



PROGRAM MATERIALS

Program #3233

January 31, 2022

Top 10 +1 Business and Human Rights Issues for 2022

Copyright ©2022 by

- **Jonathan C. Drimmer, Esq. - Paul Hastings, LLP**
- **Tara K. Giunta, Esq. - Paul Hastings, LLP**
- **Nicola Bonucci, Esq. - Paul Hastings, LLP**

**All Rights Reserved.
Licensed to Celesq®, Inc.**

Celesq® AttorneysEd Center
www.celesq.com

5255 North Federal Highway, Suite 100, Boca Raton, FL 33487
Phone 561-241-1919

PAUL
HASTINGS

TOP 10 +1 PREDICTED BUSINESS AND HUMAN RIGHTS ISSUES FOR 2022

New Regulatory Obligations, New Rights & Continuing Themes

January 2022





INTRODUCTION

PRESENTERS



JONATHAN C. DRIMMER
Partner, Litigation Department

2050 M Street, NW
Washington, D.C. 20036
+1 202-551-1870
jondrimmer@paulhastings.com



TARA K. GIUNTA
Partner, Litigation Department

2050 M Street, NW
Washington, D.C. 20036
+1 202-551-1791
taragiunta@paulhastings.com



NICOLA BONUCCI
Partner, Litigation Department

32, rue Monceau
Paris, 75008
+33 1-42-99-04-20
nicolabonucci@paulhastings.com

AGENDA

I. Introduction

II. Top 10 +1 Business and Human Rights Issues for 2022

1. Mandatory Due Diligence
2. Who is a “Worker”?
3. Right to Health Care and Access to Medicines
4. Corporate Accountability
5. Conflict Affected Areas and Responsible Exit
6. Right to a Clean, Healthy, and Sustainable Environment
7. Forced Labor Import Bans
8. “Downstream” Human Rights: Responsible Product Usage & Product Misuse
9. Stock Market Listing Requirements
10. Reporting Robustness and Coherence
11. Financing and Lending Decisions

III. Key Takeaways

IV. Q&A

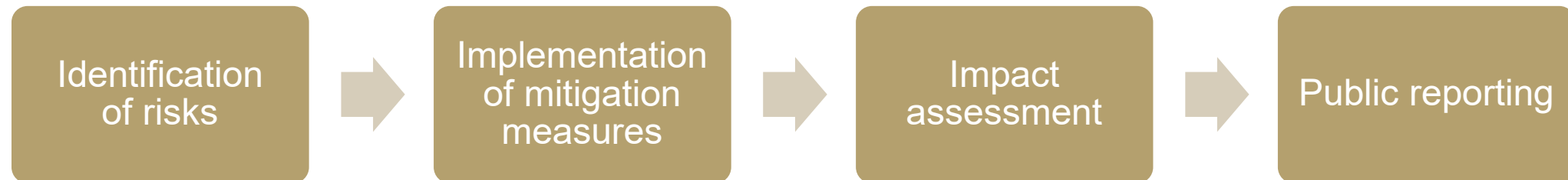


TOP 10 +1 BUSINESS AND HUMAN RIGHTS ISSUES FOR 2022

MANDATORY DUE DILIGENCE

The concept of mandatory human rights due diligence is a step beyond human rights transparency laws, such as the California Supply Chain Transparency Act or the UK Modern Slavery Act.

- Under mandatory due diligence laws, companies must undertake **affirmative assessments** to identify their human rights risks, institute measures to mitigate any negative impacts, assess the effectiveness of their measures, and publicly report on their approaches.



THE RISE OF DOMESTIC DILIGENCE LAWS

Throughout 2021, the prospect of mandatory corporate human rights due diligence laws being enacted across Europe was a dominant theme.

- In 2021, two European countries, Germany and Norway, joined France in enacting domestic laws mandating human rights due diligence. Core diligence obligation under these laws is to (1) assess relevant risks, (2) institute mitigation measures, and (3) evaluate those measures, along with disclosure of these three steps.
 - The **German Supply Chain Due Diligence Act**, which will enter into force on January 2023, obligates companies with 3,000 or more employees and their first tier suppliers to identify, assess, and manage human rights and environmental risks, including child labor, forced labor, slavery, and servitude, as well as occupational health and safety and freedom of association. Obligations for diligence extend beyond first tier suppliers if they have substantiated knowledge of human rights violations.
 - The **Norwegian Transparency Act**, which will take effect on July 1, 2022, requires multinational companies doing business in Norway to regularly conduct human rights due diligence both upstream and downstream without limitation, publish an annual human rights statement, and respond to third party requests for information regarding adverse human rights impacts.
 - The first legal action brought under the **French Duty of Vigilance Law**, in effect since 2017, made its way to the Supreme Court of France on a jurisdictional challenge. On December 15, 2021, the Court allowed the case against French oil company Total to proceed in the French Civil Court system.
 - Several other countries, including the Netherlands and Finland, seem poised to enact their own laws.

EU MANDATORY DUE DILIGENCE DIRECTIVE

The European Parliament has called for a binding EU law that will compel businesses to adopt due diligence throughout their value chains

- In March 2021, the European Parliament voted by an overwhelming majority in support of the adoption of a binding EU law that requires companies to conduct environmental and human rights **due diligence along their full value chain**.
 - The idea behind the new legislation is that voluntary due diligence and national/sectoral legislation are not sufficient to combat recurring human rights and sustainability issues such as forced labor, pollution, and corruption.
 - Due diligence includes assessing risks, mitigating them, developing processes to evaluate their effectiveness, and disclosing these three issues
 - The law, which is contemplated as a directive, would cover EU-based businesses and non-EU based businesses operating in the EU
 - Companies likely will be required to carry out comprehensive human rights and environmental due diligence of their operations and business relationships, upstream and downstream.
 - The new legislation is extra-territorial by design and will affect non-EU entities dealing with companies operating in the EU.
- The European Commission is expected to publish the proposed directive in 2022 with a projected 2024 effective date.

BINDING TREATY ON BUSINESS AND HUMAN RIGHTS

In August 2021, the United Nations released the Third Revised Draft of a proposed Binding Treaty on Business and Human Rights.



- **Legal Liability (Article 8):** “States must ensure that their domestic law provides for or establishes . . . the liability of businesses and individuals for their failure to prevent another business or individual with whom they have had a business relationship, from causing or contributing to human rights abuses . . .”
- **Definitions (Article 1):** “‘Business relationship’ refers to any relationship between natural or legal persons including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State.”
- This treaty is broad in its approach and is at odds with traditional notions of business organization and liability for human rights violations. If adopted, it would have substantial business impacts. For example, the scope of the treaty is all “internationally recognized human rights binding on the State Parties,” which could include not just obligations from human rights instruments, but also customary international law.

WHO IS A “WORKER”?

One of the most profound shifts in the business and human rights landscape involves determining who is a “worker.”

- Historically, employers have not provided contract workers with the same benefits (e.g., health insurance, retirement plans, paid time off) as full-time employees, resulting in profound cost savings and reduced liabilities.
- With the rise of the “**gig economy**,” contract workers around the world have sought the same kinds of benefits provided to traditional full-time employees. In the United States and abroad, gig workers have organized strikes protesting labor exploitation and misclassification.
- Delivery and ridesharing companies are increasingly facing class action lawsuits alleging that they denied workers fair pay, benefits, and job security by misclassifying employees as independent contractors.



WHO IS A “WORKER”?

Below are just some of the recent legal developments in the rise of the gig workers’ rights movement.

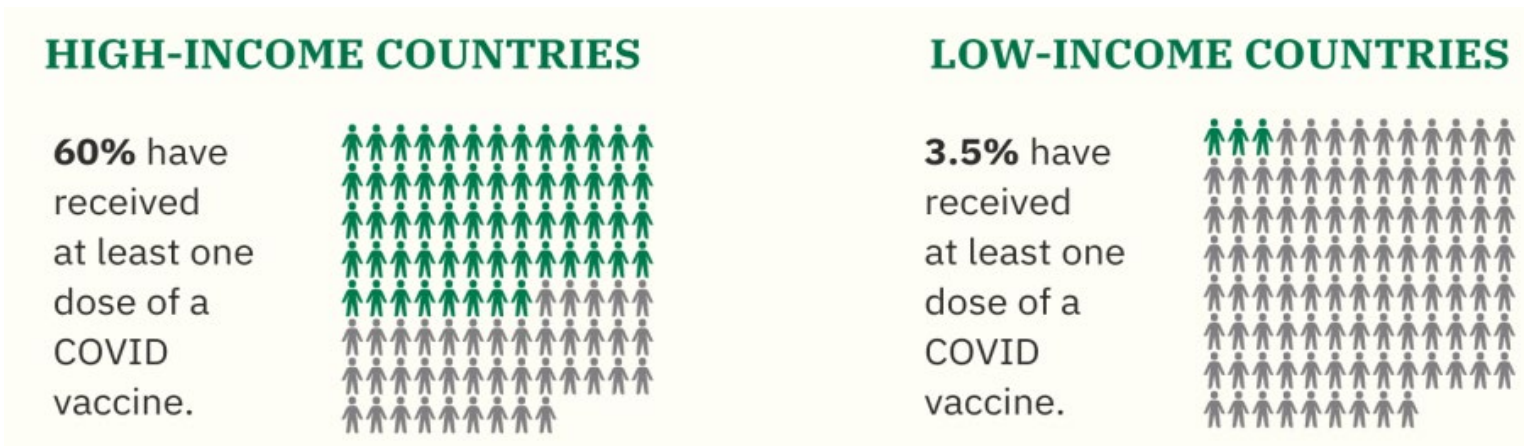
- **Portugal’s government** approved a bill aiming to grant thousands of ride-hailing and food delivery workers’ rights as staff with formal contracts and benefits (October 2021).
- Lawsuit on behalf of **delivery drivers in the UK** treated as “self-employed” and not receiving benefits (October 2021).
- **Dutch court** ruled ride-hailing company drivers are employees, not contractors, and so entitled to greater workers' rights including the minimum wage, workers’ status and contracts under local labor laws (September 2021).
- Proposed \$400-million class action certified by **Ontario Superior Court of Justice**. Seeks to have delivery couriers entitled to minimum wage, vacation pay and other labor protections and is paving the way for a battle over whether the contractors should be treated as employees (August 2021).



RIGHT TO HEALTH CARE AND ACCESS TO MEDICINES

The race to obtain COVID-19 vaccines has opened up discussion about the human right to health and access to medicines.

- Globally, less than 4% of the population in low-income countries have been vaccinated. In 20 developing countries less than 5% of the population has received even one dose, and less than 15% in about 15 more. In some developed countries individuals are receiving third and fourth doses.
- Within the United States, some racial and ethnic minority groups have been found to be less likely to be vaccinated than white people, despite often being at increased risk for adverse COVID-19 outcomes due to various factors such as occupation, income, and healthcare access.



Source: Concern Worldwide U.S. (reflects figures as of September 29, 2021)

VACCINE EQUITY

In 2022, there likely will be heightened scrutiny over the policies and practices of companies and governments that may impact vaccine equity.

- While some of the focus has been on wealth disparity and accusations that prosperous companies are hoarding vaccines, civil society organizations are identifying company pricing structures, intellectual property policies, knowledge and technology sharing, and allocation of available vaccine doses as critical issues.
- In late 2021, the WTO planned to meet to discuss TRIPS waivers for COVID-19 vaccine patents, but the meeting was canceled due to rapid onset of the omicron variant. Expectations are that a decision will be made in 2022.
- Amnesty International and the WHO, among others, have urged that states and businesses ensure vaccines are developed and manufactured in sufficient supply, and distributed in a timely and equitable manner around the globe.



Amnesty International urges states and businesses to work together to ensure that intellectual property rules do not prevent any countries from upholding the right to health.

