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Via Electronic Mail

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Re: Initial Comments of the United States Council for International Business on the Proposed U.S. National Action Plan on Responsible Business Conduct

Dear Ms. Yetken and Mr. Pielemeier,

The United States Council for International Business (“USCIB”) appreciates the opportunity to submit these comments to the United States Government as part of the open consultation process on the proposed National Action Plan on Responsible Business Conduct (“U.S. NAP”). The USCIB is a multi-sector business association consisting of approximately 300 U.S. businesses, service and law firms and trade associations, roughly a third of which are Fortune 500 companies operating globally.

The USCIB has been an active supporter of the development of the United Nations Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises and other U.S. Government initiatives focused on encouraging business respect for human rights both domestically and abroad. The USCIB offers the following high-level principles and proposals for the drafters of the U.S. NAP to consider to help find a “smart mix” of measures to achieve two goals: to help reduce the U.S. Government’s own role in causing or contributing to adverse human rights impacts and to provide guidance and support to businesses in their own efforts to respect human rights.

The USCIB is reserving further detailed comments for a later date after the U.S. Government has released more specific proposals for comment. It is our expectation that the U.S. Government will continue to consult the business community in an iterative engagement process as additional drafts are released. Providing such robust consultation will help ensure that the final proposed U.S. NAP will enjoy the same broad consensus as the U.N. Guiding Principles.

As an overview, our high-level proposals at this stage are as follows:

- Maintain the balance and diversified roles prescribed under the Guiding Principles.
- Adopt a risk-based, severity-driven prioritization to coordinate efforts and impact change.
- Level the global playing field through focusing on governance.
- Reflect on the best long-term strategy to address global supply chain issues, including where to direct resources and how to drive better outcomes on the ground.
- Substantially strengthen internal coordination and enhanced, more synergized outreach to the private sector.
- Revolutionize the U.S. Government’s role as a source of information on business-related human rights risks.
- Strive for a smart mix of regulation and proper sequencing of regulatory efforts that is fit for purpose, while limiting the potential for unintended consequences.
- Get innovative on access to remedy.

I. Maintain the balance and diversified roles prescribed under the Guiding Principles

In drafting the U.S. NAP, the USCIB expects that the U.S. Government will respect the balance prescribed by the Guiding Principles between the primary state duty to protect, respect and fulfill human rights (Pillar 1) and the corporate responsibility to respect human rights (Pillar 2) and the shared responsibility of both to ensure for effective remedies for human rights violations (Principle 3). It is our expectation that the proposed U.S. NAP will also remain attentive to business enterprises’ unique capacity for innovation when properly incentivized and supported by properly calibrated enabling governance frameworks.

II. Adopt a risk-based, severity-driven prioritization to coordinate efforts and impact change

Because the U.S. Government will almost certainly need to set priorities in formulating the U.S. NAP and in its implementation, the USCIB would strongly encourage it to focus the vast majority of its attention on human rights impacts abroad. This follows from the UN Working Group’s Guidance on the development of National Action Plans, which proposes that governments set their priorities based first on “severity” of potential human rights impacts, as judged by “scale, scope and irremediable character,” and “the leverage of the Government in bringing about actual change on the ground.”

Weak governance capacity in developing countries means there are fewer national regulatory safeguards and enforcement mechanisms in place to prevent impacts from occurring in the first place. Such potential impacts also pose the most complicated challenges for U.S. companies to address exclusively through their own efforts. Consequently, it is in addressing those potential impacts that U.S. companies most need the assistance of the U.S. Government.

Developing countries are also where the U.S. Government has *unique leverage* due to its considerable political and other resources to serve as a clearinghouse for information on human rights risks in foreign operating contexts and to directly support business efforts through direct engagement with foreign governments. Engaging foreign governments to ensure that they have the requisite knowledge, capacity and incentives to improve their own regulatory environments and support business respect for human rights would tend to lessen the likelihood of such impacts from occurring and to facilitate their mitigation and remediation when they do nonetheless unfortunately occur. This of course does not mean the U.S. Government should not do all that it can to provide information and training on how to prevent human rights abuses across its own agencies and through its own supply chains and to other government entities in the United States on the state and local levels, it is simply guidance on where to prioritize efforts.

The USCIB encourages the U.S. Government to adopt these criteria as organizing principles for their own internal coordination and resource-allocation throughout the NAP planning process and beyond. Periodic review of such severity assessments could be conducted with broad engagement of U.S. agencies and domestic stakeholders, as well as recipients of substantial U.S.-originating official development assistance, foreign direct investment and trade in goods and services.

