CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA
1615 H STREET, N.W.
WASHINGTON, D.C. 20062
202/463-5522

RANDEL K. JOHNSON
SENIOR VICE PRESIDENT
LABOR, IMMIGRATION & EMPLOYEE BENEFITS

JAMES PLUNKETT
DIRECTOR
LABOR LAW POLICY

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Via Electronic Mail

Vicky Dodman: vicky.dodman@corporatebenchmark.org
Typhaine de Borne: Typhaine.deBorne@eiris.org

Re: Corporate Human Rights Benchmark – Public Consultation

Dear Ms. Dodman and Ms. de Borne:

We are pleased to submit these initial comments on behalf of the U.S. Chamber of Commerce (Chamber) on the proposed Methodology 1.0 of the Corporate Human Rights Benchmark (CHRB). The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees.

I. Introduction

The Chamber and its members are well-attuned to business and human rights issues. As you may know, together with the U.S. Council for International Business (USCIB) and the International Organisation of Employers (IOE) the Chamber co-sponsors a yearly event on the issue of business and human rights. Furthermore, on multiple occasions we have partnered with the Global Business Coalition Against Trafficking (gBCAT) in presentations and conferences at the Chamber's headquarters on the issue of human trafficking. The Chamber has also engaged with the U.S. Government and submitted preliminary comments to its proposed National Action Plan.

Additionally, during the development of the U.N. Guiding Principles on Business and Human Rights (UNGPs or Guiding Principles), the Chamber was pleased to offer input as to how the Guiding Principles could work effectively for *all* stakeholders, particularly the business community. We offered this input with the understanding that a goal of the U.N. Special Representative was to create an instrument that would be supported by the business community. We believe that the Guiding Principles can serve as an important tool to guide

business and governments in their activities worldwide, and we continue to support the foundational premise of the Guiding Principles which is to "do no harm."

In short, the Chamber: (1) supports corporate efforts to address potential human rights impacts; and (2) has a record of formal engagement in several multi-stakeholder efforts relating to business and human rights. However, while we applaud CHRB's efforts, we have both procedural and substantive concerns.[1] First, the Chamber believes that the involuntary nature of the initiative will result in imprecise and perhaps counterproductive benchmarking of companies which will not only damage their brands and reputations, but which will also undermine the goals of the CHRB itself. Second, the abbreviated consultation process forecloses the significant input necessary from the business community – whose support of the CHRB is essential if the framework is to be ultimately successful. Third, the draft indicators propose to evaluate companies on metrics that, in some cases, conflict with certain legal requirements and go beyond what is contemplated by the Guiding Principles.

II. Participation in CHRB Should be Voluntary

The Chamber is concerned that the compulsory nature of the CHRB will result in incomplete and inaccurate "grading" of companies.[2] Indeed, much of the criteria set forth in the CHRB is not publicly available and can only be evaluated if information is provided by the company being "graded." For example, unless provided voluntarily through some feedback mechanism, the compilers of the CHRB will have no way of knowing whether "the Company considers the importance of human rights issues in the formulation of its corporate strategy."[3] Yet companies will still be scored on this indicator whether or not they provide this information.[4] Materials supporting the CHRB indicators document acknowledge that "[t]he Benchmark will not be a fundamental measure of performance due to difficulties of sourcing complete information" but offer no solutions or recommendations on how to deal with this fundamental problem. By choosing a "stick" rather than a "carrot," CHRB will result in the publication of flawed evidence about companies' track records on a critical and sensitive issue. This will inevitably lead to confusion and disputes between companies, CHRB and other stakeholders. Indeed, there are certainly reasons that a company may not choose to participate in the CHRB process that are entirely consistent with the UNGPs such as, by way of example, its voluntary participation in another human rights assurance or reporting mechanism.

