



SUBMISSION ON THE REVISION PROCESS FOR THE U.S. NATIONAL ACTION PLAN ON RESPONSIBLE BUSINESS CONDUCT

October 7, 2021

The undersigned organizations, who are committed to advancing corporate accountability and business respect for human rights, welcome the Biden Administration’s decision to update and revitalize the U.S. National Action Plan on Responsible Business Conduct (U.S. NAP). While this decision is a step in the right direction, the legitimacy and effectiveness of the updated NAP will hinge on the process through which it is developed and implemented.

Although there were positive aspects of the development process for the 2016 NAP – including the consultative manner in which stakeholder input and recommendations were gathered - there were also weaknesses that the Biden administration should learn from and improve on this time around. Ultimately, the content of the 2016 NAP left much to be desired, focusing primarily on past or existing laws and policies with very few bold new actions to address the challenges posed by business-related impacts on human rights, among other deficiencies.¹ In short, taking a “light touch” approach to revising the NAP is not sufficient; it needs an overhaul.

Given the opportunity the NAP revision presents to advance responsible business conduct, we urge you to conduct a robust, participatory, inclusive, and transparent update process that provides for meaningful engagement with rights-holders and other stakeholders during all stages of the NAP’s development. In particular, we strongly encourage the Biden administration to take up the concrete process-related recommendations laid out below, which are critical to an effective and rights-compatible approach.²

- 1. UNDERTAKE A NATIONAL BASELINE ASSESSMENT AT THE OUTSET OF THE NAP UPDATE PROCESS.** The drafting process for the 2016 NAP was undermined by the fact that the U.S. government did not conduct a full national baseline assessment (NBA).³ By failing to conduct an NBA, the U.S. government missed the opportunity to map the State’s unique context in relation to business and human rights and pinpoint the governance gaps that should be addressed in the content of the NAP in order to

increase protection for human rights in the context of corporate activities. We urge you to take this opportunity to address this key gap by undertaking an NBA at the outset of the NAP update process.

- 2. CONDUCT AND PUBLISH A PROGRESS REVIEW FOCUSED ON IMPLEMENTATION OF THE COMMITMENTS IN THE 2016 NAP.** In addition to undertaking an NBA, the Biden administration should conduct and publish a progress review detailing the implementation status for each individual commitment included in the 2016 NAP. During the review process the State's performance in meeting targets and benchmarks established in the 2016 NAP should be assessed and reported on.
- 3. ALLOCATE APPROPRIATE FINANCIAL RESOURCES TO THE NAP UPDATE PROCESS.** The Biden administration should allocate adequate human and financial resources to those responsible for developing the revised NAP throughout the NAP lifecycle, including the development and completion of an NBA, as well as monitoring and review of the NAP's implementation.
- 4. ENSURE MEANINGFUL PARTICIPATION BY ALL RELEVANT STAKEHOLDERS IN THE NAP UPDATE PROCESS.** Failure to conduct sufficient stakeholder engagement throughout the revision process not only threatens to undermine the NAP's legitimacy, but it also cuts out a key source of information about the challenges and potentially effective solutions related to business and human rights. U.S. businesses have an outsized impact on people's lives and human rights around the world, so ensuring participation from impacted communities at home and abroad would be key to understanding gaps in governance. It is imperative that the administration ensures that all stakeholders can meaningfully participate on an equal basis during both the process of creating the updated NAP and its implementation. This stakeholder engagement could include, for instance, written submissions, online consultations, or regional dialogues like those conducted during the 2016 NAP process.
 - Conduct a stakeholder mapping: Many national stakeholders may be well-known to relevant government departments; however, others may not be. To address this, the administration should consider undertaking a stakeholder mapping at an early stage in the NAP update process.
 - Facilitate participation by marginalized or at-risk groups: To be rights-compatible, a NAP process needs to be open and inclusive for all relevant stakeholders. Rights-holders from affected groups and communities in the U.S. and around the world, especially those from vulnerable or marginalized groups, often face challenges in participating fully and effectively in NAPs processes. Considering this, the Biden administration should take special measures to engage with and facilitate participation by marginalized or at-risk individuals and groups throughout the NAP process. A particular effort should be made to include gender diverse feedback, including from women rights-holders.
 - Provide capacity building for State actors and relevant external stakeholders where needed: The UNGPs, and business and human rights issues more widely, will be new to some stakeholders, both inside and outside of the government. Where this is the case, stakeholders may require information or capacity-building if they are to participate effectively in the formulation of the new NAP.

