



LAPFF Response to US National Action Plan on Responsible Business Conduct Consultation

Background

In 2016, the US released a National Action Plan (NAP) on Responsible Business Conduct (RBC) to 'reinforce and strengthen the US government's role in advancing responsible business conduct' among US companies. This plan is rooted in the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.

The NAP describes RBC as a two-pronged concept: (1) business can perform well while doing good; and (2) governments should set and facilitate the conditions for RBC to take place. In other words, governments need to create enabling environments for companies to conduct their businesses responsibly. This process is led by the US Department of State but crosses all government departments.

The current US NAP consists of five main headings: (1) leading by example; (2) collaborating with stakeholders; (3) facilitating RBC by companies; (4) recognising positive performance; and (5) providing access to remedy. The NAP stresses the importance of providing positive examples of responsible business conduct and the use of voluntary initiatives to achieve its objectives. It also stresses the importance of engagement with a range of stakeholders in arriving at appropriate responsible outcomes.

The US government is now seeking comments as it considers updates to the National Action Plan. The objectives of the new NAP are to devise a framework that is in line with the US approach to 'building back better' after Covid and to establish a foreign policy for the US middle class. To this end, the NAP will:

1. Emphasise and accentuate positive contributions businesses can make to economic, environmental, and social progress;
2. Commit to robust due diligence; and
3. Ensure businesses are aware of and are complying with legal obligations within their supply chains at home and abroad.

The Local Authority Pension Fund Forum (LAPFF) is a voluntary association of 85 local authority pension funds and six LGPS pools, with combined assets of over £350 billion. It exists to promote the investment interests of member funds, and to maximise their influence as shareholders to promote high standards of corporate governance and corporate responsibility amongst the companies in which they invest.

As LAPFF works extensively in the area of responsible business conduct and is comprised of government representatives (albeit at the local level), it was felt that LAPFF's experiences and observations might prove useful to the US government in its NAP revision process. LAPFF has also engaged extensively with BHP and Rio Tinto in relation to their Resolution Copper joint venture in Arizona, so LAPFF members have a financial interest in the US government's having an effective approach to responsible business conduct. Therefore, LAPFF's recommendations for updating the US NAP on RBC are presented below.

LAPFF welcomes the opportunity to respond to this timely consultation.

LAPFF Recommendations

Structure

Purpose: It is acknowledged that the NAP is designed to provide positive reinforcement for the US government and US businesses in undertaking RBC. However, LAPFF recommends that there be a stronger element of sanctions and enforcement to the NAP for those businesses that are not able to understand the financial benefits to them of RBC.

Actors: LAPFF would encourage the Securities and Exchange Commission and the Commodities Futures Trading Commission to be involved in the drafting and execution of the next NAP.

Role of Environment and Climate Change: It is acknowledged that to this point, environment has been considered to the extent it overlaps with RBC. There have been a number of developments in relation to the environment that suggest this topic warrants a more integral inclusion in the updated RBC. First, there is now a recognised right to a clean and healthy environment that creates a clear link between human rights and environment. Second, the social and environmental impacts of climate change, and the role of business in mitigating and adapting to climate change, have placed this issue at the top of most government and business agendas and strategic thinking. Third, there is an increasing focus on a fair and just transition to a zero-carbon economy. In other words, all societal actors are increasingly recognising that in order to ensure a green transition is successful, the social aspect of the transition – ie, jobs, communities, consumer needs – must be considered and accounted for.

Given these developments, it does not seem either desirable or possible to maintain environmental considerations as merely tangential to RBC. LAPFF would therefore recommend that environment, along with climate change, be embedded in the updated RBC in a more fundamental and strategic manner than it has been included to date.

Focus on impact. The current NAP focuses heavily on commitments and initiatives. It sets out a range of programmes and projects in which the US is involved but does not talk much about expected or actual impacts of those activities. LAPFF's view is that it would be useful to include targets and deadlines for action and outcomes in the NAP. These elements could all be reviewed at the time of the next NAP review for either continued action or for revision. This approach is generally taken by responsible businesses in respect of their corrective action plans, such as in relation to factory audits.

Corporate Philanthropy versus Core Business Focus

While LAPFF acknowledges that recognising positive performance is important, it would encourage drafters to recognise that RBC is not rooted in corporate philanthropy but in respect for human rights and environmental law and in the pursuit of sustainable financial returns. It is suggested that the new NAP should reflect developments that acknowledge RBC must be embedded in core business focus. This approach includes an understanding that doing good is not mutually exclusive from doing well, and in most cases is a precondition for it.

Voluntary versus Legally-Binding Obligations

The 2016 NAP focused on voluntary initiatives. However, a lot of developments globally in the RBC space over the last six years have been legal and legally-binding. For example, there is a reference in the initial NAP to sparse human rights due diligence tools. There are now many more such tools, many of which have been enshrined in law. LAPFF would encourage drafters to reflect on human rights and environmental due diligence laws that have been passed and proposed and include this trend in the updated NAP.

