PUBLIC CONSULTATION

Due Diligence Companion (Draft)

Additional tips and explanations for implementing the Due Diligence Guidance for Responsible Business Conduct

Deadline for response: 9 February 2017

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Context

The OECD is currently developing a general *Due Diligence Guidance for Responsible Business Conduct* to provide practical support to companies on the implementation of the *OECD Guidelines for Multinational Enterprises*. The draft *Guidance* contains plain language explanations of the due diligence recommendations and associated provisions in the *Guidelines* and can be used by companies in any sector of the economy. In this context, the OECD is making two draft documents available for public comment:

- **OECD Due Diligence Guidance for Responsible Business Conduct**
- **OECD Due Diligence Companion** - a "living document" containing examples, tips and good practices that could be regularly updated with further examples as the Due Diligence Guidance is implemented

This document contains the draft Due Diligence Companion. Information about the public consultation can be found online at http://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm.

Invitation to comment

Comments or any queries on the draft Due Diligence Guidance are welcome until **9 February 2017** and should be sent to investment@oecd.org.

Find out more about OECD work on responsible business conduct at: http://mneguidelines.oecd.org

I. Embedding Responsible Business Conduct into Policy and Management Systems

A. PURPOSE

- An enterprise's approach to RBC is most likely to be effective, and an increasingly strategic asset, if such practices are guided and managed with the same seriousness and systematic app**roach** as other areas of enterprise strategy. Guiding that approach with an overarching policy commitment or more specific policy commitments to RBC serves multiple purposes (see Box 1).

Box 1: Good Practices Box
Why Adopt a Public Commitment to Responsible Business Conduct

- Demonstrates that RBC is a priority for enterprise management – it sends a **signal "from the top"** that the enterprise considers this important
- Lays the foundations for an **RBC business culture**
- Sets clear expectations for the **entities in the enterprise**, **staff and business partners**
- Provides the basis to apply an RBC framework across the enterprise's business activities
- **Shows** the wider world (governments, investors, customers, other stakeholders) that the company has considered the issues covered by the *Guidelines* and understands that they represent a **minimum standard for conducting business with legitimacy**
- Provides a starting point to **better leverage RBC in its business relationships**

B. KEY ACTIONS

Actions enterprises may take to develop policies and management systems are likely to include the following:

1. Devise and adopt an **RBC policy** (or combinations of policies) that provide guidance to staff and business partners and a clear signal to stakeholders and publish the RBC policy (or policies) to support transparency.
2. **Embed** the RBC policy into its **enterprise culture, approaches and management systems** to make sure it is rooted in the enterprise and is actually implemented as part of everyday business.
3. Assign **accountability** for RBC matters to senior management, and for public companies, assign board level responsibilities; complement this by assigning responsibility across relevant departments.
4. Develop **management system**(s) with internal controls that are commensurate with the RBC risks of its operations and operating contexts to integrate RBC into its everyday business processes.
5. Support coherent and effective **implementation** by providing adequate resources and training to staff and as appropriate, business partners.
6. Incorporate RBC expectations and policies into supplier **or other business relationships**, including through contracts or other forms of written agreements with business partners.

C. FURTHER EXPLNATIONS OF KEY ACTIONS

Drawing on expertise in developing the policy

- Involving the **relevant units of an enterprise in policy development** is a way of accessing internal expertise and gaining more buy-in from the start. They are likely to have a better insight and expertise into key risks and challenges, know where guidance is needed and be a good source of insight for new issues that need to be incorporated when updating policy as they deal with emerging issues in their day-to-day activities. **Trade union or worker representatives** within the company are a source of expertise on working conditions.

- Considering the wide range of issues covered by the *Guidelines*, enterprises may find it useful to involve **relevant experts and stakeholders**. For smaller enterprises, guidance from employer organisations, industry associations, relevant NGOs, or multi-stakeholder initiatives can be a good starting point in developing policy approaches. Benchmarking peers can also be another cost-effective measure.
- Where an enterprise may be involved with **severe risks** it should consider engaging in consultations with **potentially affected stakeholders** or representative organisations to better understand risks and suggested approaches.[1]

Explicitly referencing authoritative international RBC standards

- This makes clear the enterprise's commitment to those standards and provides a **common, accepted reference point** with stakeholders that helps ensure that the enterprise and its stakeholders are using the same terminology and concepts.
- The policy could **usefully reference** the *Guidelines*, UNGPs and the international human rights standards on which they are based, the Declaration on Fundamental Principles and Rights at Work and in the core ILO conventions set out in the Declaration.

Setting out the enterprise's expectations

- As it is meant to provide guidance on the enterprise's approach to matters covered under the *Guidelines*, the RBC policy or policies can usefully provide more specific guidance on the **specific RBC risks** and how it will handle some or all of them. It can also provide policy direction on areas that are likely to be of interest to stakeholders such as how the enterprise will **implement** its responsibilities – how it will approach due diligence, stakeholder engagement, remediation.
- Stipulate the enterprise's **expectations of its workers** (including its employees, temporary workers and others who perform work for it).
- By being clear **about the expectations of its business relationships**, this helps provide clarity early on but also helps build leverage early on for incorporation into contractual requirements (see Point 6 below).
- Making the commitment **publicly available and communicated** to all members of the corporate group, workers, business partners and stakeholders so that they know what their responsibilities are demonstrates commitment.[2]

