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The OECD Publishes Updated Guidelines for Multinational Enterprises on Responsible Business Conduct for the First Time in Over a Decade

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In June, the Organisation for Economic Co-operation and Development updated the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. The Guidelines are the leading international standard on responsible business conduct. In addition to being referenced as a guiding principle for many human rights compliance policies and programs, they are explicitly incorporated into human rights legislation and related guidance. The 2023 edition marks the seventh update to the Guidelines and the first since 2011. In this Alert, we provide an overview of the updates to the Guidelines.

About the Guidelines

The Guidelines are a set of recommendations for multinational business enterprises. They were developed by governments to encourage responsible business practices. The Guidelines were first adopted in 1976 and have been periodically updated in the years since. To date, 51 countries have endorsed the Guidelines, including the United States and the majority of the European Union member states.

The Guidelines set out voluntary principles for responsible business practices by enterprises. The Guidelines cover nine topic areas, organized by chapter, consisting of the following: (1) disclosure; (2) human rights; (3) employment and industrial relations; (4) the environment; (5) bribery and other forms of corruption; (6) consumer interests; (7) science, technology and innovation; (8) competition; and (9) taxation.

The Guidelines are aligned with other international standards. These include the UN Guiding Principles on Business and Human Rights and the ILO Tripartite Declaration.

Although compliance with the Guidelines is voluntary, legislation recently adopted or proposed in several jurisdictions expressly references or incorporates the Guidelines, or the Guidelines are referenced in guidance under that legislation. For example:

- The Norwegian Transparency Act (Alert) and proposed Belgian and Dutch (Alert) mandatory human rights due diligence legislation indicate that subject enterprises are required to carry out due diligence in accordance with the Guidelines.
- The proposed EU Corporate Sustainability Due Diligence Directive (Alert) is generally aligned with the Guidelines, although the contours of the Directive are being negotiated.
- Guidance under the German Due Diligence in the Supply Chain Act (Alerts here and here) and the U.S. Uyghur Forced Labor Prevention Act (Alert) reference the Guidelines for operationalizing due diligence.
- Materiality assessments under the EU Corporate Sustainability Reporting Directive (Alert) are informed by the due diligence process defined in the Guidelines.
- “Minimum safeguards” for purposes of the EU Taxonomy Regulation contemplate procedures aligned with the Guidelines.
- Under the EU Sustainable Finance Disclosure Regulation, Article 8 funds that make sustainable investments and Article 9 funds are required to provide disclosures indicating how investments align with the Guidelines and whether investments violate the Guidelines.

An Overview of the 2023 Updates

The most recent updates to the Guidelines were released in June after their adoption at the 2023 OECD Ministerial Council Meeting. The OECD Working Party on Responsible Business Conduct, a subcommittee of the OECD Investment Committee, is responsible for promoting the Guidelines and ensuring that they remain relevant over time. In developing the updates, the WPRBC focused on the following: (1) ensuring coherence with OECD priorities and standards; (2) enhancing the OECD's leadership on responsible business conduct; (3) building on prior achievements and strengths; and (4) ensuring focus and proportionality. The revision process involved two public consultations that were open to interested stakeholders in all countries.

At a high level, the revisions do not change the broad topic categories covered by the Guidelines but rather seek to evolve the recommendations to better reflect the risks facing enterprises. The key updates for business enterprises include the following:

- Recommendations for aligning the Guidelines with internationally agreed upon goals for climate change and biodiversity;
- Due diligence expectations relating to the development, financing, sale, licensing, trade and use of technology, including gathering and using data;
- Expectations for conducting due diligence on the impacts and business relationships related to the use of an enterprise's products and services;
- Protections for at-risk persons and groups, including those who raise concerns regarding business conduct;
- Updated recommendations on the disclosure of responsible business conduct information;
- Expanded due diligence recommendations to all forms of corruption;
- Recommendations to ensure that lobbying activities are consistent with the Guidelines; and
- Strengthened procedures to ensure the visibility, effectiveness and functional equivalence of National Contact Points for Responsible Business Conduct.

A Deeper Dive on the 2023 Updates

Selected updates to the Guidelines are described in more detail below.

General Guidelines

Chapter II of the Guidelines contains the underlying principles that create the foundation of the Guidelines. The primary message of this chapter is that an enterprise should conduct risk-based due diligence to assess and address adverse impacts associated with its operations, products and services.

The updated Guidelines recommend that enterprises carry out risk-based due diligence in line with the OECD's 2018 Due Diligence Guidance for Responsible Business Conduct. Risk-based due diligence should take into account known or reasonably foreseeable circumstances related to the use of the product or service in accordance with its intended purpose, or under conditions of reasonably foreseeable improper use or misuse, which may give rise to adverse impacts.

