

# United States' National Action Plan on Responsible Business Conduct

INPUT FROM BSR | MAY 2022

## INTRODUCTION

BSR welcomes the opportunity to provide input into the update of the United States' National Action Plan (NAP) on Responsible Business Conduct. In this submission we share the insights we have gained from working with companies to apply UN Guiding Principles on Business and Human Rights (UNGPs) and draw upon BSR's experience working with the world's most influential companies on human rights issues for the past three decades. This includes:

- **Collaboration:** Facilitating the creation of the [Voluntary Principles on Security and Human Rights](#) (VPs), [Global Network Initiative](#) (GNI), [Responsible Business Alliance](#) (RBA), the [Partnership for LGBTQI+ Equality](#) (PGLE), [Technology Against Trafficking](#) (TAT), [Energy for a Just Transition](#), and [dozens of other collaborative and multi-stakeholder initiatives](#), as well as engagements with organizations such as the [Global Internet Forum to Counter Terrorism](#) (GIFCT).
- **Human Rights Due Diligence:** Engagements with over 300 BSR member companies from many industries (such as finance, technology, energy, extractives, infrastructure, healthcare, retail, and food and agriculture) and including hundreds of human rights assessments and other human rights due diligence engagements based on the UNGPs.
- **Research:** Publications that share best practices and insights from our work, including on [human rights assessment](#), [human rights based approaches to content governance in the social media industry](#), [conflict sensitivity analysis](#), [a human rights roadmap for the finance industry](#), and [technology and human rights during times of public health emergency](#).

We believe that our experience working directly with companies across sectors provides unique insight into where government has the most important role to play in establishing a policy and regulatory framework that enables business to meet its responsibility to respect human rights and play a full role in helping ensure that human rights are realized in practice.

Our submission is grounded in pillar one of the UNGPs (i.e., "The State Duty to Protect Human Rights"), including protecting against human rights abuses by business enterprises both domestically and internationally (Principles 1 and 2), adoption of effective laws, policies, and guidance for business on human rights (Principle 3), the State-business nexus (Principles 4 – 6), supporting business respect for human rights in conflict affected areas (Principle 7), and ensuring policy coherence across departments, agencies, and state-based institutions (Principle 8), when pursuing business-related policy objectives through treaties and contracts, and when participating in multilateral institutions (Principles 9 and 10).

We welcome the opportunity to discuss this submission further and participate in dialogue about the revised NAP.

# 1. FINANCE, INVESTORS, AND HUMAN RIGHTS

## 1.1. Human Rights and Environmental Due Diligence Rule

Wide-ranging research increasingly documents a positive correlation between corporate attention to environmental, social, and governance (ESG), including human rights issues, and corporate financial performance.<sup>1</sup> A robust understanding of ESG risks, including human rights risks, facing portfolio companies helps investors manage potential financial impact on investment portfolios and avoid potential contribution to unlawful or unsustainable activities.

Corporate and securities law in several jurisdictions increasingly recognizes the importance of ESG factors for investors by mandating disclosure on ESG issues considered to be material for business success, including financial and legal risks associated with ESG performance. In the United States, heightened SEC attention on climate disclosure and human capital are noteworthy steps that may lead to a more robust data set for investors.

Despite these developments, risks to people and planet—whether economic, social, cultural, civil, political, labor, or environmental rights risks—remain widely neglected or underestimated among business and financial actors in the United States, even among those who consider ESG in investment decisions and stewardship.

The ability of institutional investors to meaningfully assess and prioritize how to address human rights risks connected with their investment activities has been starkly challenged by the fact that meaningful corporate human rights and environmental risk management disclosure remains an exception, not the norm. A root cause is the lack of appropriate disclosure requirements in securities regulation as well as limited integration of the UNGPs and the OECD Guidelines for Multinational Enterprises across the myriad reporting frameworks, benchmarks, and other data and research products used by investors to assess companies.

In addition to presenting material risks for investors, the absence of mandatory human rights and environmental due diligence disclosure requirements undermines the ability of institutional investors to respect human rights in line with the UNGPs and align their activities with the OECD's guidance for investors.<sup>2</sup>

In 2020, the investment community explicitly recognized that disclosure of human rights due diligence is materially good for business, investors, and the economy; is essential in creating uniformity and efficiency as an increasing number of governments are already taking this step; and a necessary component for investors to fulfil their own responsibility to respect human rights in line with the UNGPs.<sup>3</sup>

Echoing this view, the European Union has recognized, through the adoption of the Sustainable Finance Disclosure Regulation, that understanding the impacts on people and planet of portfolio companies is essential for the ability of investors to understand and account for the material impacts connected to their investments.