Tamaryn Nelson
Health Advisor, Amnesty International



CORPORATE ACCOUNTABILITY

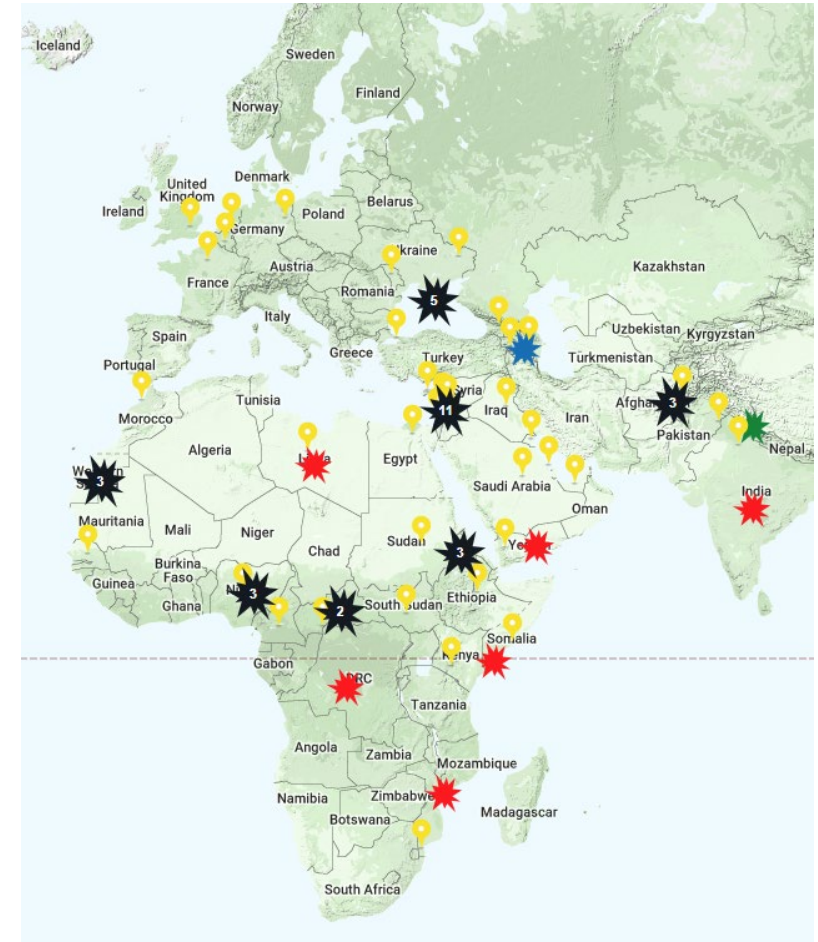
There will be increased focus on when, whether, and how companies should be held accountable for their negative human rights impacts and those of their subsidiaries that operate globally.

- Courts in the UK, the Netherlands, and throughout the EU are increasingly holding parent companies liable for the acts of their subsidiaries, including for criminal acts.
- In November 2020, voters in Switzerland went to the polls to vote on the Responsible Business Initiative, which included a broad corporate accountability provision for domestic companies regarding overseas operations. While the Initiative was not enacted, a majority of citizens voted in favor of it, and a counter-proposal was enacted by parliament to require new reporting and diligence obligations.
- In the United States, courts are filled with cases under the Trafficking Victims Protection Reauthorization Act alleging that parent companies are liable for the acts of their subsidiaries under deceptive trade and marketing theories regarding statements about their sustainability and human rights practices, and under securities and common law tort theories.
- The inboxes of the OECD National Contact Points for Specific Instances are also filled with Human Rights cases against multinational businesses (57% of the cases since 2011). In September 2021, the OECD launched a public consultation on the OECD Guidelines for Multinational Enterprises.

CONFLICT AFFECTED AREAS AND RESPONSIBLE EXIT

How and why companies might choose to exit or remain in conflict-affected, high-risk areas will be another area of emphasis in 2022.

- There are more than 80 armed conflicts involving at least 55 states and more than 70 armed non-state actors around the world.
- **Businesses operating in or near such environments face a dilemma.**
 - Those that stay risk being connected to gross human rights violations, as seen in the context of the Syrian civil war, Sudan, and Myanmar. For example, a French cement company recently was charged with complicity for crimes against humanity for abuses committed by a Syrian subsidiary in connection with the civil war.
 - Conversely, those that choose to leave conflict-affected areas create obvious economic impacts to their organizations, physical and economic risks to local workforces who have reduced job opportunities, and even potential risks that any equipment or materials left behind may be used in the conflict.

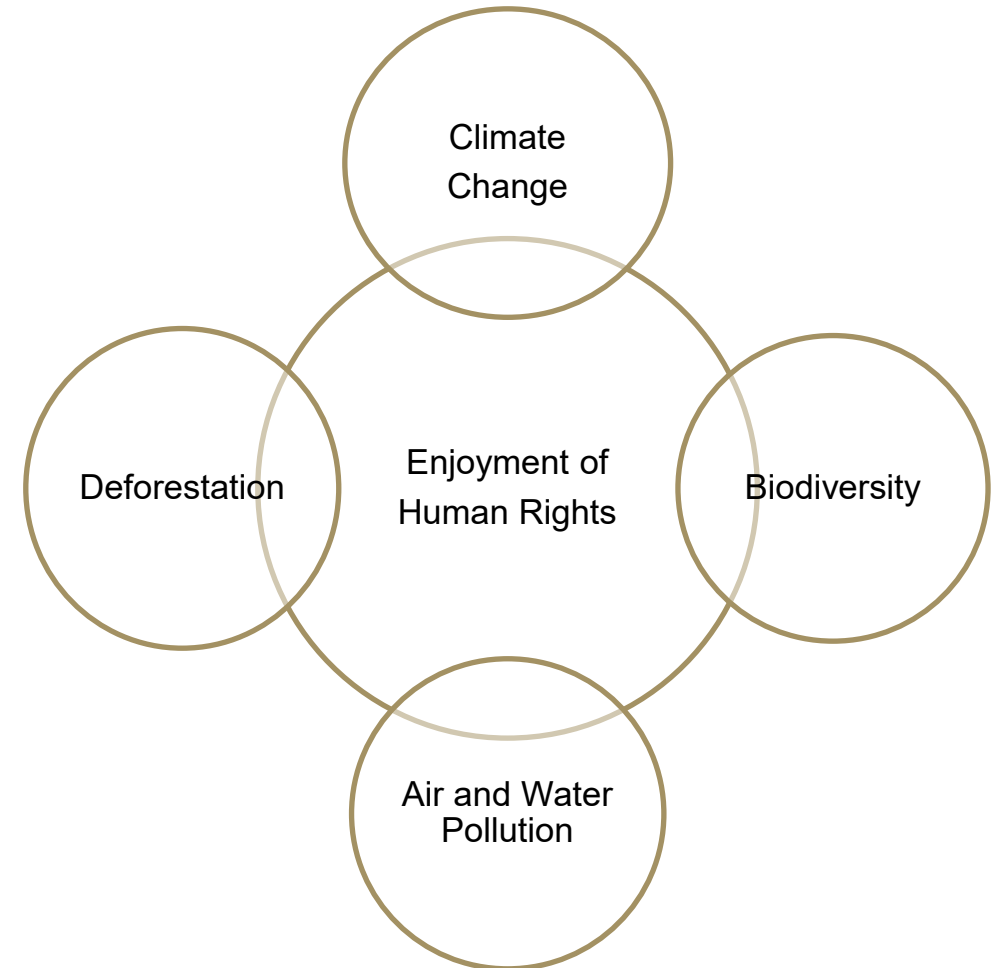


Source: Geneva Academy of International Humanitarian Law and Human Rights

RIGHT TO A SUSTAINABLE ENVIRONMENT

In October 2021, the UN Human Rights Council declared that a clean, healthy, and sustainable environment is a human right.

- A healthy environment, including in relation to climate change, biodiversity, air and water pollution, and deforestation, has been identified by the UN as **a precondition to the enjoyment of human rights**.
- Throughout 2022, the implications of the newly recognized right will be amply debated, and further integrated into business processes.
- The right to a clean, healthy, and sustainable environment will be of increasing prominence in government regulations, government permitting and licensing decisions, company due diligence and risk assessment exercises, and company management processes.
- These developments will also work in tandem with the mandatory due diligence regime in the EU, which will include environmental and human rights within its scope.



FORCED LABOR IMPORT BANS

The concept of banning goods produced with forced labor is a natural extension of modern slavery acts and mandatory human rights due diligence regimes, which are premised on identifying and mitigating supply chain risks.

- The United States has been actively enforcing **Section 307 of the Tariff Act of 1930** (19 U.S.C. § 1307), which prohibits importation of any product that was mined, produced, or manufactured wholly or in part by forced labor, including forced or indentured child labor.
- The newly enacted **Uyghur Forced Labor Prevention Act** creates a rebuttable presumption that goods manufactured wholly or in part in Xinjiang by entities connected to poverty alleviation programs are made with forced labor, and therefore blocked from import into the U.S.
- Similarly, Canada, the UK, and Mexico have forced labor import bans of different types, and Australia is considering a sweeping law.
- In September 2021, the **European Commission** announced a plan to propose a ban on the import of products made with forced labor. Earlier, in July 2021, the Commission published guidance on due diligence for EU businesses to address the risk of forced labor in their operations and supply chains.

CHINA AND FORCED LABOR

With the Olympics scheduled in Beijing in February 2022, forced labor and other human rights issues being reported in China will remain high on the agenda in the first half of the year.

- Reports on the Xinjiang Uyghur Autonomous Region (XUAR) of China will be entering its third year in 2022.
 - In 2019, the U.S. government began issuing a series of executive actions in response to what it calls a system of repression against Uyghurs and other Muslim minorities in Xinjiang.
 - In 2020, there were sanctions against individuals and entities, export controls on certain companies, and items seized at the border, among other measures.
 - In 2021, President Biden signed into law legislation that bans imports from Xinjiang over concerns about forced labor. **The Uyghur Forced Labor Prevention Act** assumes that all goods from Xinjiang, where Beijing has established detention camps for Uyghurs and other Muslim groups, are made with forced labor. The Act bars goods made in whole or in part in Xinjiang unless companies are able to prove to customs officials that the products were not made with forced labor.
- Canada, the UK, Australia, Japan, and the EU have joined the United States in reassessing their supply chains for potential forced-labor goods.
- In a highly visible act, the US, UK, Canada, and Australia announced a diplomatic boycott of the Beijing games over China's actions in XUAR.

“DOWNSTREAM” HUMAN RIGHTS

2022 will be the year that “downstream” human rights mandates and diligence enter center stage.

- Since the United Kingdom adopted its Modern Slavery Act in 2015, there has been a sustained “upstream” human rights focus, centered on human rights risks in supply chains.
 - Australia followed with its own Modern Slavery Act, and Canada has proposed a similar law. Germany’s Supply Chain Due Diligence Act and the Dutch Child Labor Due Diligence Law are similarly focused on whether goods or services have been produced using forced labor.
 - In the United States, there is the Tariff Act of 1930 and a Federal Acquisition Rule that mandates steps companies must take to protect against trafficking within their supply chains associated with certain federal contracts.
- However, these laws and regulations encompass only company operations and upstream supply chain risks. As a result, companies often do not take steps associated with **downstream product usage impacts**.
- In 2022, new laws and regulations may require companies to develop detailed strategies to identify and mitigate relevant customer and end-user related human rights risks, rethink product marketing, and ultimately **reevaluate the relationships between companies and their customers and end-users**. The forthcoming EU Mandatory Due Diligence proposal is expected to erase the distinction between upstream and downstream supply chains.

RESPONSIBLE PRODUCT USAGE & PRODUCT MISUSE

The UN Guiding Principles on Business and Human Rights specifically contemplates that human rights responsibilities extend equally to downstream use of products by consumers and end-users.



“The downstream value chain encompasses the human rights impacts that occur during and after the sale of a product or service and is influenced by the business inputs to that product or service (e.g., R&D, design, testing, promotion).”

Source: BSR™ (Business for Social Responsibility)

STOCK MARKET LISTING REQUIREMENTS

In August 2021, SEC approved Nasdaq's Board Diversity Rule, which will likely lead to additional pressures to amend stock exchange listing rules to include human rights requirements.

- The past decade has seen a great deal of chatter around **using stock market listings to compel company activity**.
 - Canada passed a “comply or explain” law 6 years ago requiring that public companies appoint at least one woman to their boards of directors or explain the lack of progress.
 - In 2021, Nasdaq established its own comply or explain rule, mandating that listed companies have at least two diverse directors or explain why they do not meet the benchmarks.
 - The UN Human Rights Working Group also issued a report in 2021 referencing the role that stock exchanges can play in driving human rights and implementation of the UN Guiding Principles on Business and Human Rights. The report notes that investors representing over \$5 trillion have called on the SEC to mandate reporting that includes human rights disclosure.
- The Sustainable Stock Exchange Initiative reports that 48 out of 56 stock exchanges touch on human rights in their disclosure guidance. Most exchanges specifically mention labor rights, diversity and inclusion, and health and safety, while roughly 30% mention the UNGPs in their guidance.

REPORTING ROBUSTNESS AND COHERENCE

The steady focus on ESG and human rights has led to increased demand for transparency and reporting requirements.

- The SEC has indicated that ESG disclosure regulation will be a central focus of the Biden administration, and that the SEC will be “working toward a comprehensive ESG disclosure framework.”
- The EU’s Sustainable Finance Disclosure Regulation (SFDR), which came into effect in March 2021, sets out disclosure obligations for asset managers and advisers with regard to how sustainability factors are considered in investment process.
- Moreover, following the 2021 G20 Rome Summit in October, G20 leaders issued a joint declaration, committing to sustainable finance and welcoming the work of the International Financial Reporting Standards Foundation (IFRS) to develop global reporting standards for ESG disclosures.
- As efforts will persist to increase reporting and address current shortfalls, the market is plagued by reporting inconsistencies, and discussions around common reporting standards will be a focus for 2022.

BONUS ISSUE: FINANCING AND LENDING DECISIONS

2022 will further elevate human rights into the lending and financing decisions of financial services firms.

