a fair hearing on their concerns. FASB should provide stronger *advance* assurance, naming *specific* methods, of how affected parties are to seek dispute resolution over any matters regarding 2023-ED100.

Better Cost-Benefit Analysis = Better Policy. At every level of the tax process described here, a sore need exists for better measurement of the costs and benefits associated with a given tax law, rule, or accounting standard.

For instance, NTU Foundation's annual tax complexity study contains analysis of data from the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB), on the compliance hours and numbers of taxpayers associated with tax forms. This methodology is far from perfect. As NTU recently pointed out, staff evaluating the impact of tax filings often receive a handful of (or even no) public responses to requests for taxpayer input on the difficulty of completing tax forms.[39] Furthermore, NTU Foundation discovered that OIRA's database lists "information collections" with

[39] Brady, Demian. "Public Comments on IRS Tax Forms Can Help Ease Filing Burdens." National Taxpayers Union Foundation, March 17, 2022. Retrieved from: https://www.ntu.org/foundation/detail/public-comments-on-irs-tax-forms-can-help-ease-filing-burdens.

indeterminate burdens as zero. There is an obvious difference between a form whose burdens are not possible to calculate, and a form that imposes no burden at all.[40]

The latter is but one of many ways we believe that government's compliance time and cost demands on the private sector are likely understated. In the tax realm, there are far more impositions on the private sector than filling out forms. NTU Foundation's Joe Bishop-Henchman recently wrote,[41] "[i]f the IRS analyzes the compliance or economic costs of its subregulatory guidance, it does not release its analysis publicly."[42]

It is clear that 2023-ED100, while not a direct government compliance mandate, fairly resembles the form and function of an "information collection." As such, its compliance costs must be measured for FASB and others to understand the magnitude of standard's impact, *before* that standard takes effect.

As of the writing of this paper, most of the comments FASB received on 2023-ED100 either describe the burdens of complying with public CBCR as minimal versus the "value" of the information, or describe the burdens as "considerable" and not worth the "value" of the information. Only a handful of commenters (see Sanford, above) sought to provide any kind of calculation to their observations, and none offered a methodology for quantifying sector-wide burdens.

This lack of systematic analysis can and should be rectified for a proposal as significant as 2023-ED100. FASB could consult with any and all of the following entities, which have experience in tax-related regulatory costs: OIRA, OMB, CBO, the Government Accountability Office, the National Taxpayer Advocate of the Internal Revenue Service, the IRS Advisory Council, the Department of Commerce, and the Small Business Administration Office of Advocacy. Nongovernmental entities whose expertise could be tapped for this exercise include the American Institute of Certified Public Accountants, the Tax Executives Institute, the National Association of Manufacturers, the Institute for Regulatory Law and Economics, and the Competitive Enterprise Institute.

The preceding list is by no means exhaustive. FASB could also call upon interested parties to submit specific quantitative cost-benefit analysis on the compliance factors surrounding public CBCR in general, and 2023-ED100. Whichever route is taken will lead to greater enlightenment on critical questions of economic and financial impact. Neither lawmaking, nor rulemaking, nor standard setting, should be conducted in the dark.

The Broader Context of Public CBCR Cannot Be Ignored. Nor, unfortunately, can standard setting over CBCR be conducted in a vacuum. Although standard-setting bodies usually (and admirably) perform their duties without the intrusion of political controversies, as this paper has noted, CBCR is fraught with far more than the operational technicalities that the vast majority of FASB's tasks entail.

NTU, and others have warned of this problem in other contexts. Earlier this year, when commenting on Australia's strident public CBCR scheme, we wrote:

> The threat of misinterpretation of public data – or worse yet, manipulation of data by policymakers or stakeholders with a particular agenda – is very real. NTU has witnessed this problem firsthand in the United States, where some commenters have distorted publicly traded companies' mandated disclosures to the U.S. Securities and Exchange Commission to imply or even directly accuse U.S. companies of cheating on their taxes. The

[40] Brady, Demian. "6.5 Billion Hours, $260 Billion: What Tax Complexity Costs Americans." National Taxpayers Union Foundation, April 17, 2023. Retrieved from: https://www.ntu.org/foundation/detail/65-billion-hours-260-billion-what-tax-complexity-costs-for-americans.

