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PREVIEW ON THE UPDATE OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

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Introduction

The updated text of the OECD Guidelines for Multinational Enterprises (the "Guidelines") was initially approved in April, 2011 by the 42 adhering countries at the meeting of the OECD Investment Committee and was finally adopted by the OECD Council on May 25, 2011 .

Despite that the initial purpose of the update was not to embark on a full scale revision of the Guidelines, the process has resulted in substantial modifications which increase the expectations put on multinational enterprises ("MNEs") with respect to a number of issues that raise concern within the business community. *The update of the Guidelines is a step forward towards greater accountability and transparency of MNEs and will require adhering countries and MNEs to make changes to their policies and practices.*

Although the Guidelines remain voluntary and not legally enforceable recommendations, the adhering countries make a binding commitment to implement them and encourage their use. Keeping in mind that the review and complaint mechanism, which is the most unique feature of the Guidelines, and that procedural provisions set the frame for their implementation, evolution towards a socially and politically imposed/ driven "quasi-regulatory" nature of the Guidelines is especially concerning in a new international landscape where supranational non-governmental and social actors have a

significantly more active, coordinated and influential role.

Purpose of the Update

The purpose of the update is to ensure the continued role of the Guidelines as a leading international instrument for the promotion of responsible business conduct in the rapidly changing environment for international investment and MNEs. The updated text takes into consideration that

- The world economy has witnessed new and more complex patterns of production and consumption;
- Non-OECD countries are attracting a larger share of world investment and MNEs from non-adhering countries have grown in importance; and
- The financial and economic crisis and the loss of confidence in open markets, the need to address climate change, and reaffirmed commitments to development goals have prompted renewed calls from governments, the private sector and social partners for high standards of responsible business conduct.
- The change in the international landscape is clearly reflected in the consultation process of the update and, particularly, in the targeted expert partners and stakeholders called upon by the OECD to participate in the update which includes:

- accredited stakeholders including BIAC, TUAC, OECD Watch, and a substantial number of diverse international NGOs;
- interested non-adhering countries, with priority given to major emerging economies; bilateral consultations have been held with non-adhering G20 governments, including China, India, Indonesia, Saudi Arabia and South Africa;
- international organizations including the ILO, the Office of the UNSRSG, the UN Global Compact, the International Finance Corporation, UNP Finance Initiative and the ISO;
- relevant OECD committees; and
- outside experts and other influential personalities on the Guidelines.

Scope of the Update

1. Commitments by Adhering Governments

The Guidelines provide voluntary principles and standards however, the countries adhering to the Guidelines make a binding commitment to implement them and encourage their use. Adhering countries must set up National Contact Points to further the effectiveness of the Guidelines and to raise awareness of them and their implementation procedures.

2. Human Rights

The new Chapter II of the Guidelines draws upon the United Nations Framework for Business and Human Rights "Protect, Respect and Remedy". Enterprises regardless of their size, sector, operational context, ownership and structure, should respect human rights wherever they operate. The Guidelines recommend that enterprises carry out human rights due

diligence in order to assess actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how these impacts are addressed.

3. Group Corporate Governance

The Guidelines recommend that enterprises apply good corporate governance practice drawn from the OECD Principles of Corporate Governance. The Principles extend to enterprise groups and call on the board of the parent entity to ensure the strategic guidance of the enterprise, the effective monitoring of management and their accountability to the enterprise and to the shareholders, while taking into account the interests of stakeholders. State-owned MNEs are subject to the same recommendations as privately-owned enterprises.

4. Due Diligence General Policies

Given the general application of due diligence to business conduct beyond human rights, the Guidelines have made due diligence one of their general operational principles. Paragraph A.10 recommends that "Enterprises should: Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts [...], and account for how these impacts are addressed. The nature and extent of due diligence, depends on the circumstance of a particular situation".

Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation. Enterprises should "avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur".

Enterprises should also “seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship”.

This recommendation applies to those matters covered by the Guidelines that are related to adverse impacts. It does not apply to matters covered by the chapters on “Science and Technology”, “Competition” and “Taxation”.

5. Supply Chains

The update of the OECD Guidelines is intended to develop and clarify how the Guidelines could apply to supply chains based on two main considerations: (a) the influence of MNEs on the conduct of their business partners by using their business relationships as a lever of influence, and (b) the importance for financial institutions to carry out their fiduciary or other responsibilities with due diligence.

The Guidelines now recommend that enterprises should not only prevent or mitigate an adverse impact directly related to their activities, but they should also:

- (a) seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations or services by a business relationship, including entities in their supply chain as, for example, franchising, licensing and subcontracting relationships; and
- (b) encourage business partners (including suppliers and subcontractors), where practicable, to apply principles of responsible business conduct compatible with the Guidelines.

According to the updated Guidelines if an MNE identifies a risk of contributing

to an adverse impact, then it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible. Leverage should be deemed to exist where the enterprise in question has the ability to effect change in the wrongful practice of its supplier, subcontractor, licensee or franchisee, for example. Enterprises can influence suppliers through, for example, contractual arrangements such as management contracts, pre-qualification requirements for potential suppliers, voting trusts, and license or franchise agreements.

Although the Guidelines recognize that there are practical limitations on the ability of MNEs to effect change in the behavior of their suppliers, the commentaries suggest that appropriate responses from the enterprise may include the continuation of the relationship with a supplier through the course of risk mitigation efforts; temporary suspension of the relationship while pursuing ongoing risk mitigation, or, as a last resort, disengagement with the supplier either after failed attempts of mitigation, or where the enterprise deems mitigation not feasible, or because of the severity of the impact.