- Firms have made references to ESG and human rights in their promotional materials for some time. Increasingly, however, **firms are being called upon to match rhetoric with action.**
 - Fund management firms are being called out for lending to countries with appalling human rights records.
 - Emerging market bond indexes that use ESG scoring criteria are being called out for over-exposure to bonds issued by countries rated “not free” by leading NGOs.
 - Banks are pressured to prioritize human rights in their financing decisions and to set internal standards regarding responsible business conduct. They are also sued or investigated for sustainability indices that are claimed to be misleading.
 - Institutional investors are increasingly focused on ESG, which has begun to affect their voting behavior.
- In 2022, there will be enhanced scrutiny on the strategies and standards for financial services firms. This will include:
 - How they integrate human rights due diligence into their lending and financing decisions and product offerings;
 - The nature of government bonds being purchased; and
 - Investments in state-owned entities.



KEY TAKEAWAYS

ISSUES TO WATCH IN 2022

1. More countries (and the EU) are expected to enact laws mandating **human rights due diligence**.
2. A **new labor movement** driven by gig workers is challenging the traditional understanding of a “worker” and the associated rights and benefits.
3. The prolonged COVID-19 crisis is raising questions about policies and practices that may impact **vaccine equity**.
4. Courts across the globe are increasingly focusing on **corporate accountability**, holding parent companies liable for the acts of their subsidiaries.
5. Businesses operating in or near **conflict-affected areas** are expected to be under heightened scrutiny over how and why they exit or remain in the region.
6. The **right to a clean, healthy, and sustainable environment** is becoming more prominent in government regulations, government licensing decisions, and company management processes.
7. With the Beijing Winter Olympics in February 2022, **forced labor** and other human rights violations with links to China are likely to remain the focus of the U.S. Government.
8. Regulators are beginning to act on **“downstream” human rights** mandates, requiring companies to identify and mitigate risks created by their customers and end-users.
9. Stock exchange **listing rules** are increasingly used to drive progress on human rights issues.
10. The steady focus on human rights is resulting in increased demand for transparency and **reporting requirements**.
11. Financial services firms are being called upon to integrate human rights into their **lending and financing decisions** and product offerings.



QUESTIONS?

THE AMERICAS

Atlanta
Century City
Chicago
Houston
Los Angeles
New York
Orange County
Palo Alto
San Diego
San Francisco
São Paulo
Washington, D.C.

EUROPE

Brussels
Frankfurt
London
Paris

ASIA

Beijing
Hong Kong
Seoul
Shanghai
Tokyo

21 OFFICES
1 LEGAL TEAM

ACROSS THE AMERICAS, ASIA,
AND EUROPE
TO INTEGRATE WITH THE STRATEGIC
GOALS OF YOUR BUSINESS

Integrating Human Rights and ESG into International Regulatory Compliance: Governance Considerations

January 26, 2021

By [Jonathan C. Drimmer, Tara K. Giunta, Nicola Bonucci, & Renata Parras](#)

As we [wrote](#) toward the end of 2020, the risks associated with business and human rights, and ESG more generally, have led a growing number of companies to create human rights/ESG management systems or to integrate human rights/ESG into existing compliance programs. Relying on the UN Guiding Principles on Business and Human Rights (“UNGPs”), we listed six core elements of human rights/ESG compliance programs – which are generally part of effective international regulatory compliance programs. We promised to provide detailed posts regarding each individual element where we will discuss the key components of that element and how its presence in anti-corruption and other compliance programs can be leveraged for human rights/ESG. This first post discusses an element of paramount importance but subject to less scrutiny, at least so far: Governance.

Governance, in this context, reflects the structural management and oversight of a compliance program. It includes the role of the board, the responsibilities and accountabilities of management, metrics, and key performance indicators to help track a program’s robustness and effectiveness. Each of these issues is discussed below.

Board Oversight. With increasing frequency, governments and stakeholders expect that boards of directors will oversee human rights/ESG issues, as they do anti-corruption, sanctions, and AML. As a general proposition, board responsibility for key compliance areas is generally considered a hallmark of an effective program. For instance, the U.S. Department of Justice (“DOJ”) and the Securities and Exchange Commission both consider board oversight of anti-corruption programs to be critical to its effectiveness. DOJ has made the same proclamation for anti-trust programs, as has the UK Serious Fraud Office in the context of the UK Bribery Act. Vesting authority with the board is a clear demonstration of a company’s commitment to human rights/ESG issues, and creates accountability for management in designing and implementing a program that is comprehensive and effective.

Board oversight is now a regular feature of proposed human rights and ESG legislation, and domestic litigation. The U.K. and Australian Modern Slavery Acts, mandating disclosure of steps taken by the organization to address modern slavery in operations and supply chains, require that company reports are approved at the board level. Canada's proposed Modern Slavery Act, Bill S-216, also references potential board attestation regarding relevant reports. Early drafts of the widely anticipated [EU legislative directive](#) on mandatory diligence creates distinct and detailed board-level responsibilities. A new Swiss law, to be adopted in the wake of the vote on the contentious Responsible Business Initiative, requires board of director approval of reports regarding non-financial matters, including human rights, anti-corruption, environmental, and other social issues. In the United States, companies can expect heightened human rights/ESG attention by regulators as the incoming Biden Administration placed ESG issues front and center during their campaign, most notably in climate change and diversity. There also is a growing line of U.S. cases looking more critically at whether a company's board of directors fulfilled its fiduciary duty to the corporation under the *Caremark* standard in its oversight of the company's legal, regulatory, and operational risks.^[1] With that in mind, corporations can expect to see an increase in shareholder derivative lawsuits, alleging that company boards have breached their duty of oversight. In short, company human rights/ESG issues are becoming engrained as board-level responsibilities.

To formalize that approach, human rights/ESG programs are taking a page from anti-corruption programs, where audit committee charters commonly reflect anti-corruption responsibilities, memorializing human rights/ESG responsibilities in relevant board committee charters. That may include a general reference to human rights/ESG, as exists for some companies, or more granular and detailed references to key areas of responsibilities and policies over which the committee is expected to govern. To fulfill its mandate, boards are regularly receiving reports from management on key human rights/ESG risks – including how salient risks are determined, how they are managed, the effectiveness of those management approaches, and specific issues or dilemmas that arise. Increasingly, boards expect management to include in their reports human rights/ESG metrics and key performance indicators (mentioned below), measuring and reflecting management's view of the program's robustness and effectiveness. Further, good practice, as in anti-corruption and other compliance programs, is to appoint to the board at least one individual with sufficient human rights/ESG expertise to enable the board to exercise its fiduciary responsibilities, and to provide the board with education and learning sessions around relevant human rights/ESG risk areas. In fact, certain [organizations](#) now offer courses specifically tailored for board members to understand significant human rights/ESG areas.

Management. As with anti-corruption and other regulatory compliance programs, the Office of the High Commissioner of Human Rights ("OHCHR"), in its *Interpretive Guide* to the UNGPs (at 30), explains that it is important for effective implementation of a human rights/ESG program to have one or more individuals are assigned day-to-day oversight, that they have seniority or status in the organization that engenders respect for their function and gives them authority within the company's management structure,

and that they are given sufficient resources to fulfill their mandate. Of course, as in other compliance areas, it is critical that the individuals involved in driving human rights/ESG have relevant expertise – in the substantive areas of the program, but also in program implementation and project management more generally. It also is important that the function has sufficient headcount and budget to operationalize human rights/ESG throughout the organization.

In terms of how human rights/ESG functions are organized, some companies treat human rights/ESG as standalone functions. They may fall underneath legal, compliance, or another unit on a corporate organizational chart, or they may report directly to a member of senior management (such as corporate affairs). At other companies, human rights/ESG is more fully integrated into legal, compliance, or another function, with employees assigned responsibilities for these and other areas. While there is no “right” way to organize a human rights/ESG function, if human rights/ESG is separate from anti-corruption and international regulatory compliance, frequent communication and close coordination among the groups is critical to avoid silos. Indeed, human rights/ESG problems are often red flags for corruption and other areas, and corruption and other compliance failings are often red flags for human rights/ESG concerns. Close communication and sharing information can create efficiencies and enhanced performance, and avoid approaches that are uncoordinated or not in sync.

By the same token, for programs where human rights/ESG is integrated into another function, it is important that individuals assigned with the day-to-day implementation of human rights/ESG responsibilities have a sufficient substantive understanding of the field. As with any discipline, human rights/ESG is a discrete subject area, with distinct risks, norms, requirements, and frameworks. Depending on the salient human rights/ESG risks facing the company, that expertise may differ. For instance, a food and beverage company may seek particular expertise on modern slavery and food safety, while an extractive company may prioritize environmental, health and safety, and security-related human rights/ESG issues. Indeed, as business and human rights and ESG operate from the primary premise of avoiding harm to stakeholders, and secondarily of avoiding harm to the business – though the business risks are tangible, real and often deeply impactful – even the relevant starting point is different from other international regulatory areas. While an efficient and integrated approach is thus more likely where human rights/ESG is integrated into another compliance function, there is a risk that the distinct aspects of human rights/ESG will be ignored or diluted. That can most effectively be overcome where individuals assigned human rights/ESG have a strong basis of knowledge, or receive external expert support to assist them.

Once the determination is made of where the human rights/ESG program is housed, as with anti-corruption and other compliance areas, programs can then be centralized or decentralized, and for effective operationalization, responsibilities often are “shared” with relevant functional units. For instance, in anti-corruption programs, human resources may have primary accountability for screening potential employees for potential political exposure, with performance monitored or tracked by legal or

compliance. In human rights/ESG programs, human resources may have accountability for diversity, anti-discrimination, and modern slavery issues, with performance monitored or tracked by the function in which human rights/ESG has been vested. However it is ultimately structured, close and continued communication across a cross-section of functions is an important facet of success.

Metrics. To measure the program's performance and assess implementation, as with [any program](#), human rights/ESG increasingly rely on metrics and key performance indicators. The OHCHR, in its *Interpretive Guide* (at 53 & 56), supports that approach. Metrics and KPIs are important to different stakeholders, for different reasons. They are important to boards and the C-Suite in creating confidence that the program is in place and functioning as intended. They are important management tools, allowing an assessment into whether the program is working to achieve its desired goals, which aspects are performing as they should, and which may need strengthening. Metrics and KPIs also can assist discrete functional units or employees who may contribute to elements of a program, promoting ownership and buy-in. Companies also are using compliance KPIs as performance measurement and compensation tools for individual officers and employees. KPIs and metrics are also clearly important to external stakeholders, who seek evidence of a program's robustness and effectiveness. They also are frequently referenced and used in the overabundance of benchmarking tools and services. Finally, as disclosure and reporting obligations increase, metrics will be critical to a company's ability to substantiate those disclosures, thereby mitigating risks of litigation, and companies can expect that regulators, particularly securities regulators, will require disclosure that is standards- or metrics-based. As of today there is a variety of ESG ratings and ESG-related tools and services available in the market. Although the subject of selecting and presenting organizationally appropriate human rights/ESG metrics deserves an entirely separate post, we note for now that many companies start modestly, and gradually enhance their approach over time.

Conclusion

The governance of any compliance program, including human rights/ESG, is vital to its effectiveness. As with all other areas of human rights/ESG compliance programs, much can be learned and leveraged from anti-corruption and other international regulatory compliance programs. Further posts will consider human rights/ESG-related litigation, training, policies and procedures, due diligence, risk assessments and program testing, grievance mechanisms and investigations, and reporting.

[1] This will be treated as part of a subsequent posting on litigation trends.

Integrating Human Rights and ESG into International Regulatory Compliance: Training and Education

April 02, 2021

By [Jonathan C. Drimmer, Tara K. Giunta, Nicola Bonucci, & Renata Parras](#)

At the end of 2020, we published the [first](#) in a planned series of posts discussing how emerging business and human rights and ESG responsibilities have led companies to either create standalone human rights/ESG management systems or integrate human rights/ESG into existing compliance programs. That initial post identified six key components of human rights/ESG compliance programs, which are found in effective international regulatory compliance programs more generally and can help operationalize the UN Guiding Principles on Business and Human Rights (“UNGPs”). We pledged to provide subsequent posts focusing on each of those six compliance program elements, talking about their key features, and how businesses can leverage anti-corruption and other compliance programs to enhance their human rights/ESG approach.

This is the third post in our series, following posts on [Governance](#) and [Policies and Procedures](#), and it will focus on spreading awareness through Training and Education. Providing effective training and education to employees, officers, directors, relevant third parties and others is instrumental to the success of any compliance program or management system. While the specific content of training and education efforts necessarily will differ among sectors, companies, and operations, anti-corruption training platforms and best practices can be leveraged and used to help drive efficient, effective, and memorable human rights/ESG trainings.

Training & Education: The Basics

Educating relevant company personnel and third parties on company values, requirements, and expectations is a fundamental aspect of any compliance program or management system. Training is mentioned expressly by the U.S. Federal Sentencing Guidelines, the foundation of modern legal compliance programs, which states that an effective program should “take reasonable steps to communicate ... its standards and

procedures, and other aspects of the compliance and ethics program,” to directors, officers, employees and, as appropriate, third parties. The Guidelines further note that the programs should be “effective” and otherwise disseminate information “appropriate” to trainees’ “respective roles and responsibilities.” [U.S. Sentencing Guidelines](#) (“USSG”) §8B2.1(b)(4)(A)-(B). The U.S. Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) [FCPA Resource Guide](#) (“FCPA Resource Guide”) elaborates:

Compliance policies cannot work unless effectively communicated throughout a company. Accordingly, DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization.... Such training typically covers company policies and procedures, instruction on applicable laws, practical advice to address real-life scenarios, and case studies. Regardless of how a company chooses to conduct its training ... the information should be presented in a manner appropriate for the targeted audience, including providing training and training materials in the local language.