2. Embedding an RBC Culture in the Enterprise

- Making **leadership on RBC clearly visible** to workers and business partners from statements and other actions at senior management level sets the right "tone from the top" and **make RBC a part of enterprise culture**. For example, many companies operating in hazardous sectors have developed a strong culture of safety – demonstrating that it is **possible to align not only formal processes but also mindsets**. An RBC policy that is approved at the most senior level of the enterprise and actively communicating and referenced conveys seriousness about the commitments and their implementation.
- With reference to publicly-traded companies, the revised OECD Principles on Corporate Governance highlight that the **board has a key role in setting the ethical tone** of the enterprise, not only by its own actions, but also in appointing and overseeing key executives and management, including of matters covered by the *Guidelines*.[3] Boards or their equivalent can play a similar role in enterprises not covered by the Principles.
- The board can also play a key role in ensuring that there is coherence across the **enterprise's group structure (including subsidiaries as appropriate)**[4] **and systems** -- that structures, processes, and accountabilities do not work against effective RBC implementation but instead incentivise and support implementation.

3. Assigning Accountability

- **Guiding the enterprise's approach to and implementation** of its RBC approach should be assigned to **board and senior management level**.[5] Some enterprises have specific board committees responsible for RBC matters, which may include the audit committee. For smaller enterprises, where there may be less formal structures, staff will look to the owners or directors for leadership and accountability.
- Accountability can also be reinforced by including RBC issues in the **management/staff incentive structures**.

4. Developing a Management System(s)

- The systems to manage RBC risks and impacts – and the resources devoted to them - should be commensurate with the nature and context of its operations. The *Guidelines* highlight management systems as a way to "foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate" and refer to them in almost all Chapters.[6] Design of **appropriately scaled, sufficiently complex and appropriately resourced RBC risk management systems** should be driven by: [7]

  i. *the **size of an enterprise***: The policies, processes and systems that a large enterprise needs are likely to be more extensive than those at smaller enterprises because they will cover more employees, types of operations, business relationships, etc. Smaller enterprises usually have more informal processes and management systems and structures to address these issues.

  ii. *the **operating context** of an enterprise:* is likely to have strong influence on the presence or absence of potential risk. Factors to consider include the g*overnance context* (the existence and effectiveness of government policies in the countries and local area will increase or decrease the risk of adverse impacts) and the s*ocio-economic context* (low educational achievement, or elevated rates of poverty, discrimination against vulnerable groups.

  iii. the ***specific recommendations*** in the *Guidelines* (See Box 2)*;*

  iv. the RBC risks ***inherent to an enterprise's business model*** and those with which it may actually be involved. RBC risk is the driving factor in designing appropriate systems, thus even smaller enterprises involved in higher risk (for example, hazardous activities) will need more in-depth controls.

Box 2: Guidelines Box

***Guidelines* Recommendations for Developing a Management System to Address Corruption, Bribery and Extortion**

- Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation).
- These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery.
- Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion.[8]

- Enterprises are encouraged to make **continuous improvement of performance the objective** of the management system should be.*[9]* In addition, *s*ystems should be adaptive and designed to pick up new issues to be addressed and old issues to be corrected. An iterative process to adapt and update policies, systems, processes, resource allocation, is a core part of the continuous improvement. Tracking (see Section x - Tracking) plays an important role in this process.

- In some cases, it may be most effective for enterprises to **integrate RBC risk management within broader enterprise risk management systems**,[10] as long as the systems go beyond simply identifying and managing material risks to the enterprise itself, but also cover the RBC risks. In other cases, **stand-alone systems to address specific risks** such as worker health and safety or anti-bribery may be more appropriate and effective.[11]
- Embedding internal controls[12] in management systems to track progress in meeting the *Guidelines'* recommendations, throughout the **full life-cycle** of the enterprise's operations, products and services[13] is helpful in taking a **long-term perspective**.[14] This can contribute to considering and developing innovative approaches to eliminating or minimizing negative impacts and should also prompt enterprises to consider the eventual closure or end of operations (including through specific financial provisioning).[15] Many of the issues highlighted in the *Guidelines* chapters do not happen in isolation of each other – considering the **inter-linkages** between economic, social, environmental and governance issues and managing them in an integrated fashion can be both cost-effective and contribute to sustainable development.[16]
- Incorporating RBC Policy commitments in **relevant operational policies and procedures** is necessary to embed it throughout the enterprise[17] so that they are aligned with the RBC Policy. In particular, attention may be needed to ensure that business units do not have in place incentives, policies or procedures that would **undermine or even contradict an RBC approach**. This is about achieving **coherence** across the organisation on RBC matters.
- Include RBC risk management an **integral part of enterprise decision-making processes** so that the potential or actual adverse RBC impacts are **routinely considered** and **given due weight** in decisions. Enterprises will have a range of approaches for including RBC matters in decision-making – for example requiring sign-off from the environmental department before a project proposal can proceed to the next decision stage or risk escalation procedures to senior management where more severe RBC risks are identified.
- Situations change so **due diligence processes need to designed** to change and respond accordingly.