It is indicated in the supporting materials to this consultation that legislative measures will be considered to promote RBC. To this end, it would be useful to understand the extent to which the US intends to rely on soft law to promote RBC and the extent to which it envisions legislating to create an enabling legal framework for RBC. This addition will enable both government and business actors to understand better their roles in promoting RBC, especially when the lines for their respective conduct can be blurry. Consideration of a US human rights and environmental due diligence law might be worthwhile to add to existing US legislation of this nature that targets individual issues, such as forced labour and responsible supply chains.

Domestic versus Extraterritorial Application

In particular, there needs to be a review of the value of extraterritorial legislation and regulation of business conduct beyond the Foreign Corrupt Practices Act,

especially in light of the French due diligence law and the new EU sustainable corporate governance directive, among other developing laws and regulations. Courts in a number of countries (the Netherlands and the UK to name two) are increasingly recognising extraterritorial legal responsibility for companies in their jurisdictions. Among other implications, these laws and rulings could impact directly on US companies. Consequently, there must be a larger focus on both laws and policies regarding RBC that have extraterritorial application.

Prevention versus Remedy

While a focus on access to remedy is critical within the NAP, it would be helpful to explore legislation that would create an enabling environment to prevent corporate human rights and environmental abuse before it takes place. In LAPFF's experience, prevention is far preferable to remedy. It saves lives, it protects the environment, and it saves costs for companies, investors, and governments.

That said, it is inevitable that human rights violations, negative environmental impacts, and corruption will take place in business contexts. Therefore, it is imperative that the US government, as a governmental entity, focus on legally-binding, enforceable remedies for victims. As noted, these laws and contingent policies should create an enabling environment for businesses to develop and implement their voluntary initiatives in line with international human rights law and international environmental law. However, the US government itself would do well to focus on legally-binding initiatives and public policy responses, especially given the trend of mandatory human rights due diligence legislation emerging internationally.

Stakeholder Engagement

LAPFF welcomes a strong stakeholder engagement component within the US NAP. In LAPFF's experience, seeking out and listening properly to the stories and needs of the most vulnerable stakeholders affected by business is a critical component missing from most RBC approaches worldwide. LAPFF's experience is that reaching these groups is not difficult, for the most part. Furthermore, not only is it the right thing to do, but the information LAPFF has received from these stakeholders has allowed for much more probing and informative discussions with companies about issues ranging from their environmental, social, and governance practices to their business strategies, business models, and financial returns.

Given that the US sees itself as a leader in RBC, espousing a truly effective approach to integrating feedback from the most vulnerable stakeholders, including workers and community members affected by the conduct of US businesses, would support the US's assertion of its leadership role on RBC. Ensuring that the international legal standard of free prior and informed consent is met, not just in relation to company engagement with Indigenous peoples but more broadly, would be helpful to ensure sound, sustainable business practices and investor returns that respect human rights and the environment. Please see

this recent [LAPFF report on mining and human rights](#) that might help to inform the US NAP in relation to effective stakeholder engagement.

Leading by Example

LAPFF applauds the idea of leading by example. In addition to the means mentioned in the current NAP, there are some other ways in which the US might consider reinforcing this approach in the updated NAP:

- o Ratify and implement international human rights treaties as a basis for creating an enabling environment for the interpretation and implementation of RBC;
- o Ensure that the UN Guiding Principles on Business and Human Rights and the OECD Guidelines are promoted through rooting their application and implementation in international human rights law and international environmental law, including international climate change law;
- o In respect of leveraging purchasing power, consider basing public sector contracts on the new American Bar Association model contract clauses 2.0 to ensure an appropriate balance of power between contractors and suppliers. This approach could be used in relation to trade treaties and other contracts too;
- o On a related note, ensure living wages and other purchasing practice protections related to human rights and the environment, including climate change, for federal contractors and create an enabling environment to encourage the same from state and municipal governments;
- o Hold effective consultations regularly with communities affected by mining and other extractive and utilities projects to discuss how to ensure these communities' needs and expectations can inform the best social, environmental, and business outcomes for both the communities and the companies involved;
- o Ensure US companies respect the spirit of legal judgments against them, not just in relation to bribery and corruption but also in relation to social and environmental issues. To this end, ensure that there is an appropriate balance of power through including affected workers and communities in approaches to resolving such issues, including arbitral decisions on trade and investment outcomes; and
- o Recognise Indigenous people's land rights in undertaking mining and other land use approvals. This recognition would require adherence to free prior and informed consent from affected communities, including Indigenous people, prior to any decisions related to land transfers and project-related activities.