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<sup>1</sup> Money, Millennials and Human Rights — Sustaining “Sustainable Investing”, June 2018:

[https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working\\_papers/CRI69\\_FINAL.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working_papers/CRI69_FINAL.pdf)

<sup>2</sup> Responsible business conduct for institutional investors, OECD, 2017: <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

<sup>3</sup> Statement on [The Investor Case for Mandatory Human Rights Due Diligence](#), Investor Alliance for Human Rights. This statement follows a statement made by investors representing over US\$5 trillion in assets under management calling on the SEC to mandate corporate disclosure of ESG, including human rights information.

<https://www.sec.gov/rules/petitions/2018/petn4-730.pdf>

**BSR recommends that the SEC adopt a human rights and environmental due diligence disclosure standard that extends to the full value chain of business impacts, including those extraterritorial impacts connected to corporate supply chains and end use of products and services. BSR further recommends that this disclosure standard be interoperable with other emerging standards, such as the EU Corporate Sustainability Reporting Directive and the International Sustainability Standards Board standards.**

## 1.2. Clarify that Managing Human Rights Risks is Consistent with Fiduciary Duties

A 2020 consultation led by the UN found that human rights considerations are often seen as secondary to or inconsistent with investors' fiduciary duty. While there are exceptions and there is regulatory movement to address this in the United Kingdom and the EU, there are important barriers in the United States stemming from the potential misinterpretation of fiduciary duties as limiting the ability of investors to devote assets and efforts to anything that does not increase the financial standing of pension plan beneficiaries or customers in the short-term.

Under ERISA, a fiduciary cannot devote assets (including "effort") to anything that does not increase the financial standing of pension plan beneficiaries or customers. The US Supreme Court says benefits must be pecuniary, and mainstream investors have used ERISA as their guide since 1974.<sup>4</sup>

Over the past decade, a wide range of research has documented the correlation between human rights risks, corporate financial performance, and risks to investment. A UN Working Group on Business and Human Rights report taking stock of investor uptake of the UNGPs highlighted several initiatives that have emerged to help further clarify the relationship between severe risks to people in investment portfolios and material costs for financial returns. It points to the Sustainability Accounting Standards Board (SASB) Materiality Map, which identified several human rights risks that are deemed to likely affect the financial condition or operating performance of business. SASB is now backed by investors with more than US\$41 trillion asset under management (AUM) and several BSR member companies. Institutional investors with universal ownership are increasingly demanding that investee companies disclose against the SASB standards, and shareholder resolutions that have requested material disclosures compliant with SASB standards have fared especially well.<sup>5</sup>

The financial costs of a failure to respect human rights have been well documented, including in the United States. First Peoples Worldwide found that the material costs for investors where companies fail to act with due diligence to respect the rights of Indigenous Peoples in the Dakota Access Pipeline project incurred no less than US\$7.5 billion in costs.<sup>6</sup> Also, a 2020 study found that firms associated with the assassination of civil society activists involved in mining activity have large, negative abnormal returns following the event.<sup>7</sup>

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<sup>4</sup> SUMMARY NOTE UNGPs 10+ and UN B-Tech dialogue on investment and human rights Thursday, October 29, 2020: <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/B-Tech/Summary-note-UNGPs10-dialogue.pdf>

<sup>5</sup> Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights, June 2021: <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>

<sup>6</sup> *Social Cost and Material Loss: The Dakota Access Pipeline*, First Peoples Worldwide, November 2018: [https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social\\_cost\\_and\\_material\\_loss\\_0.pdf](https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf)

<sup>7</sup> The Value of Names - Civil Society, Information, and Governing Multinationals on the Global Periphery: <https://osf.io/preprints/socarxiv/aw7sq>

Leading investors recognize that responsible and rights-respecting stewardship is part of fiduciary duties. In May 2020, investors representing over \$5 trillion in assets under management stated that ‘where there are the most severe risks to human rights, there are material risks to business.’<sup>8</sup>

States have a key role to play in advancing corporate respect for human rights, including by taking all appropriate steps to prevent, investigate, punish, and redress abuses connected to corporate and investment value chains through effective policies, legislation, regulations, and adjudication.

