U.S. Chamber of Commerce

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June 5, 2023

The Honorable Antony J. Blinken
Secretary of State
U.S. Department of State
2430 E St., NW
Washington, DC 20301

Dear Secretary Blinken:

The U.S. Chamber of Commerce ("Chamber") writes to express our deep concerns regarding the recently proposed changes to the OECD Guidelines for Multinational Enterprises ("Proposed Guidelines"). If embraced by the United States as currently drafted, the Proposed Guidelines could conflict with settled U.S. securities and corporate governance laws, impose enormous costs for U.S.-based businesses and investors, undermine principles of free speech, contradict U.S. labor law, and weaken the United States' competitive edge in global markets. U.S. businesses, their suppliers and their shareholders could also become the targets of internationally coordinated campaigns by activists and international organizations seeking to "enforce" the guidelines.

Accordingly, we believe the Proposed Guidelines must be substantially amended and narrowed prior to any final approval. If that is not achievable, then the United States must reject any attempts to coerce U.S. businesses into compliance with the new guidelines.

The Chamber fundamentally believes that businesses historically and presently play an indispensable role, with many other actors, in progressing the human condition in the United States and around the world. However, misguided or ambiguous directives may have the opposite effect and worsen issues of concern by disincentivizing investments from the private sector that are so critical to improving the livelihoods of people across the world. While the objectives sought by the Proposed Guidelines are laudable in the theoretical, the Chamber strongly disagrees with the methods proposed to achieve them.

The Chamber also notes that the June 2022 Ministerial Council Statement called for a "targeted update" to OECD guidelines that would keep these guidelines "fit for purpose."[1] However, the Proposed Guidelines are anything but "targeted" and introduce concepts and requirements that are fundamentally at odds with U.S. law and the principles that have made the U.S. capital markets the most transparent and attractive in the world. The U.S. business community is not alone in recognizing the problems with the Proposed Guidelines and their unintended consequences. Both B7 and Business@OECD voiced their deep misgivings about the dangers of vague language that will open companies to harassment and penetrate the laws and judicial

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[1] 2022 Ministerial Council Statement. June 2022. Available at https://www.oecd.org/mcm/2022-MCM-Statement-EN.pdf

decisions in countries where courts routinely cite OECD and other voluntary recommendations.[2]

As a threshold matter, the Chamber notes that the OECD guidelines are *voluntary* in nature and businesses are not legally obligated to follow them. At the same time, the interests of U.S. businesses and investors must be prioritized by the U.S. government when any new OECD standards are developed.

Our views on specific issues within the Proposed Guidelines are discussed in further detail below.

**The Proposed Guidelines contemplate new and substantial regulatory burdens and will create unintended consequences.**

The Proposed Guidelines state that the "political, economic, environmental, social, physical, and technological environment for international business is undergoing far-reaching and rapid change."[3] It is difficult to argue with this assertion. Left largely unrecognized by the Proposed Guidelines, however, is the extent to which businesses in the United States and other advanced economies have adapted to this far-reaching and rapid change. Over the last twenty years, businesses have been increasingly responsive to the evolving interests of their customers and employees, and to investor demand for greater information regarding sustainability, the environment, executive compensation, and other issues. The failure to recognize this evolution of market practices and the adaption of businesses since the last time the OECD guidelines were updated is a fatal flaw of the Proposed Guidelines.

The Proposed Guidelines in some instances call for unrealistically prescriptive and burdensome standards for businesses. For example, businesses would be expected to undertake "risk-based due diligence" to identify, prevent, and mitigate adverse consequences regarding matters covered by the Proposed Guidelines. The Proposed Guidelines state that companies should follow the OECD Due Diligence Guidance, which would impose a one-size-fits-all framework for issues that may affect different businesses in fundamentally diverse ways. This would be the exact opposite of a "risk-based" approach that would allow companies to calibrate their due diligence based upon how their industry and operations are implicated by specific issues.

At the same time, the Proposed Guidelines are replete with several ill-defined terms that will be open to interpretation by governments, special interest activists, and quasi-governmental entities that will launch campaigns to try to force businesses into compliance with their views. Terms such as "meaningful stakeholder engagement," "sustainable and inclusive economic growth," and "social partners and…civil society organisations" are malleable to differing opinions. A U.S. business that started from nothing decades ago and - through recessions, wars, and pandemics - continues to employ thousands of people in communities across the world, may understandably believe it has engaged in "sustainable and inclusive economic growth." Yet

[2] Joint Letter to the OECD by the B7 on the OECD Guidelines for Multinational Enterprises. March 1, 2023. Available at: https://www.keidanren.or.jp/en/policy/2023/013.html

[3] Proposed Guidelines at 5

that business may still become a target for activist groups that hold a different view of that concept.