III. Level the global playing field through focusing on governance

The State Department’s *U.S. Government Approach to Business and Human Rights* (2013) explains that there should be a “race to the top” as U.S. companies seek to implement human rights policies in line with the Guiding Principles and other international guidelines and notes that “[t]he U.S. government aims to support the innovations of business, partner with business on issues of shared interest, and promote the rule of law, respect for human rights, and a level playing field.” The USCIB urges the U.S. Government to redouble efforts to engage with host country governments to drive better enforcement of laws and business practices among their domestic enterprises who are both connected to global supply chains and those that produce purely for domestic markets. We also encourage the Government to upgrade its outreach to other governments whose firms source from countries that are

major investment and trade destinations for business activity connected to U.S. business enterprises. The recently announced *Initiative to Promote Fundamental Labor Rights and Practices in Myanmar* exemplifies both the inter-agency coordination and the multi-stakeholder and multi-country approach that needs to be replicated in other countries with respect to other sectors and particular issues, for example, human trafficking.

IV. Reflect on the best long-term strategy to address global supply chain issues, including where to direct resources and how to drive better outcomes on the ground

The USCIB strongly believes that current debates on supply chains both within and outside the U.S. Government often rely on a caricature view of what they look like and how they function in the global economy. This caricature tends to oversimplify the complexity of supply chains and the extent of U.S. companies' visibility and control over the entirety of the chains of production. As a result, these approaches tend to overestimate the impact private compliance initiatives can have on addressing human rights issues without additional strong support from host country regulatory authorities and local companies. In the USCIB's view, this approach is short-sighted and not built for lasting impacts that truly address endemic issues of weak governance and regulatory capacity.

If efforts focus exclusively on multinational companies' practices alone, there will be considerable missed opportunities to truly transform rights protection on the ground in the long-term that could come from engaging host country governments to upgrade their regulatory capacity where the fundamental governance gaps are most persistent and pressing. Additional synergies are also created through U.S. government bilateral and multilateral engagement with other "home state" countries whose own companies may be operating in or connected to markets to which U.S. companies may also be connected through their business relationships and activities. Such engagement creates another source of pressure to help *all* workers or others in a given economy, not just those that may be tied in some way to U.S. production processes and value chains, which are of course flexible and could redirect to other markets.

V. Substantially strengthen internal coordination and enhanced, more synergized outreach to the private sector

The USCIB's experience with various U.S. agencies on these issues suggests that there is considerable need to break down barriers to coordination and collaboration within the U.S. Government and to approach global human rights issues in a holistic and strategic manner. This will entail even more synchronized knowledge sharing and impact assessment on diverse initiatives and programs touching upon similar issue areas and regions of concern and more shared calendar and budgetary planning for future work, particularly when it involves the private sector. There are a number of ways in which various U.S. agencies (Departments of State and Labor, USAID, Homeland Security, USTR) can work better together and partner more effectively with the private sector, so that all resources can be used more effectively and efficiently, driving innovation and increasing the likelihood that more successful initiatives can be scaled. Enhanced outreach to Congress would also better align all branches of

government in their efforts to identify the “smart mix” of regulatory and other interventions that are most likely to improve business practices in relation to human rights impacts.

For example, can the U.S. Government do more to inform U.S. companies and their philanthropic foundations of both grant-receiving and grant-making opportunities to directly support existing capacity building efforts with suppliers or civil society actors abroad? Can there be more information sharing between companies and government initiatives to amplify government efforts in capacity building by helping to bring them to scale and contribute to processes of continuous learning, innovation and dissemination of impact results to galvanize wider private sector participation, including among business partners of U.S. companies? Companies sourcing from the same country may not by themselves be able to organize such collaboration among competitors, but government involvement may help bridge any competition law concerns.

As part of this strategy of engagement, the USCIB encourages the Government to facilitate more meetings and consultation on responsible business conduct issues to identify lessons learned (both positive and negative) on a country-by-country and issue-specific basis. A useful starting point would be to examine the achievements and effectiveness of an innovative initiative such as the *Public-Private Alliance for Responsible Minerals Trade*, whose multi-stakeholder participants, including industry, civil society and U.S. agencies (USAID and the Department of State) collectively pursue their “common interest in promoting the development of fully traced and validated mineral supply chain routes” through leveraging different sources of financing and expertise.

VI. Revolutionize the U.S. Government’s role as a source of information on business-related human rights risks

The U.S. NAP should revolutionize U.S. Government risk-assessment and reporting so that it more effectively streamlines information and disseminates it in a useful fashion to businesses. More can be done to modernize the U.S. Government’s flagship reports relevant to responsible business conduct, some of which are more accessible and user-friendly than others. In revising the way this information is gathered, presented and disseminated, the USCIB encourages the U.S. Government to form working groups of company representatives who can provide *user-centric design feedback* to upgrade these resources to facilitate the issue-spotting and risk mitigation that companies doing human rights due diligence need to carry out when exploring new operating environments.

