

**Submission to the United States Department of State
on updating and revitalizing the
United States National Action Plan on Responsible Business Conduct**

May 31 2022

The Institute for Human Rights and Business (IHRB) and the World Benchmarking Alliance (WBA) welcome the opportunity to provide joint input for the current review of the United States National Action Plan (USNAP) on Responsible Business Conduct. IHRB and WBA are committed to encouraging responsible business practices around the world consistent with international human rights, labour and environmental standards. Governments are critical to achieving this objective, including through effective legislation and incentives that shape business performance at home and abroad.

In marking the 10th anniversary of the UN Guiding Principles on Business and Human Rights (UNGPs) in June 2021, and in announcing the intention to update and revitalize the USNAP, US Secretary of State Antony Blinken highlighted the ongoing importance of this international framework and the extensive work still required to achieve its aims¹.

The current USNAP has a number of shortcomings in monitoring government progress on implementing its commitments, as well as in calling for new actions, including mandatory business actions, to prevent and address adverse impacts on human rights caused by or linked to business activities domestically and abroad. Our organisations believe that the ongoing process to update the USNAP serves as an important opportunity to address these issues and advance the implementation of the UNGPs both by the State and by companies.

This submission provides **evidence and recommendations** on the following topics:

- 1. Improving implementation of USNAP commitments***
- 2. Addressing domestic and extraterritorial scope***
- 3. Developing mandatory business human rights due diligence legislation***
- 4. Strengthening policy coherence by embedding human rights within priority areas such as climate change, labour, SEC disclosures, director duties, public procurement, and technology***

Evidence and Recommendations

1. Improving implementation of USNAP commitments

It should be noted that the US Government has taken steps in recent years to advance and highlight responsible business practices in select areas. Examples include integrating labour rights protections into the US-Mexico-Canada Trade Agreement (USMCA) and including specific reference to the UNGPs in the context of guidance to companies regarding supply chain risks of forced labour and other human rights abuses linked to the Xinjiang, China as well as transactions linked to foreign government end-users of products on services with surveillance capabilities. In some instances, sanctions imposed on specific individuals and countries to address human rights concerns, besides other objectives.

A review of available public information since 2016 indicates, however, that US Government actions to implement the full range of commitments made in the USNAP have been uneven and have not prompted new Government actions in important policy areas.

¹ <https://www.state.gov/responsible-business-conduct-national-action-plan/>

Although some tools have been developed for businesses to consult on a voluntarily basis, there is no readily available public information concerning the USNAP to assist in measuring effectiveness of corporate efforts, and online information concerning Government actions to implement its commitments concerning the USNAP is incomplete. There also does not appear to have been a concerted effort by US authorities to promote the importance of the USNAP to business actors or other stakeholders, or to highlight its relevance in actions taken in other relevant policy areas.

One noteworthy example of commitments set out in the USNAP and current state of play in this regard relates to the US National Contact Point (USNCP) for the OECD Guidelines for Multinational Enterprises. The USNAP commits the Government to “Publish(ing) an annual report of” and “develop(ing) an outreach plan” for the USNCP as being of relevance to UNGPs provisions relating to access to remedy. The importance of “consulting with stakeholders” on these matters is also highlighted. It should be noted that USNCP documents are among the only official records available that specifically mention the USNAP. However, as of 2021, the USNCP does not regularly report to the executive or Congress, has no dedicated budget, has no oversight body, and its advisory body (Stakeholder Advisory Board) has ceased operations. The IWG was added as an advisory board in 2019, but did not meet in 2021 even virtually, having only completed consulting by email. This situation raises a number of concerns relating to access to remedy for human rights abuses linked to business activities. **We strongly recommend for these issues to be addressed as part of the current USNAP consultations by setting clear accountability, timelines and by creating a mechanism for monitoring and regular updates.**

2. Addressing domestic and extraterritorial scope

Currently, the scope of the USNAP is completely extraterritorial, and the content does not address domestic business-related human rights issues. WBA assessed over 400 US companies on its core social indicators² which focus on three themes: respect for human rights, decent work and ethical conduct.