[41] Bishop-Henchman, Joseph. "Transforming the Internal Revenue Service." Cato Institute Policy Analysis No. 942, April 11, 2023. Retrieved from: https://www.cato.org/policy-analysis/transforming-internal-revenue-service.

[42] Bishop-Henchman refers readers to the following for more information on subregulatory compliance burden measurement at Treasury: Hickman, Kristen and Dooling, Bridget. "A Study to Evaluate OIRA Review of Treasury Regulations," George Washington University Regulatory Studies Center, January 5, 2022. And see, Dudley, Susan and Katzen, Sally. "The Story behind the IRS's Exemption from Oversight," *Wall Street Journal*, February 22, 2018.

> simple fact is that financial data reported in one regulatory context – e.g., earnings statements to shareholders – often cannot translate into taxable profits for tax law purposes.[43]

There is another, equally troubling fallout effect of public CBCR of which FASB has already been made publicly aware by one of the commenters, Ivins, Phillips & Barker:

> The FASB should be mindful of the increased risk of overreach by foreign governments. US MNEs are among the most well-known, innovative, and successful businesses in the world, and they inevitably have a target on their backs as a source of government revenues. Political and economic pressures routinely lead to excess. For example, countries' adoptions of digital services taxes, diverted profits taxes, and other destination-based taxes were widely considered to violate international tax norms, leading to the OECD's controversial Pillar 1 proposal. Some revenue authorities (particularly in non-OECD countries that do not currently receive country-by-country tax reports) aggressively focus on revenue targets rather than compliance. Governments have also increasingly used tax authorities to harass political opponents.[44]

This alone is one reason to go slow and think holistically about the issue, even for Members of Congress who sympathize with public CBCR activists do. If 2023-EDR100 unintentionally becomes a leverage point for other governments to extract revenues from U.S. firms, our own Treasury, and the overall economy could suffer as a result.

Weighty questions such as these are not, and should not, normally be among those that FASB must confront. This form of CBCR has many, many more connotations to it than "investor information" or the finer points of accounting. It is an expression of ideology, an area of the public square that FASB should seek to avoid to the greatest extent possible.

Conclusion

To be certain, any issue in the tax or financial spheres has defined roles for its actors. Some, such as Members of Congress, will involve themselves with the policy implications – will they serve taxpayers, investors, or some ideological agenda? Others will involve themselves with the government regulatory implications – will the SEC and IRS find those policies administrable and enforceable? Still others, such as FASB, ought to be able to focus on the complexities of accounting that professionals need to do their jobs. And while these roles can blur somewhat over any issue, public CBCR all too often makes them completely indistinguishable from one another. Better lines must be drawn now.

About the Author

Pete Sepp is President of the National Taxpayers Union, a nonprofit, nonpartisan citizen group founded in 1969. The organization has a long and deep history with tax administration policy, including service on the National Commission on Restructuring the IRS. For further details on our work in this area, visit www.ntu.org.

[43] At the time of this writing, comment submissions were "not available" on the Australian government's website. Hopefully this situation will change and NTU's comments will be accessible here: https://treasury.gov.au/consultation/c2023-383896.

[44] Ivins Phillips Barker. Letter to: Salo, Hillary H. (Technical Director, FASB). May 25, 2023. "Re: File Reference No. 2023-ED100: Improvements to Income Tax Disclosures." Retrieved from: https://fasb.org/Page/ShowPdf?path=TAXDISC.ED.007.IVINS%20PHILLIPS%20BARKER%20CHARTERED%20SEE%20LISTED.pdf&title=TAXDISC.ED.007.IVINS%20PHILLIPS%20BARKER%20CHARTERED%20SEE%20LISTED. NTU highly recommends that those interested in 2023-ED100 carefully read the entirety of these comments, which provide thoughtful analysis of each element in the proposed standard.

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