

# US Releases National Action Plan on Responsible Business Conduct

On December 16, 2016, the United States Government published its first National Action Plan ("US NAP" or "Plan") on Responsible Business Conduct. In doing so, the US joins other countries that have published national policy strategy statements as part of their commitment to implement the UN Guiding Principles on Business and Human Rights (the "Guiding Principles"). The US NAP confirms that it is based on international standards such as the Guiding Principles, but takes a broader approach than some, by setting out a general strategy on responsible business conduct. The US NAP is the result of the work of numerous federal agencies and involved four national consultations with businesses, NGOs, and other stakeholders, along with continuing dialogue via comment solicitation.<sup>1</sup>

The US NAP and accompanying press statement by the US State Department make clear that the US Government views its global anti-corruption and transparency agenda as key to promoting responsible business conduct, including respect for human rights. The Plan also emphasizes the US Government's increased focus on supply chain responsibility and suggests a new attention to responsible business conduct in the information and communications technology ("ICT") sector. The US NAP's objective is to present the ways in which the US Government, in partnership with stakeholders, supports "open and accountable business practices that demonstrate principled governance, respect for human rights and a commitment to transparency."<sup>2</sup>

The US NAP does not create any new legal rights or obligations. Rather, it catalogues existing laws, regulations, policies, and plans in the pipeline that address or will address responsible business conduct. The US NAP is meant to continue dialogue, rather than set out a new template for how businesses must organize their practices.<sup>3</sup>

The US NAP is the most comprehensive and current catalogue of US efforts to encourage and support responsible business conduct, and serves as a guide to businesses on where they may focus their due diligence programs aimed at avoiding adverse human rights and other social impacts, and related legal and reputational risks. Although the trajectory of the US NAP under the incoming administration remains to be seen, going forward, the Plan will serve as a helpful resource for the private sector.

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<sup>1</sup> For more information on the consultation process, please see our [December 2014 briefing](#).

<sup>2</sup> The White House, Office of the Press Secretary, *Fact Sheet: National Action Plan on Responsible Business Conduct*, December 16, 2016, <https://www.whitehouse.gov/the-press-office/2016/12/16/fact-sheet-national-action-plan-responsible-business-conduct> (accessed on December 20, 2016).

<sup>3</sup> The US Government solicits further feedback and suggestions via email at [NAP-RBC@state.gov](mailto:NAP-RBC@state.gov).

## Background

In June 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles developed by the Special Representative of the UN Secretary General on Business and Human Rights, Professor John Ruggie. While they are not themselves binding law, the Guiding Principles emphasize States' duty to protect human rights and elaborate on the ways States can help businesses consider and respect human rights in their activities, including through policy, legislation, and adjudication. The Guiding Principles state that companies and other business enterprises have a responsibility to respect human rights, which means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

The UN Working Group on Business and Human Rights<sup>4</sup> has encouraged States to develop National Action Plans on business and human rights as part of their responsibility to disseminate and implement the Guiding Principles.<sup>5</sup> In the field of business and human rights, the UN Working Group has referred to a NAP as an "evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the [Guiding Principles]."<sup>6</sup>

The UK published the first NAP in September 2013. (For more information on the UK NAP, please see our [September 2013 briefing](#).) Since then, the UK has published an updated NAP (in May 2016), and 10 further countries have published NAPs, including now the United States; at least 20 more are reported to be under development.<sup>7</sup> (For more information about NAPs that have been published, please see our [October 2015 briefing](#).)

## Key Features of the US NAP

The US NAP states that it implements domestic and international best practices, including those found in the Organization for Economic Cooperation and Development ("OECD") Guidelines for Multinational Enterprises and the Guiding Principles. More than a dozen US agencies were involved in the development and drafting of the NAP; thus, the Plan notes that it is the first time the US Government has undertaken a "whole-of-government process to focus, improve, and expand its efforts to promote [responsible business conduct]."