Specifically, separate sources of information from different agency sites (e.g., USAID country-based data on land tenure coupled with other State Department reports on forced labor) should be aggregated so that companies doing human rights due diligence on new operating contexts can get full human rights risk visibility in one location, searchable by issue area and other factors. Additional information, such as existing grants and research by the U.S. and other donors, philanthropies and industry-based initiatives, including the U.S. Government’s civil society and other implementation partners, could also be centralized so companies conducting due diligence or seeking to engage constructively in particular countries have a comprehensive snapshot of all the relevant actors and activities on the ground. This would serve to facilitate rapid learning, accelerate the formation of

partnerships, reduce redundancy of efforts and enable the scaling of successful initiatives on a local, regional or sector-wide basis in particular countries.

Working groups or data collection efforts could also be formed to gather and aggregate information *from* companies in a confidential manner so that reporting on business-specific risks in different operating environments becomes more granular, based on actual company experiences. This would also reduce information asymmetries and reduce transaction costs for companies seeking to do due diligence. This could also be usefully done at the sector level as it relates to particular operating environments, like the Institute for Human Rights and Business's report on the extractive sector in Myanmar.¹

Non-U.S. Government sources can also be added to such compilations without endorsing the information in such reports (such third-party reports, principally from NGOs, are already used as sources for some of the official U.S. Government reports). Other useful sources of information would include Transparency International's Transparency Index and the World Bank's Worldwide Governance Indicators. Additional guidance tools and supplementary materials on how to conduct due diligence and where to look for additional information should also be situated in easily accessed locations.

VII. Strive for a smart mix of regulation and proper sequencing of regulatory efforts that is fit for purpose, while limiting the potential for unintended consequences

Carefully consider the sequencing of different regulatory interventions of different types. For example, it is interesting to speculate what impact would have been made by creating a multi-stakeholder initiative like the *Public-Private Alliance for Responsible Minerals Trade before* or as part of a legislative effort like the Congo Minerals Act (2009), which eventually became Section 1502 of Dodd-Frank (2010). Such initial, more collaborative, innovative and flexible interventions can make headway and progress and lay the appropriate foundations for other regulatory interventions or stimulate further innovative solutions. The USCIB is concerned that a less robust approach has led and could in the future lead in other contexts to perverse unintended consequences that in addition to not achieving the intervention's objective, also risk negative human rights impacts as well. The complexity of many human rights issues cautions that any attempts to upgrade requirements on due diligence (or reporting on due diligence) should be developed through in-depth consultation with the private sector; poorly structured requirements can drive the wrong kind of behavior at the expense of innovation and opportunities for leadership.

VIII. Get innovative on access to remedy

The United States has historically been a tremendous promoter of rule of law capacity building efforts. Carrying out further such efforts in a strategic fashion through searching for workable, locally-driven solutions is the most pragmatic and immediately achievable way to improve access to remedies for violations of human rights. The proposed U.S. NAP offers an opportunity to revisit these past programs and related initiatives and re-channel them towards making access to effective judicial and non-judicial

¹ See Institute for Human Rights and Business, *Myanmar Sector-Wide Oil & Gas Impact Assessment* (Sept 2014), at <http://www.ihrb.org/publications/reports/myanmar-oil-gas-swia.html>

remedies in line with Principle 31 of the Guiding Principles a reality for victims of human rights abuse all over the world.

This would entail engaging all relevant U.S. agencies who work on aspects of enhancing judicial grievance mechanisms and dispute resolution abroad beyond the human rights context, such as the U.S. Department of Commerce's trainings related to commercial arbitration and alternative dispute resolution, the Federal Mediation and Conciliation Service's international service, USAID's work on judicial and other legal reform, and others engaged in rule of law development work. It may also call for stimulating and scaling-up existing innovative private-sector tools, such as the burgeoning field of online dispute resolution, or other efforts aimed at more streamlined, community-based dispute resolution, and directing such existing tools towards labor and human rights grievances. The Government could also create collaborative learning opportunities for companies to engage in peer-learning about the operational challenges of creating operational-level grievance mechanisms. Some of this analytical work has already been started by organizations like IPIECA, which has done pilot studies that draw lessons from implementing operational grievance mechanisms across companies and continents.

IX. Conclusion

The USCIB reiterates its support for the U.S. Government's initiative to issue a U.S. NAP and is grateful for your consideration of our initial views on the proposed U.S. NAP. We look forward to engaging with you further as the process continues and remain available at any time for further consultation about the process in general or for specific feedback on forthcoming working papers and drafts.

Respectfully submitted,



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