  Data on needed changes will come from the **feedback loops** built into the managements system (See Box 3): tracking systems, grievance or feedback mechanisms, from consultation and broader engagement with stakeholders, and learning from peers. While incorporation into routine processes will likely ensure more regular or periodic identification of RBC risks, enterprises will also **need ways to identify and respond to dynamic situations**. For example in environmental emergency situations, enterprises need to respond rapidly to identify new risks, emergencies and accidents and put in place responses.[18] Systems capable of picking up learnings from other parts of the enterprise will help in picking lessons from the best performing part of the enterprise that can be shared with and applied throughout the whole enterprise.[19]

> **Box 1: Good Practices Box**
> **Examples of Feedback Loops**
>
> - **Social dialogue** with workers
> - **Internal dispute resolution** mechanisms
> - **Whistleblower** mechanisms
> - Operational-level **grievance mechanisms**

- While the *Guidelines* are only periodically revised, the **issues they cover are evolving rapidly and can usefully be kept under review**.[20]
- **Fit-for-purpose information management systems** help enterprises collect and interpret the information necessary to conduct effective risk-based due diligence. (See Section X on tracking and Section Y on remediation).

5. Supporting coherent & effective implementation

- Implementation should be supported by **adequate support and financial and human resources across relevant departments and locations**, including for stakeholder engagement. This includes through leadership, accountability, incentives and training[21] and may also require disciplinary procedures for non-compliance.[22]
- Dedicated **resources and training[23]** on specific issues will likely be necessary, and should be updated as due diligence process evolve and new RBC issues are identified.
- When developing policies and processes, involving all the **relevant units** of an enterprise in charge of the different areas covered by the *Guidelines* is a way of accessing internal expertise and building buy-in for implementation.

6. Incorporating RBC expectations and policies into supplier or other business relationships

- Setting out specific RBC expectations of its business relationships **in its policies or other high level documents** (such as a code of conduct) can include:
  - Expectations that business relationships meet the *Guidelines*
  - Expectations about interactions, monitoring and reporting by the business relationships
  - Specifying whether the business relationships are expected to cascade requirements to their own business relationships, and so on out through the supply chain or value chain
- Incorporating **business relationship considerations into management systems and approaches** can be achieved in a number of ways. Some enterprises have departments managing purchasing or supplier relations, joint ventures, franchisees, etc. The policies, processes and practices for these departments should usefully be aligned with its RBC commitments as part of its approach to coherence.
- Integrating RBC standards into relationships with business partners[24] can often best be done **early in the relationship** when there is often **greater possibilities for creating leverage**:
  - *Early in the relationship*: For example, **pre-qualification process or bidding criteria** that include requirements to disclose their RBC approaches or specific selection or screening criteria can help identify early partners who are aligned with and understand RBC.
  - *At the contracting stage:* Incorporating RBC requirements into **contracts or other forms of written agreements** with business partners, including requirements as necessary to cascade such requirements to their own business partners lays the groundwork for implementation, including through wider sets of business relationships where RBC risks may be greatest. Even where the business partner may be bigger or in a better bargaining position that may make enforcement difficult, having the relevant requirements in contractual arrangements is a crucial starting point.

Box 2: Good Practices Box Examples of Building RBC Requirements into Business Relationships

- Supplier **Codes of Conduct**
- Policies about and for **joint ventures**
- Polices on the use of **recruitment agencies** to engage migrant workers
- Sales agent **mandate**s

II.A. Due Diligence: Identifying and assessing adverse RBC impacts

A. PURPOSE

The purpose of this step is to identify and assess potential and actual adverse RBC impacts that the enterprise may be involved with so it can understand the scope of issues that need to be managed. This entails a dynamic, and on-going process. For due diligence undertaken before business activities have been initiated, the process of assessing potential adverse RBC impacts means understanding what harm may result from an enterprise's proposed activities or new business relationships – will there be more pollution, will working conditions improve or get worse? For due diligence undertaken once activities are underway and actual or potential impacts are discovered, enterprises may be assessing what new actions need to be taken and/or whether ceasing certain activities or business relationships is necessary to adequately respond to the expectations of the Guidelines. An enterprise will need to organize, adapt and direct potentially a wide range of internal processes to do this on an on-going basis. These processes should cover the enterprise and its business relationships as enterprises' impacts do not stop "at the factory gates." Engaging in a proactive way means that enterprises are better prepared to prevent and mitigate potential and actual adverse RBC impacts.

B. KEY ACTIONS

Actions enterprises may take to develop policies and management systems are likely to include the following:

1. Use a variety of tools/approaches to **scope out and identify risks of harm** on all matters covered by the *Guidelines* that may be likely to be in the enterprise's own operations and with its business relationships.
2. Use **iterative processes to prioritise and hone in on RBC risks and impacts**, moving from general areas of RBC risk to more specific RBC risks and impacts associated with its activities and its business relationships.
3. **Assess** whether those RBC risks or actual impacts would have **the kind of adverse impacts covered by the *Guidelines***, by benchmarking against relevant laws and regulations and the *Guidelines* and assess **the enterprise's relationship** to the adverse impacts (i.e. cause, contribute or directly linked).
4. Repeat these processes on a **regular basis**, recognising that more complex an enterprise and/or the higher the RBC risks, the more in-depth these processes will need to be.

C. FURTHER EXPLANATION OF KEY ACTIONS

1. Using a variety of tools/approaches to scope out and identify risks of harm

What type of processes?

- Proactively identifying RBC risks can be carried out using a variety of approaches including: (i) modifying existing procedures to include RBC risks so that **risks are identified at regular, updated intervals** (See Box 5); (ii) building a review of RBC risks in at **specific trigger points** (See Box 6); (iii) as part of an **RBC-specific assessment**, such as a review of its supply chain.