Resource Guide, at 60-61. Similar principles are contained in the UK’s [UK Bribery Act Guidance](#) and [Evaluating a Compliance Programme](#) and the Agence Francaise Anticorruption’s [guidelines](#).

As these authorities and others make clear, sound practices associated with training and education include: (1) developing comprehensive training plans that are updated periodically, and consider education at all levels of organizations and among relevant third parties, beginning at induction and onboarding and with further trainings and reminders offered regularly thereafter; (2) providing training through a mix of formats, including live tailored sessions (particularly for individuals in positions of heightened risk or gatekeeping functions), online e-training, small group roundtables, “just-in-time” reminders associated with specific anticipated events and other behavioral prompts, as well as short “tool-box” updates or refreshers at the outset of meetings; (3) incorporating company values, using scenarios, hypotheticals, case studies, and lessons learned to help embed the company ethos, better enable application of key principles to situations that arise, and avoid recurrence of policy violations; (4) providing targeted training for managers and supervisors in light of their positions in the company; (5) employing methods to evaluate the effectiveness of training after it is provided; and (6) training in the local language of the audiences to facilitate comprehension. See DOJ, [Evaluation of Corporate Compliance Programs](#) (“ECCP”), at 5-6. Finally, in addition to training and education, authorities note that good programs will include mechanisms to provide guidance and advice, including in real-time, on complying with the company’s policies. See Resource Guide, at 61.

Sound anti-corruption and other international regulatory and compliance programs follow these principles, though with COVID-19 most companies have relied more heavily on online and remote trainings, with additional modifications that could be followed longer term. Further, for many companies, anti-corruption education platforms are mature and well-developed, offering sophisticated and engaging training throughout

an organization and among key third parties. These same principles can be helpfully used, and the same platforms can be leveraged, for human rights/ESG trainings.

Learning from Anti-Corruption for Effective Training and Education for Human Rights/ESG

The UNGPs specifically contemplate that, to embed a responsibility to respect human rights, business enterprises should create a human rights policy commitment that “is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties.” UNGP 16(d). As the Office of the High Commissioner has expressed in its Interpretive Guide to the UNGPs, “‘Embedding’ is the *macro* process of ensuring that all personnel are aware of the enterprise’s human rights policy commitment, understand its implications for how they conduct their work, are trained, empowered and incentivized to act in ways that support the commitment, and regard it as intrinsic to the core values of the workplace.” Office of the High Commissioner for Human Rights, [The Corporate Responsibility to Respect Human Rights: An Interpretive Guide](#) (“UNGPs Interpretive Guide”), at 46-47; *id.* at 78 (“the more an enterprise has embedded respect for human rights into its values and the more it has prepared its personnel for ethical dilemmas, through training, scenarios, lessons learned, decision trees and similar processes, the more likely it will be able to identify appropriate and timely responses.”). As with other compliance programs and management systems, it is no surprise that training also is key for human rights/ESG.

Like other international regulatory and compliance programs, effective human rights/ESG training also:

- Is **thoughtfully planned**. Human rights/ESG training should be included in a company’s more comprehensive training plan, potentially in conjunction with other areas of international regulatory and compliance trainings. As part of that plan, developing clear goals with each training – essentially, what is the training trying to achieve and accomplish with that particular education session – will help create an organized, coherent and tailored approach. Ideally, as with other compliance areas, human rights/ESG training will begin for company-affiliated personnel, including employees, officers, directors and relevant third parties, when they begin their relationships with the company, and regularly thereafter. Likewise, human rights/ESG training – as with good practice for anti-corruption and other international regulatory and compliance areas – includes a mapping of relevant personnel who should receive tailored, live and/or enhanced training, to ensure that those with the highest risk of being connected to negative impacts have the greatest understanding of their role, responsibilities, and how to avoid causing, contributing to, or being directly linked to harms.
- Is **practical** and **tailored**. There can be a tendency to focus on theoretical aspects of human rights/ESG during training and education sessions, delving into concepts of how a human right arises, or the key international instruments that memorialize them. It is almost always more effective to focus on the practical aspects of human rights/ESG as applied to the company, its operations, and its

stakeholders. Indeed, some companies refer to “human rights” or “ESG” as little as possible in human rights/ESG training, preferring instead to focus on company values and how relevant principles apply to it, to maximize its practical understanding and acceptance. For many audiences, directly translating the concepts of human rights and ESG into tangible steps that the company takes, and how to avoid and detect negative impacts, is often a worthwhile goal. In addition, understanding how the company can impact human rights/ESG issues, and how individuals may contribute to those impacts, generally leads to training sessions that are followed, understood and incorporated into operational performance. As with anti-corruption and other compliance areas, including realistic hypothetical scenarios related to human rights/ESG impacts, presenting human rights/ESG dilemmas and walking the audience through a decision-making process, and discussing lessons learned from past incidents in the sector or field all can be effective approaches. Finally, similar to the anti-corruption context, supplemental training for managers and supervisors around their specific human rights/ESG responsibilities can help further adherence to company policies and approaches.

- Is **engaging**. While this may seem obvious, human rights/ESG training can borrow from effective techniques used in other international regulatory and compliance trainings to engage audiences. This is particularly relevant after personnel begin receiving second and third rounds of human rights/ESG training, and tedium can arise. Among the techniques that have been effective for other compliance trainings include role playing, quizzes, game show formats, and various participatory strategies. The strategic use of photographs also can be particularly effective. Especially for human rights/ESG, impacts on stakeholders can be significant, and providing visual depictions of those effects alongside key principles and messages can help underscore critical points that are recalled long after the training concludes. Finally, keeping trainings at a manageable length – optimally less than one hour – assists in maintaining focus and comprehension. Four sessions of 30 minute trainings and discussions may be more effective than two hours of training in one sitting, where participants can fatigue and lose focus.
- Is **persuasive**, and presented by individuals with both substantive knowledge and credibility. Live training provided by individuals who lack an understanding of the relevant disciplines, and thus cannot fluidly respond to factual questions or participate in the challenging ethical discussions that often arise in human rights/ESG training, can quickly lose an audience. Training is often most effective when given by personnel perceived as peers by recipients – such as current company employees or industry veterans – who are perceived to have a strong sense of the relevant operational approaches and on-the-ground challenges. As with other areas of international regulatory compliance, human rights/ESG training should be conducted in local languages to maximize comprehension.
- Is offered strategically through **different formats**. Trainings through different delivery devices, as with other areas of international regulatory compliance, help emphasize key points being made. In addition, people learn in different

ways. Thus, live training may be more effective for some recipients than others, and roundtables more effective than lecture style. Further, companies increasingly have used “just-in-time” trainings in the context of human rights/ESG training programs. For instance, these might include a short reminder of the company’s sexual harassment policy before holiday parties, or the company’s discrimination requirements ahead of recruitment drives. In addition, companies increasingly have been using “nudges” to support their human rights/ESG trainings and drive behaviors, such as visual reminders about worker safety as employees leave company cafeterias before heading to factory floors.

- Is **effective**. As with all other areas of international regulatory compliance, measuring the effectiveness of human rights/ESG training is important. Testing effectiveness in this context generally has an immediate component, in terms of checking comprehension of the information provided through quizzes or tests. It also has a longer term component of whether participants are applying the learnings after the training concludes, which can be assessed during investigations and audits, and in root cause analyses in connection with human rights/ESG-related incidents.

Leveraging Anti-Corruption Training and Education Platforms for Human Rights/ESG

Beyond just learning from effective training principles for anti-corruption and other international regulatory programs, a company’s more mature platforms can be leveraged and expanded to include human rights/ESG. In fact, to help avoid “training fatigue,” current anti-corruption and international regulatory training can be adjusted to include human rights/ESG, providing substantive benefits and obvious efficiencies. That includes live trainings, e-trainings, and workshops, and encompass induction trainings, annual Code of Conduct training and refreshers, or annual in-person trainings. Including human rights/ESG content — such as in company policies and procedures, or guidance on identifying human rights red flags — is straightforward. The same is true for annual certifications: just as companies regularly ask employees to certify annually that they are unaware of any potential corruption concerns that have not been reported, those certifications can easily include human rights/ESG concerns as well.

Integrating human rights/ESG in anti-corruption and other international regulatory trainings also can be substantively beneficial. It can help recipients identify and consider the causal connections between the two areas, and spot and escalate relevant red flags – particularly as human rights/ESG is increasingly being integrated into sanctions regulations (through Global Magnitsky laws, for instance), AML enforcement (in connection with human trafficking, in particular), export controls (related to Xinjiang, as an example), and anti-corruption matters. As that integration reflects, human rights/ESG impacts often create other regulatory risks. For instance, corruption concerns may arise where authorities investigate reported subpar working conditions at a factory, or human health risks associated with pollutants. The converse is equally true: corruption and other international regulatory impacts can create human rights/ESG

risks. For instance, an improper payment to a building inspector can create safety risks, or a corrupt border agent can lead to human trafficking risks. Being able to identify the red flags in one area can lead to spotting red flags for others, and thus it is natural for trainings to include all potential risk factors. While incorporating human rights/ESG within other international regulatory trainings should not dilute the substance and content of either, thinking about compliance risks holistically, with human rights/ESG as part of that process, is important in developing a deeper understanding around root causes and capacities to identify red flags when they arise.

To be clear, the kind of in-depth and tailored training that authorities recognize as appropriate for anti-corruption gatekeepers and other key personnel is typically best done separately. That might focus on employees and third parties who – because of their job function, or personal or professional histories – may have enhanced risks of negative impacts, require a deeper understanding of relevant risks, or warrant a more in-depth understanding of their responsibilities and the company's expectations.

CONCLUSION

Human rights/ESG training approaches will naturally differ between companies, and often within business units or at operations within a company. However, leveraging the experience from anti-corruption and other international regulatory and compliance programs, as well as the infrastructure and content to create substantive and efficient training approaches, can help a company create effective education approaches and drive desired human rights/ESG behaviors.

Our Top 10 +1 Predicted Business and Human Rights Issues for 2022*

December 09, 2021

By [Jonathan C. Drimmer, Tara K. Giunta, & Nicola Bonucci](#)

Perhaps more than most years, 2021 has been filled with an array of business and human rights challenges that were difficult to forecast. Looking forward to 2022, the rapid changes in business and human rights (and ESG more generally) adds a further degree of difficulty to devising a list of the 10 top business and human rights issues for the next calendar year. With that in mind, and in the bold spirit of Human Rights Day, we offer such a list, in no particular order, plus a bonus issue. The list includes some new regulatory obligations, some new rights that have been recognized, some themes from 2021 that will continue into next year, and a few oldies but goodies.

1. New Regulatory Obligations: Mandatory Due Diligence

Throughout 2021, the prospect of mandatory corporate human rights due diligence laws being enacted throughout Europe was a dominant theme. The concept of mandatory diligence is a step beyond human rights transparency laws, like the California Supply Chain Transparency Act, or the UK or Australian Modern Slavery acts. Under mandatory diligence laws, companies must undertake affirmative assessments to identify their risks, institute measures to mitigate any negative impacts, assess the effectiveness of their measures, and publicly report on their approaches.

In 2021, two European countries, Germany and Norway, joined France in enacting domestic laws mandating human rights due diligence. Several other countries, including the Netherlands, Switzerland, and Finland, seem poised to enact their own laws. While the laws have similar goals, they differ in scope, thus creating a certain fragmentation. As France and Germany have been [ranked](#) as the first and third most influential countries in the European Parliament, we can expect that shortly before 2021 draws to a close the EU Commission will issue the long-awaited draft directive encompassing mandatory human rights and environmental due diligence, and it will include companies, their subsidiaries and their value chains (upstream and downstream). That leaves to 2022 the rich debate regarding the scope of the directive, its groundbreaking impacts and its worldwide repercussions.

2. Who is a Worker

One of the most profound shifts in the business and human rights landscape involves determining who is a “worker.” Historically, employers generally have not provided contract workers or independent contractors with the same benefits as full-time workers. These include social security, health and vacation benefits, and minimum wages – which have been closely tied to human rights. This has resulted in profound cost savings and often reduced liabilities for companies.

However, over the past several years, with the rise of the gig workforce, the question of who a “worker” is, and what benefits they are entitled to receive, has become a prominent focus. Contract workers around the world have sought the same kinds of benefits provided to traditional full-time employees. The debate has led to class-action litigation in the U.S., Canada, the UK, and elsewhere, legislation variably providing and denying contract workers benefits, and protests by workers themselves. Next year, we believe the issue will continue to mushroom. We can expect to see increased litigation and judicial decisions throughout the U.S. and Europe. We also can see new laws proposed on either side of the debate. The impacts are substantial, as they will redefine the nature of company workforces, reshape the obligations and duties companies owe less than full-time workers, and disrupt company and consumer economics.