While our organisations recognise the importance of addressing conduct of US-based businesses operating abroad and across supply chains, the US faces several business and human rights issues within its borders. Gender inequality in the workplace remains an ongoing challenge with the lack of mandatory standards for paid parental leave³. Indigenous rights continue to be threatened by business activities and the Working Group on Business and Human Rights (Working Group) observed how Native American communities such as the Navajo Nation face inequitable health, economic and environmental impacts from the actions of the extractives sector⁴. The Working Group also emphasised the vulnerability of migrant workers in low-wage industries in the US who are subject to illegal labour practices such as wage theft and unsafe working conditions⁵. Privacy, surveillance and

² WBA assessed 1,000 of the world’s most influential companies on their contribution to the social transformation of our global system. These companies were assessed on 18 core social indicators distributed across three categories: respect human rights, act ethically and provide and promote decent work. Of the 1,000 companies assessed, 409 companies are headquartered in the US. Further details about the scores of these companies can be found in our publicly available data set: 2022 Social Transformation Baseline Assessment data set | World Benchmarking Alliance

³ <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/065/34/PDF/G2006534.pdf?OpenElement>

⁴ <https://www.ohchr.org/en/statements/2013/05/statement-end-visit-united-states-un-working-group-business-and-human-rights?LangID=E&NewsID=13284>

⁵ <https://www.ohchr.org/en/statements/2013/05/statement-end-visit-united-states-un-working-group-business-and-human-rights?LangID=E&NewsID=13284>

digital freedom issues persist in the information and communications technology (ICT) sectors despite greater attention being paid to this issue⁶.

WBA's findings from 2022 suggest that the majority of US companies assessed currently fail to demonstrate the fundamentals of socially responsible business conduct within their own operations domestically. The following examples highlight the current situation:

- When it comes to respecting human rights, less than half of the companies assessed (47%) had a publicly available policy statement affirming their commitment to respect human rights. A smaller percentage of companies had commitments in place to respect the human rights of workers, with 76% of these not having a commitment to respect principles on fundamental rights at work in the eight ILO core conventions as set out in the ILO Declaration on Fundamental Principles and Rights at Work. These findings are particularly worrying as commitments to respecting the human rights of workers are often the start of a company's journey towards responsible business conduct.
- On the issue of providing and promoting decent work, out of the 409 US companies assessed, 76% did not meet collective bargaining fundamentals in their own operations such as disclosing the proportion of their total direct operations workforce covered by collective bargaining agreements.
- When it comes to gender equality and women's empowerment, more than half of the companies assessed (51%) did not meet requirements which include a public commitment to gender equality and women's empowerment and disclosing one or more relevant time-bound targets to achieving these goals.
- In addition, 95% of US businesses assessed do not ensure that their own employees are paid a living wage, nor disclose a time-bound target for paying all workers a living wage.
- Only 2% of companies assessed limit working hours for workers in their own operations by not requiring them to work more than the regular and overtime hours (more than 48 hours in a regular work week or 60 hours including overtime), or state that all overtime work must be consensual and paid at a premium rate.

These findings highlight protection gaps that impact not only workers and communities abroad, but also in companies' domestic operations. Most other NAPs written by other States internationally include such a focus and for many it is the domestic analysis that dominates⁷. Hence, **we strongly recommend the inclusion of domestic human rights impacts of companies operating in the United States within the scope of the updated USNAP.**

Including domestic human rights impacts should also mean the NAP requirements being shared with and implemented by State and city-level governments, recognizing that human rights – particularly economic, social, and cultural rights – and corporate accountability are often realized in practice at the sub-national level.

3. Developing mandatory business human rights due diligence (HRDD) legislation

As part of 'knowing and showing' how companies respect human rights, businesses are expected to carry out HRDD in order to identify, prevent, mitigate and account for how they address their

⁶ <https://www.ohchr.org/en/statements/2013/05/statement-end-visit-united-states-un-working-group-business-and-human-rights?LangID=E&NewsID=13284>

⁷ <https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights>

impacts on human rights both domestically and globally. This process is a key element of the UNGPs and sits at the heart of any good approach to managing human rights risks.

The current USNAP does not include a call for legislation that would ensure mandatory business action concerning HRDD. It should be noted, however, that a growing number of G7 countries have recognised the limits of market-based and non-legislative approaches to improve corporate respect for human rights and have announced mandatory reporting and/or due diligence requirements to detect and prevent human rights risks and harms in corporate supply chains. Most recently, the European Commission has adopted a proposal for a Directive on corporate sustainability due diligence⁸, while Japan has announced a process for developing similar legislation⁹.