- In addition, as noted elsewhere in this Guidance, situations change so identification and assessment processes will **need to be dynamic** enough to pick up new RBC risks – such as potential accidents and emergencies[25] – but also periodic reviews to pick up new issues, looking beyond the obvious.

Box 3: Good Practices Box
Examples of Incorporating RBC Risk Identification Processes into Other Business Processes

- **Legal reviews of upcoming transactions** can be scoped so that they review not only risks to the enterprise, but also RBC risks
- **Country context reviews** can assess human rights and corruption risks in the relevant country/region
- **Hiring decisions** involving migrant workers can particularly probe the potential increased risk for **labour exploitation**
- Expanding know-your-customer/counterparty (**KYC**) processes to consider the human rights records of persons and firms reviewed[26]
- Expanding ex ante environmental **impact assessments**[27] can be revised to do "double-duty", incorporating consideration of potential environmental, social, health and human rights impacts
- **Screening** of potential suppliers can include a review of their RBC system
- Using **customer surveys** to cover concerns about privacy

Box 4: Good Practices Box
Examples of Possible "Trigger Points" for New or Existing Transactions to Incorporate RBC Risk Identification

- Entering a **new country** for operations or sales
- Engaging with **new business partners**
- Engaging in a **new project**, developing a **new product**
- **Major changes** in a project (such as entering a new phase or expanding scope of activities)
- Acquiring a **new asset or company**
- Major changes in the **operating environment**
- As part of **regulatory reviews**
- After **major incidents** such as accidents or major protests

What is the scope of investigation?

- ***Starting with a review of potentially all RBC risks***: Responsibilities are tied to impacts so enterprises should be prepared to address all the impacts with which they are involved, not just those they find of interest or choose to engage with or which are most cost-effective or easiest to address. Thus going into an assessment with an open mind and open eyes, without excluding consideration of potential issues *a priori* helps ensures that less obvious risks are not missed out and new ones are more likely to be picked up over time. (See Box 7). A limited "box ticking" approach will likely result in some issues being overlooked and may expose enterprises to the accusation that they are picking and choosing the human rights or labour rights they find it convenient to respect for example.

Box 5: *Guidelines* Box
Identifying Potential Human Rights Impacts

The *Guidelines* note that "Enterprises can have an i**mpact on virtually the entire spectrum of internationally recognised human rights**. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all rights should be the subject of **periodic review**."[28]

- ***Time frame***: Assessment that look at adverse impacts that have already happened pick up important indicators of future risk (in addition to identifying issues to be addressed). Including legacy issues in the review -- past abuses and/or unresolved claims from local communities (for example over land) – can help enterprises avoid consolidating or exacerbating past/ongoing impacts.

- ***Geographic boundaries***: As the *Guidelines* follow enterprises wherever the enterprise has operations and business relationships, so too should the review.

What kinds of RBC risks and impacts?

- ***Considering the full range of RBC risks:*** Box 8 sets out **examples of the range of RBC risks** covered in the *Guidelines*; however the *Guidelines* cover an even wider set of RBC risks and impacts and so should be reviewed carefully to understand their relevance to the enterprise's specific operations.

Box 6: *Guidelines* Box
Examples of Adverse Impacts Covered in the *Guidelines*

- **Improper involvement** in local **political activities**[29]
- Involvement in **forced or child labour**[30]
- **Failing to respect the right of workers to form or join trade unions** and representative organizations[31]
- **Failing** to maintain **contingency plans** for preventing, mitigating and controlling serious environmental and health damage from operations[32]
- Channeling **undue pecuniary advantages** to public officials[33]
- Making **misleading or unfair representations** to consumers[34]

- ***Where to start:*** The **presence and severity of these and other RBC risks and impacts** will be influenced by a **range of factors** (See Box 9) that can usefully be considered in deciding where to start and focus efforts on identification and assessments, and in designing due diligence processes more generally so that efforts are focused where risks are **severe and more likely**.
- ***Identifying risk triggers and causal chains***: The likelihood of RBC risks materializing into actual adverse impact can often be predictable if the analysis also identifies the types of situations that are likely to trigger specific impacts or trigger other situations that lead to impacts. For example, large footprint projects that require resettlement are likely to trigger a range of adverse impacts; a failure to pay recruitment fees for migrant workers may trigger a bonded labour situation, etc. Identifying and assessing the **causal chains that links an enterprise or its relationships to the potential impacts** within these different contexts will help the enterprise hone in on preventive and mitigation measures in the next step.