The US NAP catalogues the US Government's existing laws, policies, and plans, along with some new and recent initiatives, to further responsible business conduct in five broad categories: (i) leading by example; (ii) collaborating with stakeholders; (iii) facilitating responsible business conduct by companies; (iv) recognizing positive performance; and (v) providing access to remedy.

The Plan's principal components may be grouped within a handful of themes, most of which are already familiar to businesses headquartered or operating in the US. Central themes and key action items of the NAP include:

- The importance of anti-corruption and other financial crime measures (and their enforcement) in promoting responsible business conduct, and in counteracting the impacts of those crimes on societies and on individual human rights.

<sup>4</sup> The UN Working Group on Business and Human Rights was established in June 2011 by UN Resolution A/HRC/17/4. Its formal title is "Working Group on the issue of human rights and transnational corporations and other business enterprises."

<sup>5</sup> See United Nations Human Rights, Office of the High Commissioner, *State national action plans*, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (accessed December 20, 2016).

<sup>6</sup> UN Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights*, Version 2.0, November 2015, at p. i, available at [https://business-humanrights.org/sites/default/files/documents/UNWG\\_NAPGuidance\\_Version2%200\\_final\\_print\\_09112015.pdf](https://business-humanrights.org/sites/default/files/documents/UNWG_NAPGuidance_Version2%200_final_print_09112015.pdf) (accessed December 20, 2016).

<sup>7</sup> Business & Human Rights Resource Centre, *National Action Plans*, <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (accessed December 20, 2016).

- The Plan states that the US Government will continue robust enforcement and expansion of US laws, regulations, and initiatives against bribery, money laundering, and other financial crimes, including the Foreign Corrupt Practices Act ("FCPA"), the Kleptocracy Asset Recovery Initiative, and the Bank Secrecy Act.
- The Plan points to increased efforts to strengthen financial and corporate transparency. For example, the Plan notes that, in May 2016, the US Department of the Treasury announced its final Customer Due Diligence rule – to be implemented by May 2018 – requiring financial institutions to collect and verify the personal information of beneficial owners of account holders.
- The US Government will launch a new Global Anti-Corruption Consortium ("GACC") to enhance civil society anti-corruption investigations and reporting by mentoring investigative journalists and facilitating collaboration among anti-corruption civil society actors.
- Actions against forced labor and human trafficking/supply chain responsibility: The NAP highlights the US Government's efforts to ensure that products made under exploitative conditions do not gain US market access, including by the removal in February 2016 of an exception to the Tariff Act, 19 U.S.C. § 1307. The "consumptive demand clause" – an exception to the Tariff Act – had allowed for the importation of certain goods produced through forced labor if they were not produced "in such quantities in the United States as to meet the consumptive demands of the United States." The US NAP contains a number of other initiatives aimed at eradicating forced labor and trafficking from procurement by federal agencies, and assisting private companies to achieve the same – including by providing tools for workers in global supply chains to report potential labor abuses.
- Leveraging US Government purchasing power: The US NAP pledges to leverage the purchasing power of the US Government to influence commercial counterparties to improve human rights impacts, such as by eradicating trafficking from global supply chains. The US Government's efforts will include funding resource tools for governmental and non-governmental parties to continue to develop improved guidance in the areas of human rights, labor, and social sustainability.
- Transparency requirements to promote human rights due diligence: The Plan sets forth various actions the US Government will take to promote corporate due diligence to improve human rights impacts. For example, the Plan states that the US Government will facilitate companies' compliance with the requirement under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") to submit annually a description of the measures taken to exercise due diligence on the source and chain of custody of the four "conflict minerals" – cassiterite (for tin), wolframite (for tungsten), coltan (for tantalum), and gold ore.
- Due diligence in relation to US development funding: The Overseas Private Investment Corporation ("OPIC") and Export-Import Bank of the United States ("EXIM") will enhance existing procedures and standards that require companies receiving financial support to implement responsible business conduct principles.
- Responsible business conduct in the ICT sector: The Plan states that the US Government will work with stakeholders to develop a mechanism to identify, document, and publicize lessons learned and best practices related to corporate actions that promote and protect human rights online.
- Improving stakeholders' access to remedies: While the Plan contains several initiatives aimed at improving the performance of the US National Contact Point for the OECD Guidelines, similar to other NAPs, the US NAP devotes little attention to new initiatives to improve stakeholders' access to remedies. The National Contact Point is the US State Department office responsible for promoting and handling inquiries about the OECD Guidelines and resolving issues arising from non-compliance. The Plan notes that the US National Contact Point in 2015 and 2016 facilitated its first-ever successful mediations (three in total). In 2016, the National Contact Point published its first annual report, and, in 2017, will develop an outreach plan, which will include outreach to stakeholders outside the United States.