Compounding this problem is a recommendation that interpretative authority of the guidelines be further consolidated within the OECD Secretariat's office. This will severely diminish accountability and leave interpretations of the guidelines up to a small group of individuals. At a minimum, the OECD Investment Committee and OECD Working Party on Responsible Business Conduct must retain their existing interpretive authority.

**The Proposed Guidelines deviate significantly from the materiality standard which has effectively guided corporate disclosure in the United States for decades.**

The Proposed Guidelines also include an additional set of disclosure guidelines for multinational businesses that call for businesses to disclose their "actual or potential adverse impacts on people, the environment and society, related due diligence processes…" The Proposed Guidelines state some of this information may be material to investors but go further to call for disclosure to "a broader set of stakeholders, including workers, worker representatives, local communities, and civil society."

"Materiality" is the bedrock of corporate disclosure in the United States, as it determines what companies must disclose. The Supreme Court in 1976 established the materiality standard with the landmark decision TSC Industries, Inc v. Northway.[4] In recognizing the risk that investors could be overburdened by an avalanche of information, the Court established a demanding standard that considers information to be material under the federal securities laws if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[5] This standard was extended to determine if information is material to investment decisions as well.

The Chamber has been a staunch advocate for the standard of materiality the Court formulated and that lower courts have applied over the years. The Chamber's 2017 report on materiality emphasized that the Supreme Court's materiality standard helps shield investors from the harms of information overload and also appropriately tethers federal securities regulation to the SEC's and securities laws' reason for existence.[6] That purpose is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. Traditionally, materiality has centered on information that is important for investors focused on understanding the financial and operating performance of companies as investors attempt to gain wealth and earn income. In other words, investment returns – as compared to other interests that, even when worthwhile, fall outside the SEC's remit – are the well-established touchstone of materiality. Bounding the meaning of materiality with reference to the SEC's mission keeps the SEC and the federal securities laws from being politicized, injects regulatory

[4] 426 U.S. 438 (1976)
[5] *Id.* at 448-49
[6] U.S. Chamber of Commerce Center for Capital Markets Competitiveness. "Essential Information: Modernizing our Corporate Disclosure System." Winter 2017. Available at: http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/U.S.-Chamber-Essential-Information_Materiality-Report-W_FINAL.pdf?x48633

certainty and predictability into the U.S. capital markets, avoids placing the SEC in the difficult position of regulating outside its expertise, and protects investors.

In response to increased interest surrounding sustainability, environmental, and other matters, many companies also publish annual corporate social responsibility reports (CSR) that discuss their approach to various issues. Recent research suggests that over 90% of S&P 500 companies now publish some type of annual CSR report.[7] It is important to note, however, that these reports are published on a *voluntary* basis and include tailored information that a company believes certain individuals or groups may have an interest in. Seeking to standardize and mandate the disclosure of information that is not material – as the Proposed Guidelines suggest – is a costly exercise that would likely harm shareholders of multinational businesses and provide little if any benefit to the "stakeholders" discussed in the Proposed Guidelines.

**Discriminatory and Extrajudicial Enforcement**

The expansion of de-facto duties on businesses the guidelines create should be complemented by raised barriers against frivolous and politically motivated unsubstantiated grievances with regard to alleged violations. While the National Contact Point (NCP) managed by the State Department is a highly reliable body that is able to process complex issues with integrity and professionalism the same cannot be expected in other jurisdictions that may adopt the Guidelines, especially as they will consider actions against U.S.-based multinationals. NCPs are conducting what amounts to an extra-judicial process that in many jurisdictions is non-transparent. At the very least, NCPs should be instructed to allow for balancing measures such as counter-grievances and be authorized to issue decisions against attempts to abuse the Guidelines themselves. Furthermore, it should be made clear to the National contact points that their decisions are not to be used by actual judicial bodies in order to prevent a chilling effect on enterprises' participation in NCP specific-instance procedures.