Box 9: Explanation Box: **Understanding Contextual Factors that Contribute to RBC Risks**	
	Sector
Sectoral context	• While all sectors involve certain risks and impacts, some **inherently involve more RBC risks than others**. Each sector will have a **typical set of impacts that are a good place to start** (but not finish) for both identifying potential impacts and then better assessing their relevance. This information will be available from industry associations, employers organisations, trade unions, stakeholders, credible reports from international organisations, civil society, relevant media, expert publications and peers.
	Nature of Operations, Products or Services
Operations, products or services	• An enterprise's **activities themselves** (or the activities of its **business relationships**) may hold inherent risks due to the **nature of the activity** (e.g. chemicals used in manufacturing processes, manufacturing that relies heavily on low-wage workers, construction services using unskilled, illiterate or migrant workers).
Stages in the supply chain	• For some products, there may be **stages in the supply chain or value chain** with specific high risks of severe RBC impacts (e.g. manufacturing with high chemical or water use, extraction of natural resources, high risk of child labour)
	Country / Operating Context
Operating context	• The operating context from the **national level down to the immediate, local operating environment** in which the enterprise operates and/or its business partners operate are likely to have **strong influence** on the presence or absence of potential RBC risks. Factors to consider include:
	• ***Governance context***: Existence and effectiveness of government policies in the countries and local area will increase or decrease the risk of adverse impacts. Levels of corruption play a significant role. In well-regulated locations, compliance with the national regulatory framework will often assist an enterprise in addressing many RBC risks whereas in less well-regulated locations a more proactive approach to identifying and managing risks and impacts is necessary. For example, there are likely to be significant differences in operating in countries with strong labour inspectorates and active trade unions compared to countries with weak or corrupt labour inspectorates or trade unions.
	• ***Socio-economic context:*** Ingrained discrimination against certain groups, low educational achievement, elevated rates of poverty, reliance on natural resources all raise warning flags when assessing risks.
	• ***Local context:*** In addition to the regulatory environment, the challenges of individual operating environments are relevant to consider – for example the presence of conflict, or the presence of a nearby environmentally protected area.
	Vulnerability Context
Hiding" in Plain Sight"	• Sometimes the most vulnerable are **"hiding in plain sight"** even in the most well-regulated economies – for example bonded and trafficked workers in low-wage jobs in otherwise well-regulated economies.
Vulnerability	• Some **people and places are more vulnerable** to impacts from business operations and will experience them in a more severe way than the average. For example, seeking to establish a farming plantation in an area of high biodiversity will have a more profound impact than seeking to establish one in an area of degraded or modified habitats; likewise resettlement involving agrarian, illiterate villagers with few skills to be able to

	re-establish their livelihoods requires different prevention and mitigation steps than land acquisitions for a factory in an urban environment with an active land market.
Business Relationships	
• The existence and effectiveness of **strong corporate governance** of the enterprise or business partner, consistent with the G20-OECD Principles on Corporate Governance, is a good test when looking at business partners. Lack of effective senior management oversight and responsibility, internal controls and record-keeping, and reporting can increase the risk that due diligence measures are inadequate, untrustworthy, and likely to be linked to a number of adverse impacts under the *Guidelines*, such as on disclosure, bribery, etc. Lack of prima facie evidence of RBC systems aligned with the *Guidelines* will also raise risks that business partners are not able to appropriately manage RBC risks to which the enterprise is directly linked.	
• **Non-arms-length transactions** raising the potential for conflicts of interest, non-transparent transactions, e.g. cash-based, raises red flags.	
• **Anomalies or unusual circumstances** which give rise to a reasonable suspicion of business relationship causing or contributing to RBC impacts. This is often particularly crucial in identifying risks in the anti-corruption area.	

2. Using iterative processes to hone in on RBC risks and impacts

- The **first step** in the identification process often starts with a mapping of the activities to be assessed – is it the whole enterprise and its activities and relationships, a particular transaction, a particular business relationship?
- As a **second step**, information on the potential risks associated with the activities can then be collected, often starting with desktop review and consulting experts, understanding what workers, or trade unions and other stakeholders and systems tell about RBC risks and impacts. This information should be used to put together a picture or map of **general areas of RBC risk**, in particular considering the factors set out in Box 9 above. The general areas of risk be identified around particular countries, particular parts of the operations, particular sourcing strategies, particular business partners, etc.
- As a **third step**, once the general areas of risk are identified, these risk factors should then trigger **iterative exploration** of more detailed questions, and using an array of investigative approaches that provide ever more detail on potential or actual impacts on the ground or with business partners. Enterprises may use a **variety of tools and approaches** in different areas to identify risks and risky business partners. (See Boxes 10 & 11).
- In cases where the **RBC risks are more severe** (see Box 19 below) **or more likely**, enterprises will need to adjust their due diligence processes accordingly – they may need to do more investigation – for example deeper KYC due diligence on a government procuring its products where it is suspected the government may misuse its products, more detailed investigation of the potential location for an operation when it is near a protected reserve, etc. Where the due diligence is focused on investigating potential adverse impacts around an on-going project or existing products or services, and where the investigative process be expected to take time, the enterprise will have to make judgment calls about how quickly changes must be made to the existing operations, products or services. The more severe the potential or actual impacts, the sooner action should be taken. The considerations are similar to those involved in disengagement (see next section below).

Box 10: Good Practices Box
Examples of Investigative Approaches

- **Pre-qualification** screening
- **Self-assessments** by the supplier/contractor
- **Working with key suppliers/contractors** to help them assess their own RBC risks
- **On-site assessments or audits**

Participating in **collaborative initiatives** that inspect suppliers, facilities or sites

Box 71: Good Practices Box
Examples of Know Your Customer/Know Your Counterparty Approaches to Investigation of Business Relationships

- Identification of the **ownership (including beneficial ownership**) of companies and corporate structure, including the names of corporate officers and directors
- Identification of the **related businesses, subsidiaries, parents and affiliates**
- Checking **government watchlist** information (e.g. UN sanctions lists, OFAC Specially Designated Nationals Lists, World-Check search);
- Verification of the identify of the companies using **reliable, independent source documents**, data or information (e.g. business registers extract, certificate of incorporation)

Identification of **any affiliation** of the company with governments, political parties, military, criminal networks, or armed groups.

