

The United States Government's Call for Comments on Revitalising the National Action Plan on Responsible Business Conduct

Global Partners Digital submission
May 2022

About Global Partners Digital

Global Partners Digital is a social purpose company dedicated to fostering a digital environment underpinned by human rights. As part of our work, we lead a consortium of civil society organisations from around the world engaged in advocacy work with national governments and with tech companies on business and human rights issues. This work involves leveraging the United Nations Guiding Principles framework (the UNGPs) as it applies to the tech sector and calling for the incorporation of technology-related issues in National Action Plans on Business and Human Rights (NAPs).

Introduction

We welcome and appreciate the US government's recognition that "much has changed since the release of the 2016 NAP", as it invites input into what agencies should take into account in updating the National Action Plan (NAP) on Responsible Business Conduct. One of the areas where we think the most change has occurred, and where the NAP could be most strengthened, is in relation to the rapid development and advancement of digital technology, and particularly the companies that develop digital technologies.

The 2016 NAP included a section on "Promoting Human Rights in the ICT Sector" with two actions - "developing a regular mechanism to identify, document, and publicize lessons learned and best practices related to corporate actions that promote and protect human rights online" and "fostering continued engagement among relevant stakeholders to support ongoing dialogue and collaboration on respecting human rights within the ICT sector". The supplementary information provided with the call notes the government's foreign policy commitment to "promoting rights-respecting technology deployment".



These developments notwithstanding, we believe that far more could and should be done given the prevalence of large, global technology companies based in the US, to ensure that these companies – and those that use the technology they develop – respect human rights. **We urge the US government to include a more substantive and ambitious section in its NAP on ensuring that the companies developing, deploying and using digital technologies respect human rights.**

In 2020, Global Partners Digital and the Danish Institute for Human Rights published “The Tech Sector and National Action Plans on Business and Human Rights”, a guidance document for governments and other state actors developing NAPs on how to incorporate considerations relating to the tech sector. In this submission, we highlight key recommendations from that guidance.

Process-Related Recommendations

GOVERNANCE AND RESOURCING

We recommend that, in developing the NAP, the US government identify all relevant government departments, agencies and other public bodies and institutions with a mandate relevant to technology, the tech sector and/or human rights, and ensure they are included in all steps of the process. Furthermore, these departments, agencies, bodies and institutions should be adequately resourced to ensure they are able to play an active role in stakeholder mapping, consultation, provision of capacity building and policy input.

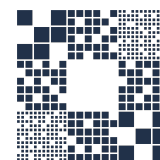
STAKEHOLDER MAPPING AND PARTICIPATION

We recommend that, as part of wide stakeholder mapping, the US government conduct a specific mapping of all non-state actors with expertise and/or an interest in the development of policy relating to technology, the tech sector and/or human rights.

Further, we recommend that the US government facilitate the meaningful participation of these actors, ensuring the representation of multiple and diverse interests and providing adequate resources and capacity building where needed. As part of this, the US government should also identify those most at risk of adverse and discriminatory impacts on human rights and ensure they can participate in the process by taking into account their specific needs and vulnerabilities.

NATIONAL BASELINE ASSESSMENTS

We recommend that the US government undertake a National Baseline Assessment (NBA) – as suggested in the guidance – and that the agency conducting the NBA has expertise on the tech sector and human rights. The NBA should include questions



specific to the tech sector and the full range of human rights, thereby identifying the policy and regulatory gaps and the most human rights risks.

SCOPE, CONTENT AND PRIORITIES

We recommend that, when considering the scope of the state's jurisdiction, the US government should take into account the importance of extraterritoriality in respect to the operations of the tech sector, and the fact that many US-based tech companies operate globally.

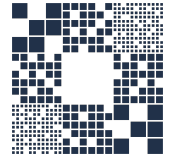
The NAP should prioritise for action the most severe impacts of the tech sector and ensure that all commitments relating to the industry are specific, measurable, achievable, relevant, and time-specific.

ACCOUNTABILITY AND FOLLOW-UP

Once developed, we recommend that the US government publish information about the NBA and NAP in an accessible, easy-to-understand format, in languages understood by all stakeholders, ensuring that any stakeholders affected by the tech sector who were consulted understand how their input was taken into account. In addition, the US government should include stakeholders included in the framework for monitoring and reporting on the implementation of the tech sector-related actions in the NAP, including in any further policy development.

Substantive Recommendations

1. The NAP should include a commitment to **supporting the development of comprehensive privacy and data protection legislation** at the federal level in line with international human rights standards and best practices, complementing the increasing trend of state-level privacy and data protection laws. Any federal legislation should be fully applicable to all actors that process data, whether in the public or private sector, and cover all forms of personal data. It should ensure that informed consent is the primary legal basis for the collection, storage or processing of personal data. It should also ensure that individuals have the ability to request from data processors copies of their data, and provide them with the rights to have data corrected and removed. The legislation should also establish a strong and independent data protection authority with the ability to enforce the law.
2. Given the essential role that encryption plays in protecting individuals' human rights, the NAP should commit to **promoting and encouraging the use of strong encryption** by tech companies for personal data or communications.
3. The NAP should build on the "Guidance on Implementing the UN Guiding Principles for Transactions Linked to Foreign Government End-Users for



Products or Services with Surveillance Capabilities” by committing to **further actions to help ensure that surveillance technologies are not used in ways which undermine human rights.**

4. With the increased attention paid by policymakers in the US (and around the world) to the regulation of online platforms and intermediaries, the NAP should include a commitment to **resisting any forms of online platform regulation that is not in conformity with international human rights law and standards relating to freedom of expression, privacy and other relevant human rights.** The NAP should include a commitment only to supporting legislation which, among other things: sets precise, clear and accessible, rules governing intermediary liability; ensures immunity from liability for intermediaries for third-party content in circumstances where they have not been involved in modifying that content; ensures that intermediaries cannot be held liable for failing to restrict lawful content; prohibits intermediaries from monitoring content proactively; and ensures that intermediaries are only required to restrict content where an order has been issued by an independent and impartial judicial authority that has determined that the material at issue is unlawful.

At the same time, the NAP should include a commitment to **promoting legislation which would ensure greater transparency** from online platforms over their content moderation policies and practices, and requires transparent and effective grievance and remedial processes for users who are affected by them.

5. To help tackle discrimination in the tech sector and the use of technology, the NAP should include a commitment to **supporting comprehensive anti-discrimination legislation** which applies to the private sector and which prohibits all forms of discrimination and all on grounds recognised under international human rights law.
6. There is an increasing trend of governments developing mandatory human rights due diligence requirements from companies. The NAP should therefore include a commitment to **promoting human rights due diligence** (or other forms of due diligence processes such as data protection and equality impact assessments) among tech companies.