**BSR recommends that the US National Action Plan commit to providing clear guidance on how to integrate human rights into investment practices, including on how this relates to fiduciary duties and to broader sustainability and ESG investing. In particular, the Department of Labor, Employee Benefits Security Administration (EBSA) should provide clear guidance for ERISA fiduciaries regarding their duty of care to provide reasonable mitigation of long-term systemic risks through investment, engagement, and proxy voting.**

## 2. TECHNOLOGY AND HUMAN RIGHTS

Over the past decade the relevance of technology for the realization, enjoyment, and fulfillment of human rights has become abundantly clear. Digital technologies play an essential role by enabling freedom of expression, assembly, and association; supporting increased economic participation by those who lack access to markets and opportunities; and increasing the realization of rights such as access to culture and enjoyment of the benefits of scientific progress and its applications. Digital technologies such as end-to-end encryption, private messaging, and social media platforms have become essential tools for human rights defenders.

At the same time the risks and challenges associated with technology and human rights have also become abundantly clear. Social media platforms have been associated with the spread of hate speech, incitement to violence, and violent extremism; advances in artificial intelligence, machine learning, and biometrics have brought new risks to non-discrimination, access to essential public services, and the rule of law; the use of data in pursuit of social, environmental, or economic goals (such as civic participation, smart cities, and advertising) have also multiplied risks to security, privacy, and human autonomy.

These trends bring three main implications for the US NAP: first, that US technology companies are playing a dominant role, and that therefore actions by the US Government have global significance; second, that we need a “smart mix” of regulatory and voluntary measures that both support the role of technology in both the realization of human rights and appropriately address risks to human rights; and third, that the global reach of technology requires responses in both domestic and foreign policy. BSR has been extensively involved in human rights due diligence at the world’s largest technology companies for over fifteen years, and our submission draws upon the insights gained from this experience.<sup>9</sup>

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<sup>8</sup> The Investor Case for Mandatory Human Rights Due Diligence, May 2020: [https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL\\_2.pdf](https://investorsforhumanrights.org/sites/default/files/attachments/2020-04/The%20Investor%20Case%20for%20mHRDD%20-%20FINAL_2.pdf)

<sup>9</sup> See also BSR Submission to OHCHR, March 2022: [https://www.bsr.org/reports/BSR\\_OHCHR\\_Submission.pdf](https://www.bsr.org/reports/BSR_OHCHR_Submission.pdf)

## 2.1. A Human Rights Based Approach to Technology-Related Domestic and Foreign Policy

BSR welcomes US Government participation in the [Global Internet Forum to Counter Terrorism](#) (GIFCT), a multistakeholder effort to prevent terrorists and violent extremists from exploiting digital platforms. In 2021 BSR published a [Human Rights Impact Assessment \(HRIA\) of GIFCT](#), including 47 recommendations for how GIFCT can embed human rights into its strategy, governance, and operations and address risks and opportunities for rights such as freedom of expression, privacy, and security. BSR concluded that GIFCT would benefit from a clearer description of the interdependent relationship between human rights and the GIFCT mission, and that human rights should be considered a deeply embedded, complementary, and reinforcing objective in counterterrorism and violent extremism efforts. BSR recommends that the US Government use the insights of this HRIA in its technology-related counterterrorism and violent extremism efforts, both domestically and internationally, paying special attention to the role of states in ensuring only legitimate, necessary, proportionate, and non-discriminatory restrictions to content.

BSR has engaged significantly with social media platforms on their human rights approaches and published several human rights assessments, including of the [Meta Oversight Board](#), [end-to-end encryption](#), and [operations in high-risk markets](#). This experience has provided direct insight into the opportunities and risks of social media regulation.

Many of the most significant public policy proposals on content governance don't regulate content itself but do envision a very important role for companies in establishing higher quality policies and processes for content governance—for example, the UK Online Harms White Paper proposes a statutory duty of care on companies to take responsibility for harm associated with content on their platforms, while the EU Digital Services Act proposes new responsibilities for online platforms to prevent misuse. We believe that it is important for regulatory obligations placed on social media companies (such as those relating to impact assessment, measurement, and appeals) be defined in a manner consistent with the UNGPs so that consistent and rights-respecting approaches can be taken across international jurisdictions. We caution against well intentioned measures that risk adverse impacts on freedom of expression and privacy (such as time-based content removal requirements that over-incentivize content removals and obligations that undermine end-to-end encryption) and have set out what [a human rights-based approach to content governance](#) means in practice. Importantly for the US, we believe that any revisions to US Section 230 should retain the original intent of Section 230 (i.e., incentivizing content moderation while protecting social media platforms from getting sued for content they host) while introducing new process-based responsibilities related to content moderation that are consistent with the UNGPs.<sup>10</sup>

We note that public policy proposals for social media regulation relate to specific jurisdictions, whereas the internet is global. Human rights-based approaches offer the promise of consistent approaches across international borders, including jurisdictions with no regulations whatsoever and jurisdictions where laws and regulations conflict with international rights standards. In this context, we welcome US leadership on the [Declaration of the Future of the Internet](#), note that US technology policy should be developed consistent with the declaration, and look forward to actions that make good on this commitment.