- With respect to **business relationships**, recognising that some enterprises will have a vast array of business partners, the *Guidelines* suggest a **principled but practical approach** to narrowing due diligence efforts.[35] Where supply chains are extensive, enterprises can **map the likely structure** of their supply chains (e.g. manufacturing, component manufacturing, raw material production, etc.) as a start and **then overlay this with risk factors** (See Box 9 above) to pinpoint higher risk suppliers or general areas of RBC risk, and then move onto more detailed, iterative investigations.
- Identifying and assessing impacts **deep in supply chains and/or beyond immediate business relationships** likely requires mechanisms or approaches that are fit-for-purpose to ensure that suppliers or other business relationships and their activities are being adequately assessed, to understand the adverse impacts at that level. An enterprise may lack visibility of or leverage with suppliers several layers down in its supply chain but this does not diminish the enterprise's responsibility to identify and assess such potential or actual RBC impacts. Because of the shared challenges in visibility, this is an area where collaborative approaches to due diligence may be helpful and there is evidence that such approaches are increasingly being used. (See Box 12).

Box 82: Good Practices Box
Approaches to Identifying RBC Risks Beyond Immediate Business Relationships

- **Traceability** is the process by which enterprises track materials and products and the conditions under which they were produced (in relation to matters covered by the OECD *Guidelines*) through the supply chain. Traceability in and of itself does not fulfill due diligence expectations; however, traceability, as a tool, may help an enterprise gain credible information.
- **Engagement with 'choke points'** – these are enterprise that sit at a key point of transformation in the supply chain or the relatively few enterprises that process or handle a majority of a commodity inputs that they transform and pass further into the downstream supply chain. These enterprises will likely have greater visibility and/or leverage over their own suppliers and enterprises even further upstream than do more downstream enterprises to which they supply. Conducting due diligence on choke point enterprises to determine whether they are in turn conducting due diligence in line with the *Guidelines* provides some comfort that risks of adverse impact linked to its own suppliers have been identified, prevented and mitigated. Identification and engagement with control points may be carried out through the incorporation of confidential supplier disclosure requirements into supplier contracts, by specifying to direct suppliers the enterprises at "control points" that meet the expectations of the *Guidelines*, by using confidential information-sharing systems on suppliers and/or through industry wide schemes to disclose upstream actors in the supply chain.

Collaborative Assessments through industry initiatives or multi-stakeholder initiatives can also provide a cost-effective means of identifying and assessing potential impacts in long value chains.

Improving the process through consultation

- Identifying and assessing impacts is an **opportunity to engage a cross-section of departments**, tapping into internal expertise, identifying ways to build on processes they may already have in place to identify risks (see Box 5 above), and creating buy-in for the next step of due diligence – prevention and mitigation. These processes will likely involve a range of departments or functions and depending on how the enterprise is organized, different locations and different levels (HQ and local offices).
- **Workers and trade unions** will have insights on impacts on themselves but also impacts on the local communities where they come from. Consultations with workers about potential impacts or issues in the workplace should not substitute for workers' right to bargain over terms and conditions of employment.[36] Instead, authorised representatives of the workers should be allowed to negotiate on collective bargaining or labour-management relations issues and to consult on matters of mutual concern with representatives of management who are authorised to take decisions on these matters.[37]
- Where the due diligence process begins to narrow down to particular operations or circumstances, enterprises should **consult with potentially affected stakeholders** in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact them.[38] (See Box 13). Enterprises are recommended to engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.[39] The most vulnerable or marginalised individuals or groups among those potentially impacted are often harder to see and least represented and special engagement efforts may be needed to involve them. Consultation may help identify potential and actual impacts that would not otherwise be uncovered and enables the enterprise to identify whether stakeholders have the same or different perspectives as to what constitutes potential impacts and whether they are being dealt with appropriately, thus helping build trust for the subsequent stages of due diligence. Meaningful consultation is itself one part of discharging the responsibility to respect human rights.
- The Disclosure Chapter of the *Guidelines* re-emphasises the importance of timely, accurate and appropriate **information** in a way that is accessible and available to communities, including those without access to print media but who may be directly affected by the enterprise's activity.[40] Accurate

and relevant information is an important part of meaningful consultation and wider stakeholder engagement.

- Stakeholders (and their representatives, including where relevant, legal representation) should **not be subject to force, manipulation, interference, threats, coercion or bribery**. Where stakeholders are subject to threats or coercion by other parties (such as the government or third party interests), special provisions may be needed to protect their security and if necessary, identity as part of the engagement process.

Box 93: *Guidelines* Box

Meaningful Stakeholder Engagement

The *Guidelines* define stakeholder engagement as involving "the interactive processes of engagement with relevant stakeholders, through, for example, meetings, hearings or consultation proceedings. Effective stakeholder engagement is characterised by two-way communication and depends on the good faith of the participants on both sides. This engagement can be particularly helpful in the planning and decision-making concerning projects or other activities involving, for example, the intensive use of land or water, which could significantly affect local communities."[41]