**The Proposed Guidelines undermine principles of free speech.**

A top focus of the Proposed Guidelines relates to efforts by businesses to influence government decisions and engage in the regulatory or legislative process in the respective countries of OECD members. The Proposed Guidelines rightfully seek to end harmful practices including bribery or other forms of corruption. However, the Proposed Guidelines also veer into vague warnings about attempts to "influence the design, implementation, execution, and evaluation of public policies" by providing "covert, deceptive, or misleading" evidence or data. The Chamber is concerned, among other things, that the undefined term "covert, deceptive, or misleading" data could be interpreted to mean data or evidence that simply contradicts or questions data that has been put forward by a government agency or legislative body.

Indeed, this has specific implications that conflict with the interpretation of securities laws in the United States. For instance, the D.C. Circuit Court of Appeals in *National Association of Manufacturers and U.S. Chamber of Commerce v. Securities and Exchange Commission* held

[7] S&P Global: State of Green Business 2021 – The Big Picture (February 2021) Available at State of Green Business 2021 - The Big Picture | S&P Global Market Intelligence (spglobal.com)

that a disclosure designed to embarrass a company violates the First Amendment.[8] Accordingly, it would be difficult for the United States government to agree to the OECD proposals as presented.

The regulatory and legislative processes in the United States are intended to foster open, vigorous debate and to allow any willing party to provide their perspective on proposed rules or laws that could affect the livelihood of millions of Americans. Government policies should promote, not suppress, further engagement by civil society in the marketplace of ideas. Granting government authorities greater latitude to declare a competing opinion “deceptive” or “misleading” – and therefore somehow punishable – would have a chilling effect on the democratic process in the U.S. and all free nations around the world.

More fundamentally, the Chamber draws a parallel between the language in the Proposed Guidelines regarding policy advocacy and attempts in the United States to use corporate disclosure to silence political opponents. The Chamber has long opposed efforts to have the Securities and Exchange Commission promulgate rules that require public companies to disclose more information regarding their political spending activity. These efforts are nothing more than thinly disguised campaigns by activists to silence the business community’s voice in political and public policy debates by using the federal securities laws to compel disclosure of activity to glean information to advance other interests through name-and-shame tactics, not for purposes of investor protection. Congress has wisely made the decision for several years to prohibit the SEC from issuing such a rule; we believe backdoor efforts to impose similar standards on U.S. companies from the OECD or other bodies should also be rejected.

**The Proposed Guidelines reach beyond the scope U.S. labor law and will erode workers’ choice in earning capacity.**

The Proposed Guidelines state that companies should “respect the rights of workers to establish or join trade unions…”. Extending this right to simply “workers” is a significant change from the 2011 Guidelines for Multinational Enterprises in which covered workers pertained only to “workers employed by the multinational enterprise.” Extending the right to establish or join trade unions to all workers is in direct conflict with the U.S. National Labor Relations Act which states that only employees are guaranteed the right to unionize.[9] Failure to revert to the original language will result in conflicting standards for U.S. businesses and undermine businesses’ aim to adhere to the Proposed Guidelines while fully complying with national law.

The Proposed Guidelines also include inflammatory language that likens short-term working arrangements to informal work and decent work deficits. Short-term working arrangements provide flexible earning opportunities to U.S. workers and solopreneurs. Attempts to limit workers’ ability to choose their working arrangements have failed in the United States. Californians voted 58 percent to 41 in favor of Proposition 22, a ballot initiative that allowed certain platform workers to remain independent contractors rather than formal employees – a

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[8] *Nat’l Ass’n of Mfrs.& U.S. Chamber of Commerce v. SEC*, 800 F.3d 518, 526 (D.C. Cir. 2015).

[9] NLRA, 29 U.S.C. §§ 151-169

clear indication that workers value the autonomy afforded through short-term working arrangements.[10] Inferring that short-term working arrangements are informal or deficient contradicts the rights and desires of U.S. workers to choose their form of work and should therefore be omitted from the Proposed Guidelines.

**Conclusion**

The Chamber believes the Proposed Guidelines would inflict serious harm on the U.S. economy and undermine our laws and Constitutional protections. We urge the State Department to take these concerns under advisement and look forward to serving as a resource regarding this OECD initiative.

Sincerely,

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

cc: The Honorable Janet Yellen, Secretary of the Treasury
cc: The Honorable Gary Gensler, Chairman, U.S. Securities and Exchange Commission
cc: The Honorable Jack Markell, Ambassador to the OECD

[10] Ballotpedia. "California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)." Available at https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)