"Business relationships" under the Guidelines include business partners, sub-contractors, franchisees, investee companies, clients and joint venture partners, and any other non-state or state entities that are directly linked to the enterprise's operations, products or services. The updated Guidelines add to the definition of business relationships "entities in the supply chain which supply products or services that contribute to the enterprise's own operations, products or services or which receive, license, buy or use products or services from the enterprise." Consistent with the foregoing, the updates further clarify that business relationships extend throughout an enterprise's supply chain beyond contractual or "first-tier" relationships. Generally, relationships with individual consumers are not considered business relationships, although, as noted in the Guidelines, an enterprise can contribute to adverse impacts caused by individuals.

The updated Guidelines state that an enterprise should not only seek to prevent or mitigate adverse impacts directly caused by its operations, products or services but also those adverse impacts linked to its operations, products or services through a business relationship.

The updated Guidelines also add in Chapter II that enterprises should ensure transparency and integrity in lobbying activities. This has become a bigger focus of stakeholders in many jurisdictions over the last decade, especially in the United States. In addition, the update further clarifies that lobbying activities should be consistent with commitments and goals on matters covered by the Guidelines, including by taking into account the OECD Recommendation on Principles for Transparency and Integrity in Lobbying.

Disclosure

Disclosure of responsible business conduct and other material information is covered in Chapter III of the Guidelines.

The updated Guidelines emphasize that disclosures of responsible business conduct information should align with the OECD's six-step due diligence framework. This framework is widely used by enterprises. The six steps, which were not changed by the 2023 Guidelines, are as follows: (1) embed responsible business conduct into policies and management systems; (2) identify and assess adverse impacts in operations, supply chains and business relationships; (3) cease, prevent or mitigate adverse impacts; (4) track implementation and results; (5) communicate how impacts are addressed; and (6) provide for or cooperate in remediation when appropriate.

The updates also indicate that the credibility of an enterprise's reported alignment with the due diligence framework is bolstered by third-party review and assurance. Third-party review and assurance have become more prevalent since the release of the 2011 Guidelines. Assurance also is part of some legal requirements and proposals, especially those relating to climate change disclosure.

The Guidelines recommend that disclosures be limited to material information in order to not place an undue burden on enterprises (this is arguably an area where at least some national legislation goes further than the Guidelines). The updates clarify that information is considered material if its omission or misstatement can reasonably be expected to influence an investor's assessment of an enterprise's value, timing and certainty of an enterprise's future cash flows or an investor's investment or voting decisions. The Guidelines further note that a materiality determination may vary over time, as well as due to the local context, enterprise-specific circumstances and jurisdictional requirements.

Human Rights

Chapter IV of the Guidelines sets forth the business responsibility to respect human rights in accordance with the UN Guiding Principles on Business and Human Rights.

The Guidelines note that human rights are at heightened risk of adverse impacts by enterprises in certain contexts and industries. The updates elaborate on this fact by recommending that enterprises pay specific attention to adverse impacts on individuals who are at particular risk of marginalization and vulnerability, either individually or as members of certain groups or populations, such as human rights defenders and indigenous peoples. Further guidance on the topic can be found in the OECD Due Diligence Guidance for Responsible Business Conduct, the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector and the OECD-FAO Guidance for Responsible Agricultural Supply Chains. Further, the updates note that enterprises should conduct enhanced due diligence in the context of armed conflict or heightened risk of gross abuses, including violations of international humanitarian law.

Environment

Chapter VI of the Guidelines covers the expectation that enterprises conduct due diligence on the adverse environmental impacts associated with their operations, products and services, including in relation to climate change and biodiversity.

The 2011 Guidelines did not reference climate change. In contrast, the updated Guidelines identify climate change as a leading environmental impact that enterprises should address in their due diligence. The Guidelines indicate that enterprises should regularly report against, review and update their greenhouse gas emissions targets to ensure that emissions and impact on carbon sinks are consistent with continually evolving internationally agreed global temperature goals, including as assessed by the Intergovernmental Panel on Climate Change. Specifically, per the updated guidance, enterprises should introduce and implement science-based policies, strategies and transition plans on climate change mitigation and adaptation, including adopting, implementing, monitoring and reporting on mitigation targets that are short, medium and long term. These targets should include both absolute and intensity-based (where relevant) GHG reduction targets and take into account scopes 1, 2 and (to the extent possible based on best available information) 3 GHG emissions. This aspect of the Guidelines is generally aligned with voluntary frameworks and evolving legislation on climate change management and reporting.

In addition, the updated Guidelines indicate that enterprises should prioritize eliminating or reducing the sources of emissions over offsetting, compensation or neutralization measures.