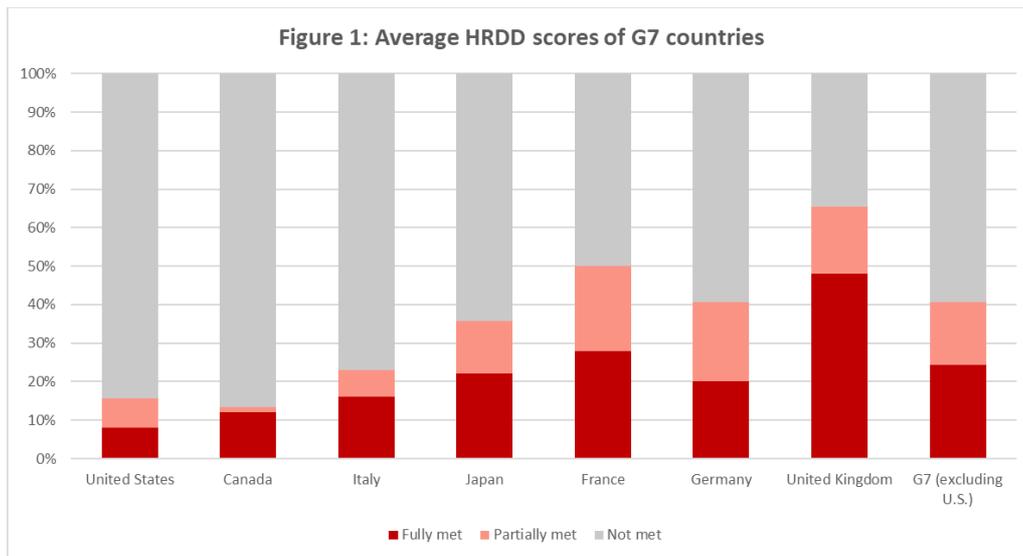
WBA's assessment of 409 US companies highlights the need for regulatory action in the US to raise the bar and ensure that companies respect the rights of all potentially affected stakeholders. The findings, shown in the table below, give an overview of the US companies' performance on WBA's HRDD and stakeholder engagement indicators¹⁰:

- 84% of US companies failed to demonstrate the initial steps of HRDD, compared with 59% of companies from other G7 countries. These steps include identifying, assessing, integrating, and acting on human rights risks and adverse impacts in their own operations and supply chains. 12% of US companies demonstrated initial steps, and only 4% showed that they have assessed, integrated and acted on negative human rights risks and impacts.
- 91% of US companies did not identify and engage with stakeholders whose human rights have been or may be affected by their activities, compared with 78% of companies based in G7 countries. Effective HRDD often relies on a company's ability to engage with all its stakeholders, especially those who are vulnerable and underrepresented. Mandatory action on HRDD should therefore strengthen transparency of human rights implementation and enable inclusion of all stakeholders in due diligence processes.

⁸ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145

⁹ <https://asia.nikkei.com/Politics/Japan-to-set-human-rights-guidelines-for-companies>

¹⁰ WBA's 2022 Social Transformation Baseline Assessment includes a set of Core Social Indicators (CSIs) that look at HRDD: CSI 3 (identifying human rights risks and impacts), CSI 4 (assessing human rights risks and impacts) and CSI 5 (integrating and acting on human rights risks and impacts), and stakeholder engagement CSI 6 (Engaging with affected and potentially affected stakeholders). The 409 US companies were assessed on these indicators. For the full set of indicators please refer to WBA's [Social Transformation Framework](#).



These findings highlight a significant gap in the policies and processes put in place by US companies to ensure they respect the rights of people in their operations and supply chains.

Hence, **we recommend the US Government includes a call for mandatory action on human rights due diligence as part of the updated USNAP.** By introducing standardised policy and disclosure requirements, the updated USNAP can significantly strengthen corporate actions and disclosures under UNGP Pillar 2.