## Looking Forward

US and multinational corporations face increasing legal and reputational risks for social and human rights impacts in the United States and abroad. The publication of the US NAP dovetails with increasing legal and regulatory measures in connection with business and human rights that affect US and multinational corporations, including:

- The reporting requirement under Dodd-Frank Section 1502 relating to conflict minerals;
- The UK Modern Slavery Act (for more information, please see our [October 6](#) and [October 29](#), 2015 briefings on the UK Modern Slavery Act);
- The EU Non-Financial Reporting Directive, which requires public interest entities<sup>8</sup> with an average of at least 500 employees to report in their annual management statements, beginning in 2017, environmental, social, employment, human rights, anti-corruption and bribery, and board diversity data;
- The California Transparency in Supply Chains Act, which requires mid-size and large retailers to report on their specific actions to eradicate slavery and human trafficking in their supply chains; and
- The US' proposed Business Supply Chain Transparency on Trafficking and Slavery Act, H.R. 3226, which would require securities issuers with global receipts exceeding US\$100 million to disclose on their web sites whether they have taken any measures during the year to identify and address conditions of forced labor, slavery, human trafficking, and child labor within their supply chains.

The NAP also reflects a policy approach that balances targeted legal and regulatory measures with encouragement of voluntary steps that incrementally enhance business respect for human rights. Some of these are market-wide standards promoted by intergovernmental organizations that reflect the international frameworks referenced by the US NAP (for example, the IFC Performance Standards and Equator Principles, adapted to reflect the Guiding Principles), or are reflected in individual or sector-wide corporate initiatives, and multi-stakeholder processes. As the NAP states, "[t]he U.S. government remains committed to working with governments to raise global standards for [responsible business conduct], including on labor rights, human rights, and anti-corruption, and to lead a race to the top." An example of an initiative aimed at encouraging businesses to take part in this race is the Corporate Human Rights Benchmark ("CHRB"), with its pilot benchmark set for launch in March 2017, which will rank the top 100 companies in the apparel, agriculture, and extractive industries.

While it remains to be seen how the new US administration will direct the trajectory of the US NAP and business and human rights expectations more broadly, the publication of the NAP emphasizes the ever-increasing importance – and provides a useful resource – for US and multinational companies to stay abreast of new developments in the business and human rights arena, in order to be in a position to understand, contribute, and lead in responsible business practices. Moreover, the Plan makes clear that it is a starting point, and that the US Government intends to increase its commitment to promoting responsible business conduct.

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<sup>8</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 defines public interest entities as securities issuers trading on a regulated market in the EU; credit institutions; insurance companies; and companies designated as public interest entities by an EU Member State. See European Commission, Banking and Finance, *Non-Financial Reporting*, [ec.europa.eu/finance/company-reporting/non-financial-reporting/index\\_en.htm#legal-framework](http://ec.europa.eu/finance/company-reporting/non-financial-reporting/index_en.htm#legal-framework) (accessed December 20, 2016).

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