Corporate benchmarking frameworks which are conducted on a voluntary basis can enjoy widespread support of the business community and provide a more inclusive and

[1] For these reasons, the Chamber supports and endorses the comments that have been submitted by the IOE.
[2] Even if the final CHRB process professes to be voluntary, it is not hard to imagine that the inherent pressure on companies to ensure an accurate depiction of their policies and actions will make the process, in fact, involuntary.
[3] Clearly, this particular indicator also raises issues concerning the privacy of corporate propriety information.
[4] At the very least, CHRB should draw no adverse inferences from a company's non-participation in any part of the proposed process.

cooperative way of achieving important policy goals. For example, the US Business Leadership Network (USBLN) and the American Association of People with Disabilities (AAPD) recently conducted their first ever Disability Equality Index (DEI), "a national, transparent benchmarking tool that offers businesses an opportunity to receive an objective score . . . on their disability inclusion policies and practices." Like CHRB, DEI scores companies based on their efforts and results in advancing a desired public policy objective. However, unlike CHRB, company participation in DEI is completely voluntary. DEI was also founded, in part, by 15 companies, including Walmart, American Airlines, Lockheed Martin and Ernst & Young. CHRB does not enjoy similar partnerships with members of the business community. In just its first year, DEI's "carrot" approach resulted in the voluntary participation of 80 companies. Thus, voluntary corporate benchmarking can provide for robust participation and comprehensive gathering of pertinent information and should be the process followed by the CHRB.

III. The Abbreviated "Consultation Process" Limits Sufficient and Necessary Stakeholder Feedback.

While the Chamber appreciates that the comment period has been extended from the original August 31 date, further improvement in the "consultation process" will be necessary if the CHRB is to be ultimately successful. For example, rather than a one-time, unilateral comment process, any final CHRB document would benefit from a consultative dialogue with all stakeholders. Such a process would allow for a more thorough exchange of ideas and feedback and likely result in a final document which could garner support from the most stakeholders.

IV. Substantive Concerns with CHRB's Proposed Metrics

Beyond the CHRB's process, the Chamber has significant concerns regarding the substance of its proposed performance indicators, including the following:

A. Issues with the Reporting Framework In General

- Potential Duplicative Reporting. Since the Guiding Principles were adopted in 2011, there has been a flurry of activity within civil society, and at the government and company levels, to implement them. One product of this activity has been the development of various reporting frameworks and measurement tools that are being developed and marketed by the socially responsible investor community and other stakeholders. These tools are being developed with the objective of measuring companies' commitment to implementing the Guiding Principles. So in addition to the proposed CHRB, there is already the Global Reporting Initiative (GRI) and Human Rights Reporting and Assurance Frameworks Initiative (RAFI).[5] Should

[5] Questions and concerns have also been raised within the employer community about the process employed to develop these frameworks *See* http://www.ioe-

CHRB go forward, it should be based on GRI and RAFI so as to avoid duplication of burdens and work.

- Confidentiality Concerns. As noted in footnote 2, *supra*, CHRB asks companies to disclose potentially confidential or proprietary information such as corporate strategy and performance incentives. As this information will be made public through the proposed portal and the final Benchmark document, it should not be included as part of the reporting process.

B. CHRB's Proposed Metrics Lack an Appropriate Focus and Conflict with U.S. Labor Law

- Public Policy Positions. The CHRB places undue emphasis on whether companies take "public policy positions in favour of legislation that aims to prevent human rights abuses or strengthens protection in a specific context or specific sector or to strengthen access to remedy." For various reasons, many companies do not openly engage in public policy debates, and it is inappropriate of the CHRB to try to leverage companies into such discussions.[6] Second, this indicator assumes that any legislation purporting to address human rights abuses is a panacea. This is demonstrably not the case.[7]

- Favoring "the use of direct employment relationships." Many companies have successful and beneficial relationships with subcontractors or independent contractors. Such relationships are not only permitted by U.S. federal law, but entire companies and industries – and the workers whom they employ – have flourished using these models. In particular, the independent contractor model can result in workers who "have more control over their economic destiny."[8] To simply assume that using subcontractors or independent contractors is inherently bad is misguided, erroneous and side-steps many critical issues in this complex policy debate.

- Gender Quotas. CHRB purports to evaluate companies on the percentage of women within their respective "governance bodies," and uses 40% as the benchmark. Although the Chamber understands that various European countries have certain

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emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2015-08-04__C-178_IOE_Position_on_Corporate_Human_Rights_Benchmark__link_.pdf (noting the flaws in the timing and structure of the consultation process).