3. Right to Health Care and Access to Medicines

The race to obtain COVID vaccines has exposed a chasm in access to medicines. Wealthy countries, and wealthy individuals in developing countries, are receiving third vaccines as boosters. In developed countries, such as the United States, Canada, Australia, Germany and the UK, the vast majority of the eligible populations have received at least one vaccine, and most are fully vaccinated. In contrast, as of today, in 20 developing countries less than 5% of the population has received even 1 dose, and less than 15% have received the vaccine in about 15 more developing nations. Within the U.S., there has been a substantial [focus](#) on vaccine equity, with references to income and wealth gaps, as well as racism and other forms of discrimination contributing to vaccine rate differentials.

While some of the focus has been on wealth disparity and accusations that prosperous countries are hoarding vaccines, [civil society organizations](#) are identifying company pricing structures, intellectual property policies, knowledge and technology sharing, and allocation of available vaccine doses as critical issues. The debate over access to medicine as a fundamental element of the right to health preceded COVID, and as 2022 progresses, there will be increasing scrutiny on the policies and practices of companies and governments in sharing potential life-saving medicines with populations in developing countries that otherwise may not access them.

4. Corporate Accountability

Courts in the UK, the Netherlands and throughout the EU increasingly are holding parent companies liable for the acts of their subsidiaries. Cases are being filed and decided across Europe regarding company obligations to reduce their carbon

emissions. Popular sentiment seems to be with them. In late November 2020, voters in Switzerland went to the polls to vote on the Responsible Business Initiative, which included a broad corporate accountability provision for domestic companies regarding overseas operations. While the initiative was not enacted, a majority of citizens voted in favor of it. In the U.S., courts are filled with cases under the Trafficking Victims Protection Reauthorization Act alleging that parent companies are liable for the acts of their subsidiaries, under deceptive trade and marketing theories regarding statements about their sustainability and human rights practices, and under securities and common law tort theories. Even the U.S. Department of Justice and U.S. Securities and Exchange Commission are getting into the act, examining allegedly false statements by companies regarding their products, programs and impacts. The inboxes of OECD National Contact Point Specific Instances also are being filled with cases against multinational businesses, and the Canadian Ombudsperson for Responsible Enterprise has now come on line. In September 2021, the OECD launched a public consultation on the OECD Guidelines for multinational enterprises, which will help inform the Working Party on Responsible Business Conduct (“RBC”) identify key achievements, challenges and opportunities.

There have never been more cases against companies, in more forums, under more traditional and emerging legal theories. If anything, 2022 will bring even greater attention. The draft EU directive and debate around its provisions will cast a spotlight on when, whether and how companies should be accountable for their negative human rights impacts and those of their subsidiaries and affiliates who operate around the world. In the same vein, the nascent [Business and Human Rights Treaty](#) includes broad liability provisions for companies, including potential exposure for a failure to present a foreseeable harm caused by global subsidiaries or third parties whose work is controlled or supervised. As cases, regulations and treaty discussions continue to progress, a focus on corporate accountability and enforcement will be front and center.

5. Conflict Affected Areas and Responsible Exit

According to the [Geneva Academy of International Humanitarian Law and Human Rights](#), there are more than 80 armed conflicts involving at least 55 states and more than 70 armed non-state actors. Businesses operating in those environments face an increasingly evident dilemma. Those that stay risk being connected to gross human rights violations, as seen in a multitude of recent cases. These include a recent decision by the Supreme Court of France regarding a global business allegedly making payments to ISIL and other armed groups in the context of the Syrian civil war, war crimes charges by Sweden against the chairman and former CEO of a global energy company for operating in Sudan from 1999 to 2003, and an OECD National Contact Point Specific Instance against a telecommunications company for activities in Myanmar, to name a few. Conversely, those companies that choose to leave conflict-affected and high-risk areas create obvious economic impacts to their organizations, physical and economic risks to their domestic workforces who stay behind with reduced job opportunities, and even potential risks that any equipment and material left behind may be used in the conflict. They also can be criticized for abandoning the country if they determine that they cannot de-risk sufficiently.

Virtually all of the clashes have multi-national enterprises operating in or near conflict zones. Some are in resource rich areas, such as Mozambique, Nigeria, Myanmar and the Democratic Republic of Congo, where global companies have made substantial investments. How and why companies might choose to stay and try to stay neutral and avoid exacerbating these conflicts, or exit responsibly, will be another area of emphasis in 2022.

6. Right to a Clean, Healthy, and Sustainable Environment

In October 2021, the UN Human Rights Council declared that a clean, healthy, and sustainable environment is a human right. That decision was not a tremendous surprise. A healthy environment, including in relation to climate change, biodiversity, air and water pollution, and deforestation, has been identified by the [UN](#) as a precondition to the enjoyment of human rights. The right also was referenced in other international instruments and conventions, and more than 150 countries directly or indirectly recognize the right. Further, the Office of the High Commissioner on Human Rights, as well as others at the UN and the EU, have advocated for the right to be formally recognized. Finally, the right to a clean and healthy environment is included in two of the three regional human rights conventions (the American Convention on Human Rights and the African Commission on Human and Peoples' Rights). Given the momentum, the question was never whether it would be recognized, but only when – and the “when” is 2022.

For 2022, the implications of the newly recognized right will be amply debated, and further integrated into business processes. It will have increasing prominence in government regulations, government permitting and licensing decisions, company due diligence and risk assessment exercises, and company management processes. It also will work in tandem with the mandatory due diligence regime in the EU, which will include environmental and human rights within its scope.

7. Forced Labor Import Bans

The human rights attention on the Xinjiang Autonomous Region of China will be entering its third year in 2022. In 2019, the U.S. government began issuing a series of executive actions in response to what it calls a system of repression against Uighurs and other Muslim minorities in Xinjiang. 2020 brought a new federal law and a variety of further steps, including sanctions against individuals and entities, export controls on certain companies and seizing goods at the border, among other measures. In 2021, the U.S. continued and expanded its efforts, and numerous other countries and the EU joined in, including Canada, the UK, Australia, and Japan. China enacted its own responsive law, and countries around the world began reassessing their supply chains for potential forced-labor goods. With the Olympics scheduled in Beijing in February 2022, the issues will stay high on the agenda in the first half of the year.

However, we believe the discussion will be much wider-ranging. The U.S. has been actively enforcing [Section 307](#) of the Tariff Act of 1930 against goods from around the

world suspected of being produced with forced labor. Canada, the UK, and Mexico have forced labor import bans of different types. Australia is considering a sweeping law. The European Commission has announced its own plan for a forced labor import ban. The concept of banning goods produced with forced labor is a natural extension of modern slavery acts and mandatory human rights due diligence regimes, which are premised on identifying and mitigating supply chain modern slavery risks. It will be a focus throughout 2022, and as it expands, will increasingly impact global commerce.

8. Downstream: Responsible Product Usage & Product Misuse

Since the UK adopted its Modern Slavery Act in 2015, there has been a sustained “upstream” human rights focus, centered on human rights risks in supply chains. Australia followed with its own Modern Slavery Act, and Canada now has introduced similar legislation. In the United States, there is also a serious supply chain effort, given the Tariff Act of 1930 and a Federal Acquisition [Rule](#) that mandates steps that companies must take to protect against trafficking within their supply chains associated with certain federal contracts. In the mandatory due diligence realm, France’s Duty of Vigilance Law applies to company operations, subsidiaries, and upstream suppliers, as does Germany’s Supply Chain Due Diligence Act. The Dutch child labor law takes a comparable approach, focusing on whether goods or services have been produced using child labor.

As these laws and regulations encompass only company operations and upstream supply chain risks, companies often do not take steps associated with downstream product usage impacts, which are not similarly mandated. We believe that 2022 will be the year that downstream human rights mandates and diligence enters center stage. In June 2021, Norway passed its Transparency Act, a mandatory diligence and disclosure law that applies throughout all business relationships in the value chain, allowing citizens to request information from companies and giving the Norwegian consumer authority to issue injunctions and fines for non-compliance. The UN Guiding Principles on Business and Human Rights specifically contemplates that human rights responsibilities extend equally to downstream use of products by consumers and end users. Similarly, the future EU due diligence directive is likely to include both upstream and downstream due diligence obligations. That will further require that companies develop detailed strategies to identify and mitigate relevant customer and end-user related human rights risks, rethink product marketing, and ultimately reevaluate the relationships between companies and their customers and end-users.

9. The Rise of Stock Market Listing Requirements

The past decade has seen a great deal of chatter around using stock market listings to compel company activity. Six years ago, Canada passed a “comply or explain” law requiring that its public companies appoint at least one woman to their boards of directors, or explain the lack of progress. In 2021, NASDAQ established its own comply-or-explain rule, which the SEC approved in August, mandating that listed companies have at least two diverse directors, or explain why they do not meet the

benchmarks. Other stock exchanges are considering similar ESG-related initiatives, including in relation to climate.

Regarding human rights specifically, the UN Human Rights Working Group issued a [report](#) in June referencing the role that stock exchanges can play in driving human rights and implementation of the UNGPs. The report also notes that investors representing over \$5 trillion have called on the SEC to mandate reporting that includes human rights disclosure, and it suggests stock exchanges and others should do more. The Sustainable Stock Exchange Initiative, a UN Partnership Program seeking to drive change, reports that 48 out of 56 stock exchanges talk about human rights in their disclosure guidance. In addition, most exchanges also specifically mention rights, like labor rights or diversity and inclusion or health and safety, while approximately 30% mention the UNGPs in their guidance. Finally, about half talk about human rights policies, practices and processes, and about 30% expressly mention grievance mechanisms or human rights diligence. As guidance can quickly become a rule, we believe the recent NASDAQ rule will lead to additional pressures to amend stock exchange listing rules to include human rights – such as policies and procedures – as “comply or explain” requirements.

10. Reporting Robustness and Coherence

The steady focus on ESG generally, and human rights as the “S” in the middle of it, has emphasized the importance of – and increasingly demands for - transparency and programmatic reporting. These trends will certainly continue into 2022. The SEC is considering new sustainability disclosure requirements, the EU’s Sustainable Finance Disclosure Regulation heads into its second year, and proposals for the EU’s Corporate Sustainability Reporting Directive, which would dramatically expand its Non-Financial Reporting Directive, will be amply considered. At the same time, concerns have been raised about the thoroughness of reporting under existing human rights reporting regimes, such as the [French](#) Duty of Vigilance Law and the [UK](#) Modern Slavery Act.

As efforts will persist to increase reporting and address current shortfalls, the market is plagued by reporting inconsistencies. The Sustainability Accounting Standards Board has brought some level of coherence, the Global Reporting Initiative has incorporated human rights into its reporting standards, and the Principles for Responsible Investment will add human rights to its reporting framework by 2025. Further, following the 2021 G20 Rome Summit on October 30-31, 2021, G20 Leaders issued a joint [declaration](#), committing to sustainable finance and welcoming the work of the International Financial Reporting Standards Foundation (IFRS) to develop global reporting standards for ESG disclosures. A few days later, the IFRS Foundation Trustees announced the creation of a new standard-setting board—the International Sustainability Standards Board (ISSB)—to help meet the growing demand for a common standard. The SEC is expected to initiate its rulemaking by the end of 2021 to consider disclosure and reporting requirements for ESG, and SEC Chair Gensler has indicated that the SEC may set its own standards and metrics or abide by established standard regimes. Discussions around common reporting standards will be a focus for 2022,

building on the demand for increased corporate transparency around ESG and human rights.

11. Financing and Lending Decisions

As a final bonus issue, 2022 will further elevate human rights into the lending and financing decisions of financial services firms. We have seen reference to human rights in promotional materials for some time. Increasingly, companies are being called upon to match rhetoric with action. Fund management firms are being called out for lending to countries that violated those rights. Emerging market bond indexes that use ESG scoring criteria are being called out for over-exposure to bonds issued by countries rated “not free” by leading NGOs. [Banks](#) are pressured to prioritize human rights in their financing decisions and to set internal standards regarding responsible business conduct and are being sued or investigated for sustainability indices that are claimed to be misleading, and a swath of OECD National Contact Point Specific Instances have been levied against financial services firms for lending and financing decisions. From a regulatory standpoint, the EU’s Sustainable Finance Reporting Disclosure Regulation, which went into effect this year and will be expanded next year, aims to protect investors by requiring financial sector institutions to be transparent about how human rights and other sustainability risks are integrated into investment decisions and advisory processes, how they consider the adverse human rights and other sustainability impacts of their investments, and the sustainability of their financial products.

We anticipate 2022 bringing enhanced scrutiny on the strategies and standards for financial services firms. That will include how they integrate human rights due diligence into their lending and financing decisions, and product offerings. It will include the nature of government bonds being purchased, and investments in state-owned entities. It will include insurance offerings, and a holistic review of sustainable offerings, such that “green bonds” are not being offered for countries with human rights abuses. Given the pronounced influence that access to capital can have, the financial services industry can expect focused attention next year.

*Note that this article originally was published in Law.com.