Further, the updated Guidelines add that biodiversity mitigation efforts should be guided by the biodiversity mitigation hierarchy, which recommends first seeking to avoid damage to biodiversity, reducing or minimizing it where avoidance is not possible and using offsets and restoration as a last resort for adverse impacts that cannot be avoided.

Combatting Bribery and Other Forms of Corruption

Chapter VII of the Guidelines provides that enterprises should not engage in any act of bribery or other forms of corruption, as adverse impacts on matters covered by the Guidelines are often enabled by corruption.

Prior versions of the Guidelines set the expectation that enterprises not engage in bribery, including by not offering, promising, giving, requesting, agreeing to or accepting bribes. The 2023 updates expand the scope of corruption covered by this chapter to also include trading in influence, embezzlement and the misuse of sponsorships and charitable donations. Further, the updates clarify that corruption can involve public officials or the employees of entities with which an enterprise has a business relationship.

The updates add that enterprises should implement safeguards against their agents exercising illicit influence and ensure that they comply with professional standards in relations with public officials. If corruption misconduct occurs, the updated Guidelines indicate that enterprises should disclose those instances, along with any remediation efforts.

Previously, the Guidelines had recommended that political contributions by an enterprise be reported to senior management. The 2023 updates go further, indicating that senior management should approve any contributions. The updates further add that an enterprise should not require its workers to support a political candidate or organization.

Science, Technology and Innovation

Chapter IX of the Guidelines recommends that enterprises conduct due diligence on adverse impacts associated with science, technology and innovation. The 2023 updates clarify that the scope of this chapter, including due diligence requirements, covers development, financing, sale, licensing, trade and use of technology, including gathering and using data, as well as scientific research and innovation.

The National Contact Point Proceeding Process

Countries that have endorsed the Guidelines are required to have a National Contact Point for Responsible Business Conduct. NCPs are governmental agencies charged with promoting the Guidelines and handling specific instances of non-compliance with them by means of a non-judicial process. Through this process, an individual or entity can submit a complaint of non-compliance with the Guidelines to an NCP. If the NCP determines that the complaint has merit, it will investigate the alleged misconduct, offer to facilitate mediation between the complainant and the target entity, and issue a set of recommendations to the entity based on its findings. Although the NCP's recommendations are not binding, its findings and recommendations are publicly available, so refusal to cooperate with the process or non-adherence with the recommendations could pose reputational risk and related repercussions to enterprises. To date, NCPs have handled over 600 cases.

Enhancements to the NCP Process

The updated Guidelines revise the name of NCPs to "National Contact Points for Responsible Business Conduct," from "National Contact Points," to better reflect their role.

Of a more substantive nature, the updates emphasize that all NCPs should operate with functional equivalence, or an equivalent degree of effectiveness through adherence to the core criteria of acting in a way that is visible, accessible, transparent, accountable, impartial and equitable, predictable, and compatible with the Guidelines.

The updated Guidelines also include changes intended to strengthen the NCP procedure. The 2023 Guidelines recommend that each of the 51 adhering countries include a dedicated budget for its NCP. The Guidelines also empower the OECD Investment Committee to make recommendations to improve the functioning of NCPs and their effective implementation of the Guidelines. In addition, in the previous version of the Guidelines, peer evaluations of NCP operations were voluntary. They are now mandatory in order to share best practices and promote functional equivalence.

The updates clarify that NCPs should publish case-handling procedures for specific instances. These are required to be consistent with the procedures set forth in the Guidelines. With respect to the handling of specific instances, the updates add an initial step for an NCP to evaluate whether the specific instance concerns NCPs in other jurisdictions and, if so, to coordinate in good faith to choose lead and supporting roles. The 2011 Guidelines stated that in making an initial assessment as to whether the issues raised in a specific instance warranted further investigation, the issues should be material and substantiated. The updates clarify that, by "material," it is intended that an issue should be relevant to the implementation of the Guidelines, and that, by "substantiated," an issue should be supported by sufficient and credible information.

At the conclusion of a specific instance proceeding, the NCP should make recommendations on the implementation of the Guidelines as appropriate. An NCP should follow up on the adoption of its recommendations, if any, and publish a follow-up statement with its findings. In the event that no agreement is reached between the parties or that one of the parties is unwilling to participate in the process, an NCP may, in its discretion, set forth its view in the final statement as to whether the targeted enterprise's conduct adhered to the Guidelines. While in practice, many NCPs already have been following these steps in concluding a specific instance proceeding, the updates are intended to make clear best practices and promote functional equivalence among the NCPs.

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For further information on the practice, click here.

Rachel B. Wilhelm (summer associate) also contributed to this alert.