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The U.S. Issues a National Action Plan on Responsible Business Conduct

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On December 16, 2016, the United States launched a National Action Plan (the "U.S. NAP") on Responsible Business Conduct. The U.S. NAP seeks to operationalize the government's role in encouraging responsible business conduct through a combination of "laws, regulations, policies, programs, and initiatives," as envisioned under the "soft law" norms of the United Nations Guiding Principles on Business and Human Rights (the "UN Guiding Principles") and the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises (the "OECD Guidelines").¹ While the U.S. NAP does not introduce any new legislation, it does seek to introduce new initiatives that will hold employers – especially federal contractors – more accountable for their responsible business conduct practices in their operations overseas. Whether these initiatives will be continued under the incoming Trump administration is unclear.

The UN Guiding Principles, the OECD Guidelines, and NAPs

In 2011, the United Nations Human Rights Council endorsed the UN Guiding Principles, which do not "creat[e] new international law obligations," but rather define governments' and companies' already-existing obligations to protect human rights and remedy violations.² The UN Guiding Principles comprise three "pillars": Pillar One – the state duty to protect against human rights abuses by business; Pillar Two – the business responsibility to respect human rights; and, Pillar Three – the responsibility of states and business to provide effective access to remedies.

1 U.S. Department of State, Responsible Business Conduct – First National Action Plan for the United States of America, December 16, 2016, available at: <https://www.state.gov/documents/organization/265918.pdf> (hereinafter "U.S. NAP").

2 A copy of the UN Guiding Principles, published by the Office of the United Nations High Commissioner for Human Rights, is available online at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

The OECD Guidelines are “non-binding principles and standards for responsible business conduct” that adhering governments “recommend” to multinational business enterprises.³ In 2011, the OECD responded to the UN Guiding Principles by adding a chapter to its own Guidelines addressing human rights and by adopting a “new and comprehensive approach to due diligence and responsible supply chain management.”

Not long after the UN Human Rights Council endorsed the UN Guiding Principles, the UN Working Group on Business and Human Rights (the “UN Working Group”) called on individual States to develop national action plans (“NAPs”) to implement the principles in a context specific to each country. The UN Working Group defines a NAP as “[a]n evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles...”⁴

In September 2013, the United Kingdom was the first country to launch a NAP, followed not long afterwards by the Netherlands. Since then, 11 additional countries have launched NAPs, the most recent being the United States, Italy, and Germany, all of which issued their NAPs in December 2016.⁵ Twenty other nations (ranging from Australia to Myanmar) are in the process of developing a plan or have committed to creating one. Another eight countries are in the preliminary stages of this process.

Generally speaking, each country’s NAP lays out the current regime of laws that further the norms promoted under the UN Guiding Principles, and the governments’ reiteration of the importance of effectively enforcing these laws. In addition, the NAPs set forth “planned measures” on how to improve local laws to comply further with the UN Guiding Principles. For example, Sweden’s NAP states that “[t]he Government will conduct a baseline study of how Swedish legislation compares with the Guiding Principles to determine whether there are any immediate or obvious gaps that need to be addressed.”⁶ Some NAPs set forth proposed legislation, as does Denmark’s NAP, which proposed extraterritorial legislation that allows for prosecution of violations that occur outside of Denmark by Danish actors.⁷

Critically, these NAPs also emphasize that the government will expect local companies to comply with the UN Guiding Principles, including making public commitments to the UN Guiding Principles, increasing reporting obligations to the governments, and reviewing and improving their due diligence and redress mechanisms. As Sweden’s NAP states: “[t]he plan sends a clear message about the Government’s expectations of modern business: successful and competitive companies of the future are those that make human rights and corporate social responsibility part of their core business.”

As detailed below, the U.S. NAP commits to principles in the UN Guiding Principles and OECD Guidelines and seeks to build on current laws by introducing new policies to hold businesses – especially federal contractors – more accountable for their responsible business conduct practices.

3 Organization for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises – Responsible Business Conduct Matters* (brochure), p. 4, available at: <http://mneguidelines.oecd.org/responsible-business-conduct-matters.htm> (accessed: 01/03/2017).

4 United Nations Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (UN Office of the High Commissioner, 2d ed. 2016), p. 3, available at: http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf. The Working Group published an initial version of its Guidance in December 2014 and then published a new version in Nov. 2015.

5 Office of the United Nations High Commissioner for Human Rights, *State national action plans*, OHCHR.ORG, available at: <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>.

6 Government Offices of Sweden, *Action Plan for Business and Human Rights at p. 28*, available at <http://www.government.se/contentassets/822dc47952124734b60daf1865e39343/action-plan-for-business-and-human-rights.pdf>.

7 The Government of Denmark, *Danish National Action Plan – implementation of the UN Guiding Principles on Business and Human Rights*, p. 15, http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf.