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<sup>10</sup> For example, see NYU Stern Center for Business and Human Rights, "Regulating Social Media", September 2020: <https://bhr.stern.nyu.edu/section-230-report-release-page>

**BSR recommends that the US National Action Plan commit to a human rights-based approach to domestic and foreign technology policy consistent with the UNGPs, especially as it relates to counterterrorism and violent extremism online, end-to-end encryption, and content governance.**

## 2.2 Privacy Protection

We are experiencing an age characterized by massive growth in the collection, processing, use, and sharing of data, as well as of sensitive communications taking place online. Whether it is social media, advertising, telemedicine, working remotely, or communicating with friends and families spread around the world, more personal data is at stake, and more of our private communications than ever before take place over platforms, apps, and services.

Privacy is an enabling human right, essential for the effective realization of other human rights, such as physical safety, freedom of opinion and expression, access to information, freedom of belief and religion, and freedom of association and assembly. For this reason, the protection of privacy in a business context should form an essential element of a business and human rights strategy.

First, BSR emphasizes the importance of the US Government not taking any actions that undermine, prevent, or interfere with end-to-end encryption, and proactively advocate in favor of end-to-end encryption and against government hacking globally. BSR notes that today's encryption debate pits two opposing groups against each other, with privacy on one side and security on the other, and believes that a more nuanced and holistic approach—one that recognizes all human rights impacted by end-to-end encryption—should be adopted. Our recent [HRIA of Meta's Expansion of End-to-End Encryption](#) provides an example of this approach.

Second, BSR emphasizes the global nature of the internet and communications, and recommends the adoption of a meaningful federal consumer privacy law that enables continues innovation by US technology companies within important privacy constraints.

**BSR recommends that the UN National Action Plan commit to the introduction of a meaningful federal consumer privacy law and against policy measures that undermine end-to-end encryption.**

## **3. CLIMATE CHANGE AND HUMAN RIGHTS**

Human rights and climate change are inextricably linked.<sup>11</sup> The impacts of rising global temperatures—natural disasters, the proliferation of vector-borne diseases, climate migration, famine, and drought—negatively impact many human rights, such as rights to shelter, natural resources, mobility, health, employment, and livelihoods.

Whether caused by physical climate impacts (e.g., extreme weather events, flooding, heat stress, the spread of disease) or climate solutions themselves (e.g., communities excluded or left behind as companies install new infrastructure as part of their transition to a net-zero economy), climate change has disproportionate impacts on poor and marginalized communities, and it exacerbates the underlying systemic inequities that these communities already face.

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<sup>11</sup> See BSR, Climate Change: Building Resilience While Protecting Human Rights, September 2021: <https://www.bsr.org/en/our-insights/report-view/climate-change-building-resilience-while-protecting-human-rights>



As climate change magnifies inequalities and vulnerabilities, protection of human rights becomes even more urgent: where human rights protections are weak, individuals and communities are less able to adapt and build resilience to climate impacts.

As the connection between climate change and adverse human rights impacts becomes more widely acknowledged, companies are increasingly being held accountable for failing to meet their human rights responsibilities. The responsibility to respect human rights pertains to every company, regardless of industry, size, or geographic location. However, the human rights impacts they will need to address will vary from industry to industry and company to company. Understanding how each company or industry is connected to human rights harms is essential to developing sustainable, rights-respecting transition plans. See for example BSR's [briefing on climate change and human rights](#).

### 3.1 Physical Climate Impacts on Human Rights

Physical climate impacts include “acute” shorter-term risks (such as extreme weather events, flooding, and drought) and “chronic” longer-term risks (such as changes in agricultural patterns and the spread of vector-borne diseases). Both types of physical impacts affect business operations and value chains—such as damage to infrastructure, disruption of logistics and communications, and worker productivity and attendance. They also can affect the communities in which businesses operate, including damage to homes, schools, agriculture, and food sources, exacerbating vulnerabilities communities may already face. While there are similarities across different countries, underlying societal inequalities are often contextual and manifest differently across geographies.