3. Assessing against the *Guidelines* as a benchmark

- Assessing means projecting how a proposed activity or associated business relationships could have impacts on the society, workers or environment against the **following benchmarks**: (ii) **national law and gaps around the *Guidelines*;** and (i) the ***Guidelines* and its referenced international standards** (these are found throughout the Commentary to the *Guidelines*).
- Assessments will also typically involve addressing compliance with domestic law **to assess** whether domestic laws and regulations **align with the *Guidelines***, are silent on matters covered by the *Guidelines* or undermine or conflict with the principles and standards of the *Guidelines*. For example, does national law require protection of consumer privacy or does the law impose restrictions that would make it difficult if not impossible to respect consumer privacy? Given the scope of the *Guidelines*, the review can usefully include a review of national law applicable to the parent company or laws with extraterritorial applicability.
- **Enterprises are expected to honour the *Guidelines*' approach to the fullest extent** which does not place them in violation of domestic law.[42] The *Guidelines* can exceed the expectations placed on enterprises by domestic law without creating a conflict; a true conflict exists only in the rare circumstances when the *Guidelines* call for action that violates or contradicts domestic law. The due diligence process should assess any gaps and propose prevention and mitigation steps to fill those gaps so that the enterprise can honour the *Guidelines* to the greatest extent possible. While starting with the most severe impacts is an effective approach under the *Guidelines*, this will not necessarily exempt an enterprise from responsibility under relevant domestic laws for other impacts.
- As highlighted throughout this Guidance, the *Guidelines* contain a series of recommendations across its Chapter about the kinds of activities and outcomes that are expected and those that are not. (See for example Box 8 above). An assessment **compares the proposed activities to the processes and outcomes set out in the *Guidelines*** to understand whether the activities under the review will meet the recommendations. The *Guidelines* in turn reference a range of international standards that provide further guidance for understanding performance against the *Guidelines* – for example the Environment Chapter draws on the (Aarhus) Convention on Access to Information, Public Participation in Decision-making and Access to Justice[43] while the Employment and Industrial Relations Chapter draws on a wide range of ILO conventions.
- Assessing also includes understanding an enterprise's involvement in a potential or actual adverse RBC impact – whether it has **caused, contributed to or is it directly linked** to the adverse RBC impact (See Annex I). This is very relevant to the next steps of due diligence – deciding and designing steps to prevent and mitigate potential impacts, or to remediate action impacts.

II.B Due Diligence: Preventing and mitigating adverse impacts

A. PURPOSE

This is the step where an enterprise turns the information gathered in the previous step into action to prevent and mitigate potential adverse RBC impacts identified and is therefore a crucial step in enabling an enterprise to meet its responsibility under the *Guidelines*. The findings from the assessment should be taken up by those in the enterprise responsible for addressing them, and turned into actionable steps that will provide an effective response. The objective in designing steps to respond is to achieve the outcomes covered in the *Guidelines* (as well as compliance with domestic law), for example protecting worker health and safety or ensuring that payments to any agents is for appropriate and legitimate services only. Effective responses will often involve active, on-going collaboration with workers, governments and stakeholders to fix harms done and prevent future harms, including by addressing root, underlying causes of the impacts.

B. KEY ACTIONS

Actions enterprises may take to develop policies and management systems are likely to include the following:

1. Design **response plans** that are fit for purpose for the potential or actual RBC impacts and corresponds to the enterprise's involvement with the impact.
2. **Prioritise responses as necessary**, based on severity of the potential or actual impacts.
3. **Use leverage** with business relationships to prompt responses to potential or actual impacts.

C. EXPLANATION OF KEY ACTIONS

1. Developing response plans that are fit for purpose

Understanding the enterprise's relationship to the impacts

- The identification and assessment process is meant to identify whether the enterprise **has caused or contributed to potential or actual impacts or is directly linked** to a potential or actual adverse impact. That will determine what actions an enterprise should take in response to the impact as a minimum baseline under the *Guidelines.* (See Figure x below and Annex I)**.**
- **The distinction between each of the three situations may not always be crystal clear**. In such cases, enterprises should be guided by the spirit and objectives of the *Guidelines* in making choices and taking action.[44] (See Box 13).

> **Box 14: Good Practices Box Addressing Complex Circumstances**
>
> In complex circumstances, engaging with **stakeholders or other experts** including the relevant OECD National Contact Point (**NCP**) to inform the enterprise's decisions or engaging in collaborative action to address issues may be a useful way forward.

- The *Guidelines* are clear that they are **not intended to shift responsibility** from the entity causing an adverse impact to the enterprise with which it has a business relationship; instead they allocate to each organization the responsibility to address their own role with respect to the adverse impacts. The due diligence process helps each organization understand its role. Where the adverse impact is a result of being directly linked to it via a business relationship the following applies (See Box 15 below for a further explanation of directly linked):
  - The **enterprise** does not have responsibility for remedying the impact itself: that responsibility remains with the entity that caused or contributed to it – the business relationship. The enterprise retains a responsibility to use its leverage with the business relationship to seek to prevent or mitigate the impact.
  - The **business relationship** retains the responsibility to cease its activities causing the impact, prevent recurrence and provide remediation.

- ***Going beyond eliminating adverse impacts****:* There is nothing that prevents enterprises from taking additional action, going beyond eliminating or reducing harm. Sometimes proactive measures to make positive contributions to livelihoods, the environment or governance can be effective tools for long-term prevention of adverse impacts.[45] However, where "offsetting" can be an appropriate response in some areas of environmental protection, such as in the reduction of greenhouse gas emissions, it is not an appropriate response strategy for the other chapters of the *Guidelines*. Offsetting does not work when it involves people - harms to people in one area cannot be offset by positive contributions elsewhere or even in the same project. For example a social investment project with a local community to build a school will not offset responsibility for adverse impacts on their water supply.