The Integration of Business and Human Rights Into International Regulatory Compliance: Transparency & External Reporting

December 15, 2021

By [Jonathan C. Drimmer, Tara K. Giunta, Nicola Bonucci, & Renata Parras](#)

Around this time last year, we started a series of [posts](#) that have focused on leveraging anti-corruption compliance programs to include business and human rights risks and ESG risks more generally - by creating human rights/ESG management systems, or by integrating human rights/ESG into existing compliance programs. In our inaugural post, we identified six central components of human rights/ESG compliance programs, which also are present in effective international regulatory compliance programs, and can drive implementation of the [UN Guiding Principles on Business and Human Rights](#) (“UNGPs”). We promised to provide posts dedicated to each individual element and how its presence in anti-corruption and other compliance programs could be leveraged to address human rights/ESG.

This is the sixth such post in our series, focusing on Transparency (posts on [Due Diligence](#), [Governance](#), [Policies and Procedures](#), [Training](#), and [Reporting and Remediation](#) are here). A fundamental underpinning of the UNGPs, as made clear in Principle 15, is that “Business enterprises need to know and show that they respect human rights.” While the other components we have discussed relate to “knowing,” this post relates to “showing.” There are several ways that companies can meet those responsibilities, learning from and leveraging pathways from other international regulatory and compliance programs.

Anti-Corruption Transparency

It is well-accepted that the concept of transparency is critical to mitigating risks of corruption. Indeed, the [Extractive Industries Transparency Initiative](#), Canada’s [Extractive Sector Transparency Measures Act](#), and the EU’s [Accounting Directive](#) all are premised on the theory that public disclosure of government payments

will reduce corruption risks. A number of civil society organizations also are dedicated to fighting corruption through transparency, including [Publish What You Pay](#) and [Transparency International](#). The [UN Convention Against Corruption](#) (“UNCAC”) repeatedly talks about transparency as a tool to fight corruption: Article 10 focuses on Public Reporting; Article 12(c) focuses on promoting transparency among private entities; and Article 13 references the participation of civil society in the fight against corruption and “enhancing the transparency of and promoting the contribution of the public to decision-making processes.” Companies further use transparency strategically, such as with contract and bidding requirement disclosures, to mitigate the risk that government officials will try to take advantage of their positions for personal enrichment.

However, transparency is rarely referenced by enforcement authorities in the context of effective anti-corruption programs. The Department of Justice’s [Evaluation of Corporate Compliance Programs](#) (“ECCP”) does not mention transparency or public disclosures. While it talks about making policies known to third parties, and providing information to employees about a range of activities, it does not reference the publication of information. The U.S. Department of Treasury’s [OFAC compliance guidance](#) is the same. The [FCPA Resource Guide](#) (at 14) only mentions transparency in the context of giving gifts to government officials. International resources are only slightly more fulsome. The UK’s [Bribery Act Guidance](#) (“Bribery Act Guidance”) (at 22, 34, 40) quickly mentions that procedures that can help prevent bribery include: “Transparency of transactions and disclosure of information,” policies that commit the company to transparency, and transparent relationships with charitable organizations. Similarly, Agence Francaise Anticorruption’s [Guidelines](#) (“French Guidelines”) (at 63) mentions the importance of transparent bidding procedures. The OECD also has a new [anti-bribery recommendation](#), stating that countries should encourage “company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery.”

Consistent with these resources, companies – while mindful of disclosing potential risks or challenges they may face given the obvious legal exposure - often publish their anti-corruption policies and strategies, bidding procedures and information, and relevant metrics about their program. In fact, guidance from leading public-disclosure authorities, such as the [Sustainability Accounting Standards Board](#) (“SASB”), specifically reference this kind of transparency. These may appear on company websites or in larger sustainability reports.

Human Rights/ESG Reporting

In the human rights/ESG context, there is increasing demand for companies to be more transparent about their commitments and performance against those commitments. Disclosure features prominently in the [OECD Guidelines for Multinational Enterprises](#), as an entire chapter is dedicated to it. Regulators, customers, investors, and civil society organizations are seeking clear and detailed information from

businesses about their impacts on third parties and the environment, and how they are identifying and mitigating risks. Legislation also increasingly presses companies to make public their human rights/ESG risks and impacts. As with anti-corruption, it is generally perceived that enhanced transparency will help drive positive change.

The UNGPs

Consistent with that, the UNGPs place primacy on human rights/ESG reporting, repeatedly discussing the importance of “knowing and showing” a company’s human rights processes and how risks are addressed. For instance, UNGP 16(d) focuses on a company’s human rights commitment. Much as with good practice in the anti-corruption space, where key processes are made public, it references the importance of making the human rights commitment publicly available.

Far beyond the anti-corruption context, however, in the human rights/ESG space, businesses are expected to report on their salient risks and impacts, and on how they address them. UNGP 21 addresses company transparency, and states, “In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them.” UNGP 21 also calls for reporting in “a form and frequency” accessible to intended audiences, by providing “information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact,” or to “legitimate requirements of commercial confidentiality.” The Commentary further references “topics and indicators” regarding identifying and addressing adverse impacts. Many of these same concepts are addressed at length by the UN Office of the High Commissioner for Human Rights, in [The Corporate Responsibility to Respect Human Rights, An Interpretive Guide](#) (57-62).

Likewise, UNGP 31(e), as part of discussing effectiveness criteria for operational grievance mechanisms, stresses the importance of transparency, including “providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake.” As the relevant Commentary notes, as with the metrics associated with SASB-compliant reporting, “[p]roviding transparency about the mechanism’s performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust.”

Regulation and Investor Demands

In addition to the soft law principles enunciated by the UNGPs, governments increasingly are demanding that companies formally report on human rights and ESG risks and processes. These may be through supply chain-related disclosures, such as under the UK or Australian modern slavery acts or the California Transparency in Supply Chain Act. They also may be through mandatory due diligence laws, such as in France, Germany and Norway, which typically require companies to identify potential

risks, institute mitigating measures, evaluate the effectiveness of those measures, and report publicly on these steps. The anticipated draft EU Directive on Corporate Due Diligence and Accountability also operates from this type of a disclosure framework. The EU Non-Financial Reporting Directive requires the publication of a variety of human rights/ESG-related risks. In the ESG space specifically, [mandatory climate change reporting](#) is now common and expected to grow.

Investors also are seeking public information related to human rights/ESG. These may be through pressures to conduct and make public impact assessments, investment and engagement frameworks that consider human rights and ESG disclosures, and through other means. For instance, the Investor Alliance for Human Rights, a group of institutional investors with a collective \$5.8 trillion in assets are pressing companies for greater human rights disclosure, and the Principles for Responsible Investment is working to add human rights to its reporting framework by 2025. Similarly, BlackRock, the world's largest asset manager, [stated](#) earlier this year, “[W]e are asking the companies that we invest in on behalf of our clients to ... publish a disclosure in line with industry-specific SASB guidelines by year-end, if you have not already done so, or disclose a similar set of data in a way that is relevant to your particular business.”

Human Rights/ESG Reporting

That said, even when it is not required or demanded, companies increasingly are reporting on their human rights/ESG risks and strategies to help build stakeholder credibility and shareholder accountability. At present, there are a few common practices. Similar to anti-corruption and other international regulatory compliance regimes, companies often include human rights in their public facing Codes of Conduct and may also have distinct publicly-disclosed human rights policies consistent with UNGP 16. Beyond that, however, some have lengthy standalone human rights or sustainability reports, while others place discrete information in differing places on their websites. The content can vary widely, from highly granular reporting supported by a variety of metrics, to more general disclosures.

Several key resources, such as the [Corporate Human Rights Benchmark](#) and [Shift's Human Rights Reporting and Assurance Frameworks Initiative](#), provide detailed insights into the substance and content of reporting coverage, and are gaining resonance. SASB's standards, covering a wide variety of industries, also impose tailored policy and risk-management metrics to enable objective assessment of corporate responsibility. The [Global Reporting Initiative](#) (“GRI”), also a prominent ESG reporting framework, was recently amended to include human rights due diligence in line with the UNGPs.

Consistent with these sources and the UNGPs, in order to be effective, human rights/ESG reporting should be specific and detailed, and not shallow corporate marketing. Some of the features connected to good reporting are:

- **Human rights/ESG vision.** Good reports often will talk about the company's strategy or vision for human rights/ESG, including where the company is on its journey, future planned activities in implementing processes, and ways that the company can contribute to the realization of human rights/ESG consistent with the Sustainable Development Goals. Companies also often talk about their partnerships with civil society, academic institutions, and others in the context of discussing their human rights/ESG strategy.
- **Program structure.** Good reports often explain the company's programmatic approach to addressing human rights/ESG risks and impacts, including (a) the governance structure for a human rights/ESG program (or to support addressing human rights/ESG risks), (b) policies and procedures implementing the company's human rights/ESG approach and addressing the pathways through which salient human rights/ESG risks may arise, (c) how the company trains and educates on the program, (d) the company's due diligence approach, and (e) grievance mechanisms and how it considers remediation. The due diligence approach ideally should include how risks and impacts are assessed, mitigating measures taken to address the risks and impacts identified, the effectiveness of those mitigating measures and the methodology used by the company in making that determination.
- **Salient risks.** Good human rights/ESG reporting will include a discussion of the company's "salient risks," discussed at length by Shift's human rights reporting framework. Salient human rights/ESG issues reflect the *most substantial potential negative impacts* of the company's activities or business relationships on rightsholders and stakeholders, regardless of the impact on the business. Salience is premised on four factors: (i) severity (how grave and widespread the impact might be), (ii) remediability (how hard it would be to correct), (iii) prevalence (how widespread the impact would be), and (iv) likelihood (how likely it would be that the harm would occur). Good reporting will include a statement of the company's salient issues, the methodology through which those issues were determined, and how they are being addressed.
- **Collective action.** Human rights/ESG reports often discuss steps the company is taking in conjunction with industry groups or trade associations to address larger human rights/ESG issues, including public policy matters.
- **Dilemmas.** Good reports often reflect on human rights/ESG challenges the company may have faced or be facing, what it has learned from addressing those challenges to date, and how it intends to approach addressing the dilemmas in the future.
- **Stakeholder engagement.** Effective disclosures also talk about the company's approach to understanding the perspectives of stakeholders who may be negatively affected by the company or its value chain, and how those perspectives are incorporated into the company's business strategy, policies, and procedures.
- **Data and metrics.** Human rights/ESG disclosures often effectively include data, key performance indicators or other metrics that demonstrate the robustness and effectiveness of program elements. These can include metrics regarding training, diligence exercises, policy reviews, formal communications efforts,

stakeholder engagement, the number and results of audits and assessments, and other criteria. Regarding grievance mechanisms in particular, companies commonly report demographics associated with grievances, including where they are lodged, the nature of the concerns raised, and the ways through which grievances are resolved.

- **Reporting frameworks.** Good human rights/ESG reports seek to adhere to leading reporting frameworks, such as SASB, the [Global Reporting Initiative](#), and other leading industry and sector-specific standards. Companies increasingly are moving toward an integrated reporting model, which uses common content published in a range of different formats, to create efficiencies and consistency.

We urge caution, however. While transparency is a critical underpinning of human rights/ESG programs, companies are wise to review their disclosures carefully. As with anti-corruption, care should be taken to avoid disclosing risks and information that can support litigation against the company. Indeed, pressures on enhanced transparency have caused companies to make statements that they may not be in a position to sustain with sufficient data, and which therefore have been cited in support of or as a basis for corporate litigation. Corporate disclosures may unwittingly provide substantive support to litigation, including the [disclosure of potential legal risks](#) that can help form a basis of liability. There also are a rash of corporate cases premised on alleged false statements in human rights/ESG non-financial disclosures, which have led to securities fraud lawsuits, derivative shareholder actions, deceptive marketing or trade practices litigation, and even regulatory investigations. The SEC's [climate and ESG task force](#) is premised on this notion. Human rights/ESG disclosures can also provide procedural support to litigants; company sustainability and human rights-related reports increasingly are used against companies to establish [parent liability](#), establish jurisdiction, and for other means. Companies should respond by addressing their non-financial disclosures with the same degree of care as their financial disclosures, subjecting them to substantive and legal scrubbing, in light of these risks. Truly effective disclosure, thus, offers transparency and provides specific insights, while avoiding legalistic caveating and creating undue legal risk.

CONCLUSION

Perhaps more than any other area of international regulatory and compliance programs, which focus on mitigating risks to the company, transparency is a hallmark of human rights/ESG programs. There are some practices in anti-corruption, such as the publication of policies and processes that roughly correlate to the transparency expectations in human rights/ESG. But the “know and show” philosophy that animates the UNGPs creates a substantial distinction from other programs, and has led to a burgeoning field of human rights/ESG reporting supported by regulation, investor demand, and good practice. It is a field that is growing rapidly.

The Integration of Business and Human Rights into International Regulatory Compliance

December 07, 2020

By [Tara K. Giunta, Jonathan C. Drimmer, & Renata Parras](#)

Over the past several years, companies have been dramatically increasing their focus on risks associated with environmental, social and governance issues, and human rights in particular (ESG/HR). These have led a growing number of companies to create dedicated ESG/HR compliance programs or management systems. While managing these issues and impacts is increasingly critical, given the interconnectedness of virtually all international regulatory compliance-related risks – including anti-corruption, sanctions and trade controls, and money laundering, to name a few – it is important also to consider how ESG/HR risks can be integrated into broader, more comprehensive compliance programs. This post, the first in a series, outlines the approaches that businesses are starting to take.