4. *Strengthening policy coherence by embedding human rights within priority areas*

Human rights issues have significant overlaps with a wide range of policy areas from finance to development, trade to environmental protection. Similarly, policies in other areas, such as SEC regulations on mandatory disclosures and public procurement, can influence implementation of the USNAP. Policy coherence and inter-agency coordination are key factors in effective implementation of USNAP. We recommend the following priority areas for strengthening policy coherence and coordination moving forward:

a. **Climate change and climate action**

In 2019, the UN Special Rapporteur on human rights and the environment found that governments failing to fulfil international climate change commitments are violating their obligations to protect the human rights of their citizens. However, not only can the effects of climate change have human rights implications, but so too can efforts to mitigate and adapt to climate change.¹¹ Countries and businesses must move towards a net zero economy that avoids mass unemployment or further entrenches ongoing inequalities. The G7 recently recognised as much, calling for a just transition “towards decent and high quality work in a green economy,” and ensuring that no region or person is left behind¹². However, WBA has found that the vast majority of high-emitting companies are failing to demonstrate efforts towards a just transition.¹³ From the 32 companies assessed on just transition by WBA, 82%

¹¹ See IHRB’s 2020 report [Just Transitions for All - Business, Human Rights, and Climate Action](#)

¹² https://assets.publishing.service.gov.uk/media/628df082e90e071f61322253/g7_lem_communique_final-1.pdf

¹³ <https://www.worldbenchmarkingalliance.org/research/2021-just-transition-assessment/>. See also <https://www.iddri.org/en/publications-and-events/report/coal-transition-united-states>

scored zero on just transition planning. In the U.S. there have been examples of coal companies strategically declaring bankruptcy thereby avoiding compensating now-unemployed workers¹⁴. The US should set an example for other countries by treating this as an opportunity to make society better, with stabler, safer, and higher paying union jobs. The ILO envisions a just transition that drives net gains in total employment, rising job quality and income, promising “decent work for all, social inclusion, and the eradication of poverty¹⁵.” Including a comprehensive climate plan with a robust just transition framework “is not an option, but a necessity”¹⁶. The USNAP should ensure that human rights are embedded within climate finance and projects by incorporating clear recommendations on just transition and climate justice, so that “green” finance and projects are only classified as such if they avoid human rights abuses and take account of the need for a just transition.

b. Labour policies including union, social dialogue and migrant workers

Migrant workers both abroad and in the US are particularly vulnerable to human rights violations. The practice of charging of recruitment fees to migrant workers, common in several significant recruitment corridors, leaves many workers seriously indebted and thus vulnerable to further exploitation. In the US, debt bondage frequently occurs amongst migrant workers who are informally recruited in agricultural supply chains.¹⁷ The government must ensure that migrants are not at risk of detention or deportation when they bring forward claims for unpaid wages, that there are fair wage determination processes and that there are commercial consequences for businesses that do not adequately remediate wage theft in their supply chains.

Internationally, addressing the challenges of recruitment fees to migrant workers remains a key part of many business strategies to prevent forced labour and trafficking. The IHRB led Leadership Group for Responsible Recruitment¹⁸ is one example of many business initiatives that challenge existing exploitative models of recruitment and see instead recruitment practices align with the *Employer Pays Principle: No worker should pay for a job. The costs of recruitment should be borne not by the worker but by the employer*. The significance of this issue and endorsement of the Employer Pays Principle saw it included in the Principles to Guide Government Action to Combat Human Trafficking in Global Supply Chains¹⁹ signed by the US Government and the Governments of Australia, Canada, New Zealand and the United Kingdom in 2017. In more recent times several Withhold Release Orders enacted by the US Government Customs and Border Protection have also seen goods for import to the USA stopped at the border due to the links between recruitment fees paid by workers and debt bondage / forced labour and trafficking. This support from the US Government helps empower those in countries of both origin and destination who advocate for legislative change to prevent this exploitative practice.

