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The Advent of Privately Developed Corporate Human Rights Reporting Frameworks

BY JOHN KLOOSTERMAN, STEFAN MARCULEWICZ AND MICHAEL CONGIU ON SEPTEMBER 9, 2015

The United Nations' adoption in 2011 of the UN Guiding Principles on Business and Human Rights ("Guiding Principles") signified a growing consensus that corporate entities have a responsibility to account for their operations' impact on human rights. In the time since the Guiding Principles' adoption, there has been a flurry of activity within civil society, and at government and company levels, regarding appropriate implementation.

One product of this activity has been the development and marketing of various potentially competing reporting frameworks to measure companies' commitment to implementing the Guiding Principles. However, these frameworks present challenges for companies.

Two examples are the UNGP Reporting Framework that was recently launched by the Human Rights Reporting and Assurance Frameworks Initiative (also known by the acronym "RAFI")¹ and the Corporate Human Rights Benchmark (the «Human Rights Benchmark»)². The UNGP Reporting Framework and the Human Rights Benchmark are in relatively nascent stages of implementation and development. Both have expanded upon commonly known reporting frameworks such as the Global Reporting Initiative ("GRI"). Further, they each present some competing requirements.

Nevertheless, the frameworks, and the broader extension of formal reporting compliance with the Guiding Principles, present challenges regarding whether "human rights" or "performance" under the Guiding Principles can be meaningfully measured and reported. These questions, in context, illustrate just one facet of a growing discussion regarding the appropriate scope of business responsibility for human rights concerns.

Setting the Stage: The Guiding Principles

The Guiding Principles³ comprise three pillars: (1) clarifying the existing role of states to protect human rights; (2) ensuring that business entities respect human rights; and (3) ensuring the proper access to remedies for human rights violations. The UNGP Reporting Framework and the Human Rights Benchmark focus on the second and third pillars, and may ultimately be used to measure a particular company's compliance with them.

1 See Shift, *Human Rights Reporting and Assurance Frameworks Initiative - RAFI*

2 See *The Corporate Human Rights Benchmark* (June 2015).

3 United Nations, Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (2011).

Though the Guiding Principles may be adopted by any entity, they qualify that compliance can and should vary by the size and complexity of a particular entity's operations.⁴ Within that context, the Guiding Principles instruct that all adopting entities should implement a «statement of policy» demonstrating commitment to respecting human rights and developing transparent «due diligence» mechanisms to ensure that human rights are properly respected throughout the entity's operations.⁵ Such mechanisms, like a statement of policy, should be prepared with the involvement of the entity's internal personnel, with assistance from external experts, and with «meaningful consultation with potentially affected groups and other relevant stakeholders.»⁶

Additionally, under the third pillar of the Guiding Principles, entities are instructed to effectively and timely remediate any “severe human rights impacts” to which they have caused or contributed.⁷

RAFI's UNGP Reporting Framework

RAFI was jointly developed by the non-profit organization Shift, which focuses on issues related to the Guiding Principles, and the global accounting firm Mazars.⁸ RAFI launched the UNGP Reporting Framework in 2015 that has gained some acceptance among some larger multinational companies, which have begun using it to report on their human rights commitments.

RAFI, however, has not escaped criticism. The International Organisation of Employers (“IOE”), for example, while expressing its commitment to support the Guiding Principles' implementation, expressed legitimate concerns when RAFI was initially introduced. The IOE expressed, for example, that formally reporting “compliance” with the deliberately flexible and subjective Guiding Principles – and then “verifying” compliance as financial data can be measured – may be problematic and counterproductive.⁹

The Human Rights Benchmark

The Human Rights Benchmark was developed recently by a number of investment groups in combination with certain civil society organizations, and with the financial backing of the United Kingdom¹⁰ and Dutch governments.¹¹ A work in progress that has not been finalized, it proposes metrics that go well beyond those contained in the UNGP Reporting Framework. Further, the Human Rights Benchmark focuses only on the 500 largest companies in the world, in contrast to the Guiding Principles' application to all business entities. The Human Rights Benchmark, most fundamentally, calls into question the sufficiency and efficacy of RAFI's UNGP Reporting Framework by presenting companies with a potentially competing set of reporting guidelines.

Significant concerns also exist concerning the substance of its proposed guidelines, including the following:

- The Human Rights Benchmark measures whether an employer remains “neutral” with respect to union organizing campaigns. Neutrality is a uniquely U.S. phenomenon, and can be interpreted as requiring silence on the part of employers in the context of union organizing efforts. That concept, though, is inconsistent with the principles of freedom of association as they are defined and understood at the international level. Indeed, it is widely believed that the free exchange of ideas, information and opinions are fundamental to the existence of a free-trade union movement. This “neutrality” metric therefore eschews the notion that principles of freedom of association, as defined at the international level, promote the free exchange of information and ideas regardless of their source or affinity. The Human Rights Benchmark thus encourages freedom of expression and opinion at the international level so long as its manifestation does not interfere with an employee's free choice to be represented, or not represented, by a union.

4 Guiding Principle 16.

5 Guiding Principle 17, 21.

6 Guiding Principles 18, 20.

7 Guiding Principle 22.

8 See *Human Rights Reporting and Assurance Frameworks Initiative* – RAFI, *supra* note 1.

9 *IOE Comments On The Mazars And Shift Discussion Paper On A Global Reporting And Assurance Standard On The Un Guiding Principles On Business And Human Rights* (June 28, 2013). In 2013, the IPIECA, for its part, also noted that: «[d]eveloping a 'Standard' on Human Rights is inconsistent with the spirit of the UNGPs. It suggests a prescriptive approach, which was explicitly not the intention of the UNGPs.” See, e.g., *Developing Global Standards for the Reporting and Assurance of Company Alignment with the UN Guiding Principles on Business and Human Rights: IPIECA Feedback on SHIFT/Mazars discussion paper*.

10 The DailyMail.com, *Government backing rights project*, (Dec. 17, 2014).

11 See *The Corporate Human Rights Benchmark*, *supra* note 2.

- The Human Rights Benchmark also includes a metric measuring whether the company “faces criticism or negative news stories related to Labour and Human Rights” or has responded to similar reports. However, a report, and even more cryptically, a “criticism,” does not necessarily equate to an actual adverse human rights impact contemplated by the Guiding Principles, and allowing unsubstantiated reports to affect a company’s “rating” does not appear to further the Guiding Principles’ effective implementation.
- Similarly, the requirement that a company report every claim relating to certain International Labour Organization conventions, as well as accompanying reports on “corrective actions taken,” presupposes the legitimacy of every claim that is raised and that every claim requires some corrective action.¹² Again, questions remain regarding whether this metric furthers the Guiding Principles.

Looking Forward

Increasingly, companies will need to be aware of different reporting guidelines, and they must prepare to field inquiries from investors and other groups regarding the company’s position on, and commitment to, human rights and those guidelines.

RAFI, its UNGP Reporting Framework, and the Human Rights Benchmark, and perhaps future initiatives or frameworks, may be designed to help employers with these important issues. Companies trying to fulfill their legitimate obligations in this important arena need to carefully and thoughtfully parse these differing guidelines and protocols to ensure that they do not incur unintended conflict and expense.

¹² See *id.*, also raising concerns about the CHRB’s land use, living wage, and other metrics.