6. Labor and Industrial Relations

The Guidelines have been revised to take into account new international instruments related to labor relations and employment practices, including the ILO Tripartite Declaration of Principles concerning MNEs, as revised in 2006.

The new terminology is intended to be consistent with that used in the ILO Tripartite Declaration. The use of the terms “workers employed by the multinational enterprise” and “workers in their employment” is intended to refer to workers who are “in an employment relationship with the multinational enterprise”.

The Guidelines recognize that working arrangements change over time and that enterprises are expected to structure their relationships with workers so as to avoid supporting, encouraging or participating in disguised employment practices. According to the Guidelines commentaries, a disguised employment relationship occurs when an employer treats an individual as other than an employee in a manner that hides his or her legal status.

The Guidelines recommend that MNEs contribute to the effective abolition of child labor and to the elimination of all forms of forced or compulsory labor in the sense of the ILO Tripartite Declaration.

Included within the general employment and industrial relations standards that MNEs should observe are compensation and working time-arrangements. A new recommendation that draws upon the ILO Tripartite Declaration is that MNEs operating in developing countries “where comparable employers may not exist”, should provide the best possible wages, benefits and conditions of work within the framework of government policies “related to the economic position of the enterprise, but should be at least adequate to satisfy the basic needs of the workers and their families”.

7. Anti-Corruption

A totally renewed “Chapter VII. Combating Bribery, Bribe Solicitation and Extortion” has been included to take into consideration: the OECD 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions; the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions; the 2006 Recommendation on Bribery and Officially Supported Export Credits, and the United Nations Convention Against Corruption (“UNCAC”).

The new chapter expands and elaborates on small facilitation payments, the use of agents or other intermediaries, bribe solicitation and extortion, reporting foreign bribery and whistle blower protection and internal controls, ethics and compliance programs or measures for preventing and detecting the bribery of foreign public officials.

8. Environment

The update recommends that enterprises include “resource utilization” within their measurable objective, and make their information to the public and workers on potential environment impacts, not only adequate and timely, but also “measurable and verifiable (where applicable)”.

Enterprises are also recommended to assess and address in their decision-making foreseeable environmental impacts associated with their activities “with a view to avoiding or, when unavoidable, mitigating” such impacts.

Finally, the Guidelines recommend that MNEs also provide accurate information on their products, including, for example, on greenhouse gas emissions, biodiversity, resource efficiency, or other environmental issues.

9. Consumer Interests

A totally renewed Chapter VIII extends the Guidelines beyond health and safety issues to address other consumer concerns such as financial education, supply chain management and sustainability issues.

Enterprises are recommended to provide accurate, verifiable and clear information to consumers in order to allow them to make informed decisions. This information should include information on prices, content, safe use, environmental attributions, maintenance, storage and disposal of goods and services and, where possible, should facilitate the consumer’s ability to compare products.

10. Taxation

A very substantial change is that enterprises should comply with not only the “letter” of the tax laws and regulations of the countries in which they operate, but also with the “spirit” of said laws and regulations. According to the commentary on the update, transactions should not be structured in a way that will produce tax results inconsistent with the underlying economic consequences of the transaction unless there exists specific legislation designed to give that result. As per the update, “complying with the spirit of the law means discerning and following the intention of the legislature”, and “it does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation”.

Tax compliance also entails the co-operation with tax authorities and provision of the information they require to ensure an effective and equitable application of the tax laws. Furthermore, MNE commitments to co-operation, transparency and tax compliance should be reflected in risk-management systems, structures and policies. For example, “corporate boards should proactively develop appropriate tax policy principles, as well as establish internal tax control systems so that the actions of management are consistent with the views of the board with regards to tax risk”.

11. Procedural Guidance

The revised Annex on Procedure recommends that adhering countries set up Natural Contact Points (“NCPs”) to further the effectiveness of the Guidelines by undertaking promotional activities, handling enquiries and contributing to the resolution of issues that arise relating to the implementation

of the Guidelines in specific instances, in a manner that is impartial, predictable and compatible with the principles and standards of the Guidelines.

The Guidelines recommend that at the conclusion of the procedures, the NCP makes the results of the procedures publicly available by issuing (a) a statement when they decide that the issues raised do not merit further consideration, (b) a report when the parties have reached an agreement on the issues raised and (c) a statement when no agreement is reached or when a party is unwilling to participate in the procedures. The NCP should take into account the need to protect sensitive business and other stakeholder information.

12. Adhering Countries

The Guidelines have been adopted by all the OECD Member states and have attracted wide support from non-members: Argentina, Brazil, Egypt, Morocco, Latvia, Lithuania, Peru and Romania have adhered to the Declaration and a number of others have recently requested to adhere (Costa Rica, Colombia, Jordan, Serbia, Tunisia and Ukraine).

Final Considerations

The new text has resulted in substantial amendments which raise the expectations put on businesses as the scope of the Guidelines has been broadened with a new human rights chapter, a new approach to due diligence and supply chains, important changes with respect to employment relations, anti-bribery, consumer interests, environment and taxation, and a clearer and reinforced procedural guidance.

Although the Guidelines provide principles and standards for responsible business

conduct that are not binding, they are the only multilaterally agreed and comprehensive code of responsible business conduct to which adhering governments have committed

to promote. *It is likely that the updated Guidelines will require adhering countries and MNEs to make changes to their policies and practices.*