The Rise of Business and Human Rights Risks to Companies

Over the past several years, ESG/HR-related compliance risks for companies have continued to grow. These include high-profile litigation in the U.S. and elsewhere premised on alleged human rights violations (the subject of a detailed future posting). Current examples include the U.S. Supreme Court considering another major case under the Alien Tort Statute, the U.K. Supreme Court considering another case seeking to hold a parent liable for alleged abuses by a foreign subsidiary, a recent Canadian Supreme Court holding that Canadian corporations can be sued in tort for violations of international human rights norms that occur abroad, and a Dutch Supreme Court ruling that protecting citizens from climate change is a human rights issue. There are dozens of civil cases in U.S. courts against hospitality companies under the Trafficking Victims Protection Reauthorization Act, major human rights cases pending against the extractive sector in Canada, South Africa, and elsewhere, a group action involving a tobacco company in the U.K., roughly 25 OECD National Contact Point Specific Instances filed against companies each year, cases in U.S. state courts premised on deceptive trade practices because of human rights marketing, and numerous other cases involving a wide span of sectors progressing in other courts around the world. In addition to litigation, business and human rights-specific legislation continues to expand. Modern Slavery Acts now exist in the U.K. and Australia and are

being considered in Canada and elsewhere. The U.S. enacted specific legislation in June of this year in relation to alleged abuses in the Xinjiang Uighur Autonomous Region of China. The EU and more than a dozen EU member states are actively considering laws that would require companies to undertake mandatory diligence that encompasses human rights. The U.K. Criminal Finances Act allows the government to seize profits connected to gross human rights abuses. U.S. Customs and Border Protection is actively seizing goods at the border suspected of having been created with forced labor under Section 307 of the 1930 Tariff Act, the U.S. government has included similar requirements in the USMCA (the new NAFTA), and it is incorporating related human rights standards in foreign aid packages. In short, human rights has grown into a standalone international regulatory compliance field with breaches that now carry sharp business and legal risks.

At the same time, however, we have seen ESG/HR increasingly integrated into other international regulatory areas. The UN, leading global business groups, TRACE International and others have identified the close connection and correlation between human rights and anti-corruption. As they make clear, human rights violations can lead to corruption, and corruption can lead to human rights abuses. Inspectors might be paid to ignore forced or child labor, licenses might be improperly granted to buildings with rampant safety code violations, and customs agents might be asked to look the other way as people are trafficked across borders. Evidence of a human rights violation is, in anti-corruption parlance, a red flag of corruption, just as evidence of corruption is a red flag for a human rights violation.

Likewise, ESG/HR is being integrated into sanctions, export control and AML regimes. Global Magnitsky Acts now exist in multiple countries, including the U.S., Canada and the U.K. These acts are being employed to strictly limit the economic activity of individuals and entities associated with alleged human rights abuses, such as rigged elections in Belarus, forced labor in China, and security abuses in Iraq, Nigeria and Burma. Similarly, over the past year, some 50 companies – and dozens more subsidiaries – have been added to the U.S. Department of Commerce’s Entity List for allegedly enabling human rights abuses in Xinjiang, making it difficult for them to purchase products from U.S. suppliers. Further, in September an Australian bank settled with the Australian financial crime agency for \$1.3 billion for lax AML controls that led to some 250 transactions consistent with child exploitation. In October 2020, the U.S. Department of Treasury’s Financial Crimes Enforcement Network (FinCEN) issued updated guidance to financial institutions on red flags associated with human trafficking, and trafficking is included as a box on suspicious activity reports. See Recent FinCEN Advisory Targets Recognition of Human Trafficking, at <https://www.paulhastings.com/publications-items/blog/international-regulatory-enforcement/international-regulatory-enforcement/2020/11/03/recent-fincen-advisory-targets-recognition-of-human-trafficking>

Establishing a System or Program

These developments increasingly point to a need to create systems and processes that focus on ESG/HR compliance, and to integrate them into other areas of international regulatory compliance. Most obviously, AML, export controls, anti-corruption and sanctions programs should consider human rights issues, whether as red flags, as part of diligence exercises, or otherwise. For instance, a company deciding to finance an initiative designed to bring potable water to a community in need is a laudable goal. However, it can also lead to risks of fraud, corruption and conflicts of interest if the entity used to manage the project, for instance, is owned (directly or indirectly) by a government official pivotal to the company's ability to build its plant and hire workers. It can also lead to a diversion of funds away from the water project into the pockets of the government official, thereby undermining the very goals of providing potable water to the community.

Given these developments and increasing vulnerabilities, companies are well-advised to establish management systems or compliance programs to address ESG/HR risks, and to integrate them into existing compliance systems. Shaped by the UN Guiding Principles on Business and Human Rights ("UNGPs"), the leading set of business and human rights guidelines, best practices in compliance programs that should be leveraged to address ESG/HR risks include the following six areas. Each is described generally here, and will be explained in greater detail in a series of subsequent posts.

- **Governance.** ESG/HR programs generally have a governance structure that includes (a) board-level oversight, with a board or committee charter encompassing all compliance-related risks and expressly including ESG/HR risks, and (b) day-to-day supervision of an appropriately tailored compliance program by one or more senior officers that expressly includes ESG/HR. Indeed, there are growing legislative expectations, and sometimes requirements, that corporate boards oversee salient human rights risks. For instance, the U.K. and Australian Modern Slavery Acts, and the pre-draft of the EU legislative directive on mandatory diligence, create board-level responsibilities. Further, enforcement agencies such as the U.S. Department of Justice consider the effectiveness of a company's compliance program, including how well it has assessed and addressed its full myriad of risks, in determining how the agencies will handle a company engaged in questionable practices. Finally, there is a growing line of cases looking more critically at whether a company's board of directors fulfilled its fiduciary duty in its oversight of the company's legal, regulatory and operational risks, moving away from tradition. Therefore, assigning day-to-day program management to senior personnel, with active oversight by the board, provides the program with gravitas and internal authority and allows for more effective implementation, understanding of its effectiveness, and defensibility. As part of this governance structure, personnel with authority for the ESG/HR program can be expected to report on the status, progress and challenges in the program, with appropriate organizational metrics and key performance indicators.

- Policies & Procedures.** ESG/HR programs have a high-level commitment incorporated into a company Code of Conduct adopted by the board of directors, supported by a distinct human rights policy or standard, with implementing procedures. As the UNGPs make clear, a human rights policy should apply throughout the organization and to third parties, detail the company's stance regarding respecting human rights, define human rights to include the International Bill of Human Rights and International Labor Organization's core conventions, and identify other key instruments and principles the company follows. The policy generally is further supported by relevant procedures, such as immediate escalation of concerns, supplier or third party codes of conduct, and relevant functional unit management systems that incorporate human rights components, which can be tailored and localized to best address the issues and risks that arise in practice at relevant operating locations. It is further important to create a policy coherence with other international regulatory and compliance areas, to best develop an integrated and coordinated approach.
- Diligence, Risk Assessments, and Program Testing.** Critical to an ESG/HR program are due diligence, risk and impact assessments, and program testing. These identify the company's actual and potential inherent risks, the degree of adherence to the company's processes to address those risks, the effectiveness of those processes in mitigating inherent risks, and any actual, potential and perceived impacts on individuals and communities. Assessment exercises can include desktop research, a review of policies, procedures and standards, and on-the-ground interviews with employees and stakeholders. While some companies conduct some or all of these exercises separately for regulatory functions, companies increasingly are undertaking integrated diligence approaches, seeking to create efficiencies and best leverage the results in assessing risks and mitigating measures.

Diligence also is undertaken for potential employees and third parties. General pre-screening questionnaires may include questions related to past issues that raise human rights red flags, such as accusations of forced labor, litigation, discrimination, security-related abuses, or other controversies. Internet and database searches also encompass such issues. Enhanced diligence is undertaken for potential employees or third parties in functions closely connected to a company's salient ESG/HR risks, or where red flags are present. Further, to mitigate potential risks, ESG/HR expectations can be included in job applications, RFPs, and agreements, training can be provided, performance can be closely monitored and documented, post-engagement third-party assessments can be done, and diligence can be periodically refreshed, among other steps.
- Training.** Training is another critical component of a human rights program. That can include live trainings, e-trainings, just-in-time trainings, and workshops. Further, while companies often pursue generic ESG/HR training that is delivered globally, tailored training is critical for employees and third parties who because of their job function, or personal or professional histories, may have enhanced risks of negative impacts or who otherwise may be in a position to influence the company's performance. Indeed, training that effectively seeks to

connect different areas of regulatory compliance will help break down traditional silos that have prevented compliance functions from operating at peak capacity.

- **Grievance Mechanisms.** As UNGP 29 makes clear, companies are expected to establish operational grievance mechanisms “accessible directly to individuals and communities who may be adversely impacted by a business enterprise.” These are designed to allow individuals and communities to raise concerns directly to the company, provide information and insights to the company, and reduce tensions and problems that can escalate to human rights abuses. When the company has caused or contributed to a negative impact, it is expected to take steps to remediate the issue. Remedy can mean different things in different circumstances, and encompasses a wide range of potentially appropriate actions, from compensation to apologies to prevention of recurrence.
- **Reporting.** There are an increasing number of mandatory and encouraged ESG/HR reporting requirements around the world. These range from the EU non-financial reporting directive, to modern slavery acts, to the new EU conflict mineral regulation. Indeed, UNGP 21 itself states that companies should provide details regarding their approach to addressing human rights risks and that formal reporting should exist where their operations or operating contexts pose risks of “severe” impacts. Many companies make public their policies and procedures and overall program approach, and disclose explicitly their salient human rights risks and the various steps they take to mitigate them. They also often publish relevant metrics, such as the number of human rights grievances filed, the number of individuals trained, and other similar data. Companies similarly often provide public information related to their anti-corruption programs and some provide further detail related to revenue transparency and similar matters.

CONCLUSION

The growth of ESG/HR – as its own compliance area and as part of other international regulatory schemes – has been rapid and comprehensive. It is continuing to gather momentum and will expand at least for the foreseeable future. Instituting a program, and integrating substantive ESG/HR issues into other international regulatory programs to develop a holistic means of addressing company risks, is becoming a business imperative, protecting the company and its stakeholders from the harms that can arise.

The Integration of Business and Human Rights into International Regulatory Compliance: Reporting and Remediation

August 27, 2021

By [Jonathan C. Drimmer, Tara K. Giunta, Nicola Bonucci, & Renata Perras](#)

Late last year, we began a series of [posts](#) focusing on leveraging anti-corruption compliance programs to encompass business and human rights risks and ESG risks more generally, whether by creating human rights/ESG management systems or integrating human rights/ESG into existing compliance programs. We listed six central components of human rights/ESG compliance programs, which are present in effective international regulatory compliance programs and can drive implementation of the [UN Guiding Principles on Business and Human Rights](#) (“UNGPs”). We indicated that we would provide posts concentrating on each individual element and talk about how its presence in anti-corruption and other compliance programs can be leveraged to address human rights/ESG.

This is the fifth post in our series, focusing on Reporting and Remediation (after posts on [Due Diligence](#), [Governance](#), [Policies and Procedures](#), and [Training](#)). Pillar III of the UNGPs is devoted to access to remedy and grievance mechanisms and is a critical element of the corporate responsibility to respect human rights. There are also substantial similarities and key differences with other international regulatory and compliance programs, providing important parts of leverage but also critical distinctions that a human rights/ESG program should contemplate.

Anti-Corruption Hotlines and Remediation

Fundamental to any anti-corruption or other international regulatory compliance program are pathways that allow employees and other third parties to raise concerns about potential legal and policy issues directly to the organization. In fact, [Section 301 of the Sarbanes-Oxley Act of 2002](#) mandates that U.S. public companies maintain processes for individuals and employees to report concerns, stating that board audit committees “shall establish procedures” for receiving and addressing complaints “regarding accounting, internal controls or auditing matters” ... and “the confidential,

anonymous submission by employees ... of concerns regarding questionable accounting or auditing matters.” 15 U.S. Code § 78j-1(m)(4). The EU has adopted a similar approach, as [Directive 2019/1937](#) (Art. 8) mandates that by the end of this year, Member States adopt laws that “ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up.” The concept of a confidential hotline for reporting concerns also appears in Chapter 8 of the U.S. Federal Sentencing Guidelines, the foundation for modern compliance programs. That section states that companies should “have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.” [§8B2.1\(b\)\(5\)](#). The EU Directive also specifies protections for whistleblowers and the importance of non-retaliation among internal reporting mechanisms, and discusses confidential reporting approaches. Directive, Art. 9, 19.