The U.S. NAP

In September 2014, during remarks at an Open Government Partnership meeting, President Barack Obama committed to “develop a national plan to promote responsible and transparent business conduct overseas.”⁸ This announcement started a process that lasted over two years, ultimately culminating in the U.S. NAP issued last month. The White House National Security Council led the effort to develop the U.S. NAP, but more than a dozen federal agencies, including the Departments of State and Labor, were involved in the development process. Moreover, the developers met with multiple stakeholders – including, labor unions, businesses, and foreign government officials – to obtain their input.

The stated purpose of the U.S. NAP is to: “strengthen the U.S. government’s role in advancing responsible business conduct through effective intra-governmental coordination and policymaking, promoting high standards globally, facilitating current and future responsible business conduct efforts through enhanced collaboration, and highlighting and supporting U.S. industry leadership.”⁹ Within the framework of promoting responsible business conduct, the U.S. NAP addresses a broad range of issues, including human rights and labor rights. The U.S. NAP focuses on “the conduct of U.S. enterprises operating abroad.”¹⁰ As for domestic conduct, the U.S. NAP simply states that the United States “supports [responsible business conduct] principles domestically and ha[s] taken meaningful steps to uphold them.”

The U.S. NAP does not propose new legislation. However, it seeks to build on existing laws and policies to hold companies more accountable for responsible business conduct by leveraging the federal government’s substantial contracting power and by increasing transparency of responsible business conduct. It groups the government’s efforts to foster responsible business conduct into five categories: (1) Leading by Example; (2) Collaborating with Stakeholders; (3) Facilitating Responsible Business Conduct by Companies; (4) Recognizing Positive Performance; and (5) Providing Access to Remedy. For each category, the U.S. NAP describes the “new actions” that the government is implementing, as well as the “ongoing commitments and initiatives.” The following are the new proposed actions employers should pay particularly close attention to:

- The U.S. National Contact Point for the OECD will undergo a peer review to enhance access to remedies through the OECD complaint process, known as the “Specific Instance” process;
- The Department of Homeland Security will enhance enforcement of laws relating to forced labor and convict labor, including recent amendments to the Tariff Act that eliminate importation of all goods derived from forced labor;¹¹
- The General Services Administration will issue “best practices” on social sustainability risks that the government must assess at the pre-award and post-award stages of a federal procurement;
- The Departments of State and Labor will develop tools to help businesses analyze, prevent, and address human trafficking risks in global supply chains;
- The Department of Labor and Office of Management and Budget will designate agency “Labor Compliance Advisors” who will enhance responsible business conduct awareness of federal contractors;

8 The White House, Office of the Press Secretary Remarks by President Obama at Open Government Partnership Meeting (Sept. 24, 2014), available at: <https://www.whitehouse.gov/the-press-office/2014/09/24/remarks-president-obama-open-government-partnership-meeting>.

9 U.S. NAP at 5.

10 *Id.* at 4, 6.

11 For nearly 85 years, the Tariff Act of 1930, while prohibiting importation of goods manufactured in whole or in part from forced labor, allowed such importation as long as domestic U.S. production could not meet the demand for those goods. The recent amendments closed this “consumptive demand exception” loop-hole. See Lavanga V. Wijekoon, “U.S. Strengthens Law Prohibiting Importation of Goods Derived from Forced Labor,” ABA International Labor & Employment Law Committee Newsletter, July 2016, available at http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/2016/july2016/usa.html.

- The Department of Labor will encourage plan fiduciaries under the Employee Retirement Income Security Act to, under certain conditions, invest in certain investments selected based on their impact on social sustainability;
- The Overseas Private Investment Corporation and Export-Import Bank of the U.S. (EXIM) will enhance standards that require companies receiving their support to implement responsible business conduct principles;
- EXIM will be enhancing its complaint mechanism to allow interested parties greater input on the responsible business conduct performance of companies with which EXIM transacts;
- The Departments of State and Labor, and the United States Agency for International Development, will build tools to “empower workers to directly report” to the relevant agencies issues in federal supply chains;
- The Department of Labor will develop effective metrics, including “Key Performance Indicators,” for measuring and managing labor rights impacts in supply chains; and,
- The State Department will support U.S. companies’ efforts to voluntarily report on responsible business conduct.

The U.S. NAP Under the Incoming Trump Administration

The U.S. NAP is a creation of the outgoing administration of President Obama. It is unclear whether President-elect Donald Trump will look to the U.S. NAP as a template for future efforts, develop his own plan, or take a different approach to responsible business conduct entirely. None of Trump’s current nominees for positions such as Secretary of State or Secretary of Labor have publicly opined on the U.S. NAP. Thus, with the imminent transfer in U.S. presidential administrations, there remains a fundamental question about the U.S. NAP’s lasting effects after January 20, 2017.