At a systemic level, current labour practices in the US have on several occasions failed to conform to the core conventions of the International Labour Organisation (ILO) and those enshrined in the *ILO Declaration on Fundamental Principles and Rights at Work*²⁰. The

¹⁴ <https://www.iddri.org/en/publications-and-events/report/coal-transition-united-states>

¹⁵ https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_432859.pdf

¹⁶ https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_432859.pdf

¹⁷ <https://www.ihrb.org/other/freedom-from-fear-based-immigration-ten-years-on-dhaka-principle-2>

¹⁸ <https://www.ihrb.org/employerpays/leadership-group-for-responsible-recruitment>

¹⁹ <https://www.state.gov/wp-content/uploads/2019/03/286369.pdf>

²⁰ <https://www.ohchr.org/en/statements/2013/05/statement-end-visit-united-states-un-working-group-business-and-human-rights?LangID=E&NewsID=13284>

government must create greater space for the rights of public workers to unionise, whether this is by strengthening legal protections for union members or by ensuring that US companies involved in union busting, unfair dismissals or other labour rights abuses are swiftly penalised. There needs to be strong accountability and enforcement mechanisms such as civil liability for companies that engage in such practices. Such measures must extend to the actions of US businesses abroad as well. The inadequacy of existing avenues of transnational remedy like the Alien Tort Statute (which has been diluted by US courts) means that designing other mechanisms of corporate accountability must be high on the agenda. Ultimately, a richer culture of collective bargaining and labour rights will generate popular support and political stability across the nation.

c. SEC rules and disclosure policies

SEC's proposed rules to enhance and standardise climate-related disclosures is a critical step towards creating a level playing field for companies, and to provide decision-useful information to investors and other stakeholders. SEC human capital disclosures could provide similar information related to the workforce. Embedding a human rights lens to SEC mandatory disclosures could ensure that standardize data on companies' actions on human rights becomes available to track progress and implementation of the USNAP.

Critics across political lines and ideological divides have been concerned with economic models that deepen inequality through a prioritisation focused on short-term returns for shareholders, because of their adverse impacts on economic and social rights. There are measures to require greater private equity (PE) disclosure underway but still important to include the importance of greater accountability and responsibility of private capital²¹. Greater transparency and accountability are necessary not only from a human rights perspective but also serves the interests of investors.

d. Board oversight and director duties

Human rights need to be a strategic priority for corporate boards if significant progress is to be made. Recently published World Economic Forum research²², which IHRB helped develop, has highlighted the lack of corporate board diversity and human rights knowledge worldwide in particular in relation the lived experience of affected stakeholders – those most at risk of negative human rights impacts by the company in question. Within the US context, Cornell University research has tracked NYSE or NASDAQ exchanges (about 3,100 companies per year) from the first quarter of 2013 to the end of September 2021²³. This shows that after many years of considerable under representation, US boards are starting to become more representative of the US population as a whole, in terms of race and ethnicity. Beyond this, however, very few US companies have reported routinely on whom their affected stakeholder groups are and whether their company has the appropriate mechanisms in place to take appropriate proactive and reactive steps.

The USNAP should consider the best ways of advancing human rights at board level. Ultimately, this is likely to require changes in the legal duties of board directors, but a range of incentives and disincentives can be put in place much sooner. The human rights competence and capacity of boards can be a criterion in public procurement requirements,

²¹ <https://www.sec.gov/news/press-release/2022-19>

²² <https://www.ihrb.org/news/guidance-note-for-boards-and-ihrb-john-morrison-davos-world-economic-forum-2022>

²³ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3952897

export credit and guarantees, tariff or sanction exemptions, trade promotion and government-sponsored awards.

e. Embedding respect for human rights in the procurement of buildings and infrastructure

At home and overseas, the US government is a major procurer of construction and infrastructure projects. The USNAP should elaborate how the government protects and advances human rights through its direct procurement practices for buildings and infrastructure, and through global infrastructure policy initiatives. The Framework for Dignity in the Built Environment provides a blueprint for aligning building and infrastructure projects with international human rights standards throughout their lifecycle²⁴.

f. Aligning the technology industry with human rights priorities

Many US companies export sensitive technology around the world. Although the US has an export control mechanism to prevent certain dual-use technologies from reaching governments or actors who might misuse it in ways that undermine US strategic objectives, human rights considerations do not necessarily guide those policies. While the US encourages companies to develop codes of conduct and practices to prevent abuse, it needs to consider legislative or regulatory mechanisms to ensure that trade in technology developed by US companies that could allow mass surveillance or otherwise undermine human rights is strictly controlled or prevented.

²⁴ <https://www.ihrb.org/focus-areas/built-environment/framework-for-dignity-built-environment>