[6] It is also inappropriate for the CHRB to attempt to drive a wedge between a company and its trade associations by grading companies positively for "leaving a trade body when its human rights positions conflicts strongly with the Company's position." First, determining "the human rights positions" of companies and trade associations is very subjective: the organizers of the CHRB cannot know what these positions are for every company and every trade association, so it should not use this as a metric. Second, companies join trade associations for various reasons and most do not expect to be in agreement with 100% of the policy positions taken by its trade associations.

[7] Sudarsan Raghavan, "How a Well-Intentioned U.S. Law Left Congolese Miners Jobless," THE WASHINGTON POST, November 30, 2014. Available at: https://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html

[8] Steven Cohen and William B. Eimicke, *Independent Contracting Policy and Management Analysis*, Columbia School of International Affairs, at 16 (August 2013).

gender parity laws which may closely track the 40% indicator, applying such a rigid number to workforce compositions in U.S. companies could result in claims of reverse discrimination. [9] Scoring companies on this criteria is, therefore, simply inappropriate.

- Union Access. Employers in the U.S. are generally not required by law to provide access to non-employee union officials. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992). Unions and workers may avail themselves of any number of ways of communicating about the pros and cons of unionization, and employers need not proactively provide "parallel means of engagement." *See Purple Communications, Inc.*, 361 NLRB No. 126, at 18 (2014)(Miscimarra dissenting)("employees now have more opportunities to conduct concerted activities relating to their employment than at any other time in *human* history"). Further, providing employees "with an alternative for dialogue" could potentially run afoul of U.S. labor law. *See* 29 U.S.C. 158(a)(2). It is inappropriate to hold employers to a standard that could result in a violation of U.S. federal law.

- Living wage. The CHRB proposes to evaluate employers on whether they pay "all workers" a "living wage." Unfortunately, the description of what constitutes a "living wage" is ambiguous and purports to include amorphous concepts such as "education," "health care," "pension," and strangely, "unemployment insurance."[10] The phrase "living wage" is not defined in U.S. federal law. Thus, there is little guidance as to how, exactly, a "living wage" is or should be defined. CHRB should not measure employers based upon such a vague concept.

- Union "Neutrality." The CHRB measures whether an employer remains "neutral" with respect to union organizing campaigns. The concept of Neutrality, particularly in the context of U.S. equates to employer silence in connection with union organizing efforts and is inconsistent with the principles of freedom of association as they are defined and understood at the international level. At the international level, true "freedom of association" should be accompanied by the free exchange of information and ideas regardless of their source or affinity. This freedom of expression and opinion is encouraged at the international level provided that it does

[9] *See* 42 U.S. Code § 2000e–2(J)("Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."); *see also Wheeler v. Missouri Highway & Transp. Comm'n*, 348 F.3d 744 (8th Cir. 2003)(upholding jury verdict in favor of male employee who alleged reverse discrimination in hiring based on his gender).

[10] In the U.S., employers do not provide their employees with unemployment insurance. Rather, unemployment insurance is provided through a dual federal/state program which is primarily funded by experience-rated taxes on employers.

not interfere with an employee's free choice to be represented, or not represented, by a union.

- "Adverse Events." In general, grading employers on mere allegations of adverse events raises serious due process concerns and encourages false allegations against companies. This type of scheme will be exacerbated by the involuntary nature of the CHRB process which makes it easier to designate particular companies as targets of corporate campaigns. More specifically, the CHRB also includes a metric as to whether the company "faces criticism or negative news stories related to Labour and Human Rights" or has responded to similar reports. These vague metrics do not appear to further the Guiding Principles.

- Reporting Requirements. The requirement to report every claim relating to certain ILO conventions, as well as accompanying reports on "corrective actions taken" presupposes the legitimacy of every claim that is raised and that every claim requires some corrective action. Again, questions remain as to whether this metric furthers the Guiding Principles.

V. Conclusion

Clearly, there is a role for businesses to play in combating human rights abuses around the world. In this regard, the Chamber supports the "know and show" concept set forth in the Guiding Principles. Unfortunately, the CHRB goes well beyond, and thus undermines, the Guiding Principles in many key areas. Should this process go forward, the Chamber recommends the adoption of the proposed changes detailed above. Most importantly, CHRB benchmarking must be done on a purely voluntary basis so as to ameliorate the business community's concerns with various aspects of the draft performance indicators, and no adverse inferences should be drawn from a company's decision not to participate.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration and
Employee Benefits

James Plunkett
Director
Labor Law Policy