- 5. ENSURE TRANSPARENCY AT ALL STAGES OF THE NAP REVISION PROCESS.** Ensuring transparency at all stages of the NAP update process – including the launch of the process, consultation, drafting period, and implementation – is critical to the legitimacy of the NAP. Not only is access to information necessary for ensuring effective stakeholder participation in the NAP update process, but it also provides stakeholders with important visibility into the government’s decision-making processes around its content.
- Devise and publish terms of reference and a timeline for the NAP update process. To effectively participate in the update process, stakeholders need to be adequately informed, with due notice, of key milestones and opportunities to provide input. Accordingly, the administration should publish and regularly update information about the plan and process for developing the revised NAP, including terms of reference, objectives, a work plan, and a timeline. Importantly, the administration should go beyond the level of transparency provided during the 2016 NAP development process by publishing information not only about the consultation stage, but also about the timeline and procedure of the *drafting* stage.
 - Publish key documents relevant to the NAP update process. The administration should also publish key documents relevant to the NAP update process, including, for example, the NBA, minutes of meetings, summaries of consultations, submissions from stakeholders, any drafts of the revised NAP, and reviews of implementation. To allow stakeholders to discern the extent to which the government took stakeholder recommendations into consideration, the administration should make sure that this public disclosure includes information or summary documents regarding the government’s deliberation over the content of the NAP. When publishing these documents, it is important to take care not to divulge sensitive information that could put stakeholders involved in the process at risk.
 - Ensure that the information published is adequate and accessible enough to ensure meaningful participation. The mere availability of information is not enough. The administration also needs to ensure that the information published is accessible and available in languages and formats that suit the needs and literacy levels of rights-holders and other stakeholders.
- 6. PUBLISH AND CONSULT ON A DRAFT OF THE REVISED NAP.** During the 2016 NAP development process the U.S. government did not consult around or release a draft NAP, missing a key opportunity to gather stakeholder opinions during a critical phase of the drafting process. We strongly recommend that the administration publish and consult on a draft version of the updated NAP. This is essential as it would allow stakeholders to provide additional input and raise concerns as to the contents of the plan, and to seek clarifications on how stakeholder input was incorporated or is reflected in the draft text. Conducting draft consultations would also give the administration additional opportunities to reflect upon stakeholder input and adopt necessary changes before the final version is released.

While we applaud the administration’s decision to revise the U.S. NAP on Responsible Business Conduct, we urge you to do so through a process that is robust, participatory, inclusive, and transparent. This is essential to the legitimacy and effectiveness of the updated NAP.

Sincerely,

International Corporate Accountability Roundtable (ICAR)

Amnesty International USA

Nomogaia

Accountability Counsel

Al Haq

Oxfam America

Corporate Accountability Lab

Investor Alliance for Human Rights

Ranking Digital Rights

¹ For a full assessment and evaluation of the 2016 NAP process and content, see ICAR’s ASSESSMENT OF THE UNITED STATES NATIONAL ACTION PLAN (NAP) ON RESPONSIBLE BUSINESS CONDUCT (March 2017), <https://icar.ngo/wp-content/uploads/2021/04/USNAPAssessmentFINAL.pdf>.

² These recommendations were drawn from ICAR & DIHR’s 2014 report NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS: A TOOLKIT FOR THE DEVELOPMENT, IMPLEMENTATION, AND REVIEW OF STATE COMMITMENTS TO BUSINESS AND HUMAN RIGHTS FRAMEWORKS (June 2014), <https://icar.ngo/wp-content/uploads/2021/04/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf> and its 2017 update NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS TOOLKIT: 2017 EDITION, <https://icar.ngo/wp-content/uploads/2021/04/FINALNAPsToolkitUpdate2017.pdf>; See also UN Working Group on Business and Human Rights, GUIDANCE ON NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS (Nov. 2016), https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

³ A National Baseline Assessment on Business and Human Rights “has the primary objective of assessing the current level of implementation of the UNGPs in a given State. It brings together an analysis of the legal and policy gaps in UNGP implementation with an overview of the adverse human rights impacts of business to identify the most salient human rights issues in a given context. In this way, it serves to inform the formulation and prioritization of actions in a NAP.” ICAR & DIHR, NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS TOOLKIT: 2017 EDITION 25 (2017), <https://icar.ngo/wp-content/uploads/2021/04/FINALNAPsToolkitUpdate2017.pdf>. For additional information and guidance on how to undertake an NBA see pages 25 – 32 of the 2017 toolkit.