**BSR recommends that climate change be placed at the center of the US National Action Plan, including both risks related to physical climate impacts and risks arising from the transition to a low-carbon economy. This should include a requirement that companies disclose the social and human rights impacts of physical and transitional climate change risks.**

### 3.2 Transitional Climate Impacts on Human Rights

To hold global warming to the agreed-upon warming level of 1.5 degrees Celsius and minimize climate impacts, the world must transition to a net zero greenhouse gas (GHG) emissions economy by 2050. The systemic change necessary will require all stakeholders—governments and businesses alike—to contribute to a just transition. This transition has the potential to create new jobs and support economic opportunities; however, failure to consider human rights impacts of the transition could also add to significant job displacement and new migration patterns that bring novel human rights challenges.

Furthermore, the transition to renewable energy is already leading to an increase in demand for minerals, used to power everything from solar panels to ion-batteries and electric vehicles. The extraction and sourcing of many of these minerals are associated with physical violence and human rights abuses as well as threats to human rights defenders, both overseas and within the United States. Sighting of renewable energy projects (e.g., large scale solar or wind, including offshore wind) can also impact human rights, in particular the social and cultural rights of Indigenous People, including Native Americans. Managing the human rights impacts as we transition away from using fossil fuels to low- or zero- emissions sources, such as renewable energy, will be critical as there is a risk that some workers and communities could be left behind or have their rights undermined.

**BSR recommends that the UN National Action Plan commit to upholding Free Prior and Informed Consent (FPIC) in projects and investments that impact the rights of Indigenous People, both domestically and abroad. BSR further recommends that the UN National Action Plan develop guidance for businesses to understand the differentiated responsibilities of the US government’s trust obligation to federally recognized Native American Tribes, and corporate responsibilities to follow FPIC.**

## **4. CONFLICT AFFECTED AREAS**

US companies in conflict-affected and high-risk contexts face heightened risks of involvement in serious human rights violations. This can lead to severe harm—including loss of life, liberty, and livelihoods—to community members, employees, suppliers, contractors, and customers, as well as reputational damage, operational interruptions, legal liability, and financial penalties for the business.

To prevent and mitigate human rights risks in high-risk contexts, companies should conduct “heightened” human rights due diligence, which means ongoing stakeholder engagement, forward-looking trend analysis, proactive mitigation measures, and localized decision-making. BSR’s recommendations for companies operating in conflict-affected and high-risk contexts are provided in our [Business in Conflict-Affected and High-Risk Contexts](#) brief.<sup>17</sup>

BSR has increasingly provided advice to companies operating in conflict-affected and high-risk contexts, including countries and regions such as Myanmar, Russia, Ethiopia, and the Middle East. A common conclusion during these engagements is the opportunity for more strategic engagement with the US Government, consistent with Principle 7 of the UNGPs, which sets out the role of “home” governments supporting business respect for human rights in conflict affected areas.

**BSR recommends that supporting business respect for human rights in conflict affected and high-risk areas be emphasized in the US National Action Plan. This includes considering human rights frameworks and impacts when considering divestment or exit from a conflict affected or high-risk area.**

## **5. UN BINDING TREATY ON BUSINESS AND HUMAN RIGHTS**

In 2014, the UN Human Rights Council took first steps for the creation of an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. This is an important global development and indicates growing recognition of the importance of State regulatory efforts to ensure business activities uphold the fundamental welfare and dignity of all people.

A “smart mix” of mandatory and voluntary measures should be understood to include global measures that close global governance gaps, thereby also helping to ensure a level playing field for those companies taking steps to align their business practices with the UNGPs and the OECD. The wave of mandatory human rights and environmental due diligence across Europe indicates that mandatory measures grounded on the UNGPs and OECD frameworks are a pressing priority. Business and investors have themselves publicly supported the need for effective EU corporate accountability legislation, stressing the need for full alignment with the UNGPs.<sup>12</sup>

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<sup>12</sup> Making EU legislation on mandatory human rights and environmental due diligence effective, February 2022: [https://media.business-humanrights.org/media/documents/EU\\_Business\\_Statement\\_February2022.pdf](https://media.business-humanrights.org/media/documents/EU_Business_Statement_February2022.pdf)



As of August 2021, the Treaty is in its Third Revised Draft. After multiple rounds of negotiation, we are at key juncture for the future of business and human rights and responsible business conduct.

**In line with Principle 10 of the UNGPs, BSR recommends that the US National Action Plan commit to participating in the ongoing binding treaty negotiations taking place among UN Member States. The US State Department should ensure that US participation is proactive, constructive, and inclusive to ensure alignment with the business responsibility to respect human rights.**

## ABOUT BSR

BSR™ is an organization of sustainable business experts that works with its global network of the world's leading companies to build a just and sustainable world. With offices in Asia, Europe, and North America, BSR™ provides insight, advice, and collaborative initiatives to help you see a changing world more clearly, create long-term business value, and scale impact.

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