The U.S. Department of Justice (“DOJ”) and Securities and Exchange Commission (“SEC”) provide further details regarding approaches to hotline and ethics reporting. As DOJ explains in its [Evaluation of Corporate Compliance Programs](#) (“ECCP”), a “hallmark of a well-designed compliance program is the existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company’s code of conduct, company policies, or suspected or actual misconduct.” ECCP, at 6-7. Among the salient questions DOJ advises its prosecutors to ask are whether the reporting mechanism is anonymous, has it been used, how is it “publicized to the company’s employees and other third parties,” and if the company assesses whether employees are comfortable using the mechanism. See DOJ and SEC [FCPA Resource Guide](#) at 66 (2020); UK’s [Bribery Act Guidance](#) (“Bribery Act Guidance”) and [Evaluating a Compliance Programme](#); Agency Francaise Anticorruption’s [Guidelines](#) (“French Guidelines”). As these authorities and others make clear, compliance programs should have systems of reporting that are publicized and transparent, trusted, actually used in practice, and available to employees and other third parties.

Of course, merely receiving concerns about legal and policy violations is not enough. These authorities make clear that companies must investigate concerns in good faith and a manner that is reliable and predictable, and then remediate program weaknesses where they find them. For instance, DOJ and SEC explain in the *FCPA Resource Guide* that “once an allegation is made, companies should have in place an efficient, reliable, and properly funded process for investigating the allegation and documenting the company’s response, including any disciplinary or remediation measures taken. Companies will want to consider taking ‘lessons learned’ from any reported violations and the outcome of any resulting investigation to update their internal controls and compliance program.” *FCPA Resource Guide*, at 66. DOJ further emphasizes the importance of independent and objective investigations, investigative “timing metrics to ensure responsiveness,” and collecting, tracking, analyzing and using information from reporting mechanisms to identify patterns. ECCP, at 7. It also focuses on the importance of properly scoped investigations by qualified personnel, monitoring

the outcome of investigations and ensuring accountability for responses, and identifying and remediating the root causes of misconduct, including discipline and “the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risks.” [Justice Manual](#), 9-47.120(3)(c). Thus, in addition to reporting mechanisms, fundamental aspects of an effective compliance program include: appropriate review of concerns, identification of root causes and lessons learned, remediation of program weaknesses to avoid repetition, and appropriate disciplinary measures.

Grievance Mechanisms, Remediation and Remedy

Similarities with Anti-Corruption and Other Compliance Programs

Several of these elements are highly similar to key human rights/ESG reporting mechanisms and remediation approaches, and indeed allow for key points of leverage. The last section of the UNGPs, the “Third Pillar,” is titled “Access to Remedy” and consists of seven principles (UNGP 25-31) that identify the concept of human rights “grievances” and how they are addressed. It covers reporting concerns through “operational-level grievance mechanisms,” defined as “a formalized means through which individuals or groups can raise concerns about the impact an enterprise has on them” – [The Corporate Responsibility to Respect Human Rights, An Interpretive Guide](#), at 68 – as well as the remediation of impacts and remedies to individuals. UNGP 31 also includes eight criteria governing the effectiveness of company grievance mechanisms and remedy more generally, stating that grievance mechanisms should be:

- (a) **Legitimate**: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) **Accessible**: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) **Predictable**: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) **Equitable**: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) **Transparent**: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) **Rights-compatible**: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and future grievances and harms ... ; [and]

(h) **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Many of these criteria -- stemming from a desire to encourage stakeholders to raise concerns -- are equally applicable for anti-corruption reporting mechanisms. For both anti-corruption and human rights/ESG programs, reporting mechanisms should be:

- Trusted by stakeholders. Hotlines and grievance mechanisms should have fair and objective processes for considering concerns. They should actively promote reporting a variety of issues, encourage stakeholders to seek clarification on company processes and activities, and not just report perceived problems. They also should take active steps to prevent retaliation for reporting concerns, including a policy prohibiting retaliation, steps to ensure the safety and security of individuals who access the mechanism, and monitoring and assessing whether retaliation or retribution may have occurred. Well-run reporting platforms also take steps to include elements of accountability, preventing parties to a concern or grievance from interfering with its fair conduct. In addition, individuals reviewing and processing concerns should have an appropriate basis of knowledge and expertise, particularly around local cultural nuances. Periodic engagement with stakeholders – whether through employee surveys or meetings with external stakeholders – about the reporting mechanisms can offer important perspectives about its perceived fairness and ability to deliver effective remedy, build trust, and lead to improvements.
- Transparent. Hotlines and grievance mechanisms should be well-publicized and accessible to stakeholders who wish to use them. They should be transmitted through different mediums where they are most likely to be received and written in plain language most likely to be understood. For grievance mechanisms, publication among workforces, throughout local communities, and among third party stakeholders who may be impacted by company operations is particularly imperative. It is also prudent for companies to offer multiple pathways of reporting, including drop boxes, anonymous telephone numbers and email addresses, and means of reporting after working hours (if not 24 hours), affording individuals different options for raising issues in a manner most amenable to them. Publicizing the results of assessments, and including metrics reflecting the number and demography of grievances raised along with the ranges of outcomes, also can help build confidence in the mechanisms (although it is always prudent to subject these publications to legal review, to avoid creating unnecessary and unintended legal risks). Further, for grievance mechanisms, being transparent about alternative pathways to raise concerns outside of company processes is often worth considering.
- Guided by open processes and timeframes. The processes for considering concerns should be clear, transparent and auditable. There should be indicative

timeframes for the consideration of concerns that are followed and tracked. Adequate resourcing, permitting adherence to those indicative timeframes, also is important. Once concerns have been reported, keeping affected individuals apprised of the progress and timing also may be appropriate. Hotlines and grievance mechanisms also should identify a predictable range of outcomes when concerns are raised, which should be tracked and assessed to ensure alignment.

- A basis for learning. The mechanism should be designed to allow for a continuing capture of information, sufficient to identify patterns and trends, as to the nature of the concerns raised and the outcomes reached. Those patterns and trends should be reviewed regularly to enhance the program, remediate potential weaknesses, and prevent recurrence through stronger policies and procedures, increased oversight, tailored training, and other steps. The information gathered also should allow for measurement against other key performance indicators (KPIs), which in turn should be made transparent.

Indeed, companies often utilize existing reporting mechanisms – such as hotlines, email drop boxes, periodic certifications, and outreach to legal or compliance personnel – to raise both anti-corruption and human rights/ESG concerns. Further, as with anti-corruption reporting mechanisms, in evaluating and investigating concerns that are raised, human rights/ESG mechanisms also should have sufficient independence to “avoid any conflicts of interest.” Interpretive Guide, at 71 and 72. That has led many companies to conduct investigations through separate investigative units, corporate legal, compliance or audit groups, or external resources.

Differences from Anti-Corruption Compliance Programs

While there are certain similarities and points of advantage between anti-corruption reporting mechanisms and operational-level grievance mechanisms, several areas are distinct, reflecting additional and more ambitious goals associated with human rights/ESG reporting. In general, anti-corruption hotlines are designed to encourage reports related to company legal and policy violations. While legal and policy violations are contemplated by grievance mechanisms, the UNGPs specifically discuss remedy for affected individuals that “accord with internationally recognized human rights.” UNGP 31(f). The object of providing such remedy is to restore affected individuals to their pre-harm state – e.g., to “counteract or make good any human rights harms that have occurred.” UNGP 25, Commentary. The UNGPs note that remedy can take many different forms, including “apologies, restitution, rehabilitation, financial or non-financial compensation.” To be clear, no similar victim remedy concept is identified by regulators in the anti-corruption space regarding compliance programs (although the U.S. Mandatory Victims Restitution Act (18 U.S.C. §3663A) does require that those convicted of certain federal crimes, such as the FCPA, make payments to victims as part of their sentences).

In addition, regarding the design of the reporting systems themselves, the UNGPs advise that companies engage with affected stakeholders about mechanism “design

and performance” to “help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success.” UNGP 31(h) and Commentary. While anti-corruption guidance contemplates assessing awareness of and comfort levels in hotlines, it does not consider collaborative and participatory approaches to reporting mechanism design or performance. In that sense, a grievance mechanism is more active – it is not just an internal administrative process for handling concerns, waiting for problems to arise in a passive sense. Rather, it aims to facilitate the identification of grievances and address them as early as possible by ensuring it is known to, and trusted by, those stakeholders for whom it is intended. Interpretive Guide, at 65. In fact, the UNGPs contemplate grievance mechanisms as a tool to avoid human rights problems, as they are intended to help reduce tensions early, “preventing harms from compounding and grievances from escalating” into disputes that can lead to negative impacts. UNGP 29, Commentary.

Finally, whereas regulator guidance for anti-corruption programs focuses on reporting concerns internally, because the UNGPs are concerned with a right to effective remedy more generally, they contemplate grievance mechanisms as part of a larger ecosystem. These include state-based judicial and non-judicial approaches, collaboration between businesses and “relevant stakeholders,” and mechanisms administered through an “external expert or body” and multi-stakeholder and other collaborative initiatives. UNGP 29, Commentary; UNGP 30. While anti-corruption concerns certainly can be and often are reported to regulators, internal hotlines generally are not treated as part of a larger network of reporting systems designed to encourage affected individuals to come forward so that a remedial right is recognized.

CONCLUSION

As with other areas of human rights programs, certain aspects and learnings from ethics and compliance hotlines for anti-corruption and other international regulatory programs can be leveraged for human rights/ESG grievance mechanisms. That is particularly true around processes for encouraging potentially affected stakeholders to report concerns. However, perhaps more than most other areas in human rights/ESG programs, there are certain fundamental distinctions, and ultimately companies are wise to consider developing separate pathways for human rights/ESG grievances in collaboration with key stakeholders, and processes to address remedy.

White House Releases 2021 National Action Plan to Combat Human Trafficking

December 06, 2021

By [Tara K. Giunta, Jonathan C. Drimmer, Nicola Bonucci, & Renata Parras](#)

On Friday, December 3, 2021, the White House released the [2021 National Action Plan to Combat Human Trafficking](#). The three-year Action Plan is centered on the foundational pillars of U.S. and global anti-trafficking efforts – **prevention, protection, prosecution, and partnership** – and calls upon partner agencies across the Executive Branch to implement a number of Priority Actions to enhance U.S. efforts to combat human trafficking.

The Action Plan comes on the heels of the annual meeting co-sponsored by the Council of Europe and the Organization for Security and Co-operation in Europe (OSCE), the largest annual meeting of its kind focused on human trafficking, which emphasized the need for National Actions Plans to increase momentum and maximize national anti-trafficking responses.

The Action Plan lays out a broad-based, multi-disciplinary, whole-of-government approach to addressing this crime and stresses its harmful impacts on victims, their communities and our national security. The anti-trafficking efforts outlined in the Action Plan are directly linked to the Administration's broader efforts to address inequities for marginalized communities which often experience overlapping social and economic inequities. As a result, individuals from these communities may be more vulnerable to becoming victims of human trafficking. The Action Plan also reflects the Administration's commitment to workers' rights and ending forced labor in global supply chains, which the COVID-19 pandemic has exacerbated due, in part, to job insecurity, supply chain disruptions, and exponential demand for essential medical supplies and services. The Plan also serves as an important component of advancing the Administration's priority of ensuring safe, orderly, and humane migration.

Importantly, the Action Plan emphasizes collaboration with state and local governments, the private sector, and non-governmental organizations in implementing an effective victim-centered and trauma-informed anti-trafficking policy and strategy.

The following are the most relevant key takeaways from the 2021 Action Plan:

1. The U.S. Department of Homeland Security will launch a labor trafficking enforcement initiative, with priority placed on interagency enforcement initiatives focused on high impact prosecutions for forced labor violations.
2. There will be a focus on dismantling organized criminal human trafficking enterprises by disrupting their financial networks, communications and other infrastructures, and by targeting facilitators of human trafficking.
3. There will be continued enhancement of programs and processes that encourage information sharing between governmental agencies and private sector partners that informs a strategic outcome.
4. There will be a push to develop new and improved technology for human trafficking interdiction and to identify technical barriers that impede investigations.
5. There will be a push to address aspects of nonimmigrant visa programs that may facilitate the exploitation of visa applicants and visa holders.
6. The U.S. Department of Justice will seek to establish federally funded but locally-led human trafficking task forces that are long-term sustainable.
7. There will be greater support for research and the development of evidence needed to better prevent and respond to human trafficking in persons in the United States.

This new Action Plan delivers a three-year comprehensive approach to combat human trafficking that will no doubt warrant adjustments for corporations, financial institutions and organizations as well as provide opportunities to enhance partnerships, business operations, technology and processes that detect and prevent trafficking initiatives. Indeed, the new Action Plan emphasizes the unique position that the private sector occupies to leverage economic power to influence existing markets, and create new ones, where workers can enjoy human dignity and are free from coercion and exploitation. Meaningful engagement with the private sector by law enforcement is not only encouraged in the Action Plan but identified as integral to forming creative solutions informed by a diverse expertise. The Action Plan makes clear that the Administration considers private sector actors to be partners in the fight against human trafficking and underscores the importance of integrating ESG/HR issues into their operational programs to do so.

A link to the Fact Sheet can be found here:

<https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/03/fact-sheet-the-national-action-plan-to-combat-human-trafficking-nap/>