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The Corporate Human Rights Benchmark Ranks Large Companies' Human Rights Performance

BY JOHN KLOOSTERMAN, STEFAN MARCULEWICZ, MICHAEL CONGIU, AND LAVANGA WIJEKOOON

In 2011, the United Nations adopted the UN Guiding Principles on Business and Human Rights (“UN Guiding Principles”), which provide non-binding guidelines on how employers should conduct their business activities to provide appropriate respect for internationally recognized human rights. Recently, various organizations – including national governments, international organizations, workers’ organizations, and non-profit entities – have all attempted to transform the “soft law” nature of the UN Guiding Principles into hard laws that may have real consequences for employers.¹ To support this, several initiatives have arisen to facilitate corporate human rights reporting and measurement in connection with the UN Guiding Principles.²

In March 2016, the Corporate Human Rights Benchmark (the “Benchmark”) published its “Pilot Methodology,” revealing plans for a publicly available, comparative, year-on-year “snapshot” of the human rights performance of the largest 500 companies.³ The stated goal of the Benchmark is to create a “public good” by publishing individual companies’ “scores.”⁴ This will allow shareholders, the media, and the public to potentially create market pressures to enhance corporate human rights performance.⁵

1 See Stefan Marculewicz, Michael Congiu, John Kloosterman and Lavanga Wijekoon, *California Laws Are Being Used to Advance Human Rights Claims Based on Global Supply Chain Activities*, Littler Insight (Oct. 14, 2015); John Kloosterman, Trent Sutton, Sari Springer and Lavanga Wijekoon, *In Canada, Foreign Workers Seek to Use International Norms as the Standard of Care in Negligence Claims Against Multinationals Operating Overseas*, Littler Insight (Sept. 16, 2015).

2 See John Kloosterman, Stefan Marculewicz and Michael Congiu, *The Advent of Privately Developed Corporate Human Rights Reporting Frameworks*, Littler Insight (Sept. 9, 2015).

3 Corporate Human Rights Benchmark (hereinafter “CHRB Report”), p. 11, available at http://business-humanrights.org/sites/default/files/CHRB_report_06_singles.pdf.

4 CHRB Report, pp. 4, 11.

5 *Id.*, p. 4.

While the ultimate aim of the Benchmark is to rank the top 500 globally listed companies, the Pilot Benchmark scheduled for publication in November 2016 will rank the top 100 companies across three industries: agricultural products, apparel and extractives. The Pilot Benchmark will assess certain risks in each industry. The labor-related risks that will be assessed in the Pilot Benchmark are: child labor, forced labor, freedom of association and collective bargaining, health and safety, and working hours, although not every risk will be assessed in each industry.⁶

The developers of the Benchmark acknowledge that human rights are “fundamentally qualitative and hard to measure.”⁷ As a result, any evaluation “will only ever be a proxy..., a tool for engagement.”⁸ Nonetheless, the Benchmark will assign “proxy scores” to companies, based largely on their perceived compliance with the UN Guiding Principles, using the methodology described below.⁹ The proxy score is calculated based on each company’s human rights performance in the following six areas:

- 1. Governance and policy** – assesses a company’s policy commitments to human rights and board-level accountability for managing these policy commitments;
- 2. Embedding respect and human rights due diligence** – assesses a company’s systems and processes established to implement the policy commitments in practice;
- 3. Remedies and grievance mechanisms** – assesses a company’s approach to remediating actual human rights harms;
- 4. Company human rights practices** – assesses a company’s actual practices implementing policy commitments;
- 5. Responses to serious allegations** – assesses a company’s responses to allegations of severe human rights impacts occurring within three years, including child labor, forced labor, and freedom of association and collective bargaining violations;
- 6. Overall transparency** – assesses a company’s willingness to disclose information on human rights under various reporting frameworks, including the Global Reporting Initiative (GRI), Sustainability Accounting Standards Board (SASB), and UN Guiding Principles Reporting Framework (UNGPRF).

A company’s perceived performance in each of the six areas is weighted differently, with the second area (embedding respect and human rights due diligence) being weighed the heaviest.¹⁰

The Benchmark will rely on several sources of information in evaluating companies.¹¹ First, it will use publicly available evidence generated by the company, including information on the company’s website and financial reports filed with government agencies such as the Securities and Exchange Commission. Second, once a company is notified that it has been selected for the Benchmark, the company will be “encouraged” to affirmatively provide relevant information on the Benchmark’s “Disclosure Platform” that will aid the evaluation of the company’s proxy score. Third, the Benchmark relies on evidence generated by third parties, including articles and reports from “multilateral organizations, trade unions, and relevant NGOs.”

Employers subject to the Benchmark will not only be evaluated on the human rights performance of their own operations, but also on the operations of their suppliers and contractors. For example, employers in the

6 *Id.*, p. 24.

7 *Id.*, p. 4.

8 *Id.*

9 CHRB Report, pp. 4, 41.

10 *Id.*, p. 41.

11 *Id.*, pp. 36-37, 42.

agricultural industry will be evaluated in part on the performance of both their direct and indirect suppliers.¹² Similarly, employers in the extractive industry will be evaluated in part on the performance of operational-level contractors and joint ventures, including those entities that are not directly part of the extractive process, such as security service providers.¹³

As the developers of the Benchmark admit, human rights performance is “very hard to measure” and that “it will be tough to do justice to the complexity of issues involved.”¹⁴ Although the Benchmark is designed to facilitate progress in corporate respect for human rights, this admission raises questions about the utility of involuntarily grading corporate entities on criteria that resists meaningful qualitative measurement.

Perhaps more critically, the Benchmark developers also admit that the proxy scores – at least those in the Pilot Benchmark – will not take into account the positive impacts from corporate social responsibility and philanthropic programs that companies have implemented.¹⁵ Instead, it focuses only on corporate measures to avoid adverse impacts on human rights.¹⁶ A grading system that disregards the affirmative measures that companies have taken to improve human rights raises significant questions about the completeness of any assigned grade and, more fundamentally, whether the Benchmark is effectively achieving its aims by failing to incentivize socially beneficial behavior.

Finally, even though a core principle of the Benchmark is “comparability,” it is unclear how the Benchmark will reliably compare companies across diverse industries that are each imbued with unique risk factors and challenges.¹⁷ It is also unclear how much credence the Benchmark will ascribe to external sources of evidence, such as advocacy pieces from non-governmental organizations and trade unions.¹⁸ Similarly, the Benchmark’s scrutiny of a company’s response to “serious” allegations may presume that every allegation is meritorious and requires some corrective action.¹⁹

Nonetheless, the publication of human rights performances of companies may garner additional scrutiny of those companies’ practices within their operations and of their supply chains. Ensuring the treatment of a workforce meets the standards of the UN Guiding Principles is a complex, culture-specific and risk-specific exercise. To that end, the Benchmark and corporate human rights reporting adds an additional layer of considerations that require experienced counsel and internal stakeholder involvement.

12 *Id.*, p. 30.

13 *Id.*

14 CHRB Report, pp. 4, 25.

15 *Id.*, p. 34.

16 *Id.*

17 CHRB Report, p. 24.

18 *Id.*, pp. 42, 112.

19 *Id.*, pp. 112-13.