Designing a Response

- ***Objective*****:** The objective in responding to RBC risks is to achieve the outcomes covered in the *Guidelines* (as well as compliance with domestic law). Each Chapter of the *Guidelines* sets out specifics - for example ensuring that forced or compulsory labour does not exist its operations or that payments to its agents is for appropriate and legitimate services only.
- ***Targeting*** the right kind of response:
    - Where enterprises are carrying out due diligence in advance of a project or transaction, it will often be easier to build in **preventive measures that can be taken into account in designing** a project in a cost-effective manner. Drawing on internal expertise and consulting with potentially affected stakeholders will sharpen the analysis and identify specific considerations to take into account, especially where stakeholders' rights may be impacted.
    - Where enterprises are carrying out due diligence on **broader areas**, such as reviewing all or part of its supply chain, broader, **more systematic changes** may be needed to respond to the wider set of impacts. (See Box 16).

Box 15: Explanation Box
Designing Appropriate Responses

Targeted RBC Due Diligence

- **Example**: Looking at a particular transaction or new project
- **Example of tools used**: Environmental or social impact assessment (ESIA)
- **Example of Response Plan**: an ESIA Action Plan—a set of specific measures to prevent and mitigate the potential impacts. Concrete, time bound, with assigned accountability and budgets.

Broader RBC Due Diligence

- **Example**: Looking at whole product lines, the supply chain
- **Example of tools used:** there may be a combination of types of reviews including compliance reviews, screening checks, trends analysis, supplier capacity training, etc.
- **Example of Responses:** Adopting system-wide changes to ensure that potential adverse impacts do not occur or actual impacts do not reoccur:
    - **E.g. Amending existing procedures, functions, job descriptions, etc.** supported by any necessary training to ensure that the new processes are understood by workers, in particular, or as necessary, business partners.
    - **E.g. Assigning clear responsibilities** for the prevention and mitigation actions across various teams and departments.
    - **E.g. Aligning internal decision-making, budget allocation and oversight processes** to make sure that decisions are made and resources allocated to ensure follow up**.**
    - **E.g. Putting in places processes to escalate concerns** to involve senior management in decision-making and oversight where serious issues arise**.**

- **E.g.** Deciding to work with government or other stakeholders on **collaborative arrangements** to work on the root cause(s) creating risks.

- ***Working with others through collaboration***: The corollary of the deepening ties among enterprises of all sizes within the global economy, is the collaboration that may be required to address some of the strategic challenges for enterprises and their stakeholders. The *Guidelines* encourage enterprise to consider such collaboration.
  - ***Moving from auditing to collaborating:*** Many larger enterprises and increasing range of industries have developed extensive systems of supplier audits for a range of issues covered in the *Guidelines* – environment, working conditions, bribery, quality control for consumer health and safety. These are also a form of due diligence. While these systems can work well to track compliance - hard data about supplier performance on issues such as emissions, both the tracking systems and the underlying data they report have in many instances will be less effective in actually addressing impacts – what is achieved. This is particularly true around worker and community issues in supply chains. Consequently, some enterprises and some sectors are working towards more collaborative and partnership based initiatives that seek to address the root causes of adverse impacts that usually involves building supplier capacity and at times, government capacity as well. The *Guidelines* encourage enterprises to participate in private or multi-stakeholder initiatives and social dialogue on responsible supply chain management, such as those undertaken as part of the *Guidelines* proactive agenda.[46] Some industries have moved to sharing ethical supply chain data, within the limits of competition constraints, or through industry associations, special-purpose non-profits and multistakeholder initiatives as a way of reducing the burden of multiple audits on suppliers, and increasing their leverage to push for improved performance.[47]
  - ***Working with certification initiatives:*** Some enterprises choose to work with certification initiatives that have aligned requirements around RBC issues, as these initiatives have their own systems of not only assessment but also (usually) corrective action planning and follow through. As with auditing approaches, it is useful for enterprises to understand the advantages but also the limits of certification systems and to inform themselves about the latest evaluations of certification systems and how they are evolving. As with auditing, they may be more effective in addressing certain issues than in others, particularly around workers and broader human rights issues and there will be differences in the approach and effectiveness of different types of certification programmes. Enterprises may need to consider supplementary measures or combinations of approaches when operating in more complex countries and issues.
  - ***Working in collaboration***: (See below).

2. Prioritising prevention & the most severe impacts

Prioritising prevention

- In all cases, the key objective of the due diligence process is to **prevent adverse RBC impacts** from occurring in the first place or from recurring. (See Figure I and Box 18). The measures that must be put in place to both prevent those impacts from occurring in the first place, to prevent recurrence when they do occur, to mitigate any remaining residual impacts and where appropriate, to remediate (See Remedy Section below) will depend on the particular circumstances and input from potentially affected stakeholders.

- This is an area where it may be useful to involve **outside expertise** in designing response steps and will likely be necessary for more complex, extensive operations. **Potentially affected**

stakeholders should be consulted to get their views on alternatives and to solicit additional ideas on prevention and mitigation steps.[48] In some formal assessment processes, such as environmental and social impact assessments, consultation on the management plans to be put in place that identify prevention and mitigation steps, is a core part of the process.[49]

Box 106: *Guidelines* Box
Examples of Prevention from the *Guidelines* and Proactive Due Diligence Guidance

- "Respect consumer privacy and take reasonable measures to ensure the security of personal data that they collect, store, process or disseminate."[50]
- "When multinational enterprises operate in developing countries, where comparable employers may not exist, provide the best possible wages, benefits and conditions of work, within the framework of government policies. These should be 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."[51]
- "Provide adequate education and training to workers in environmental health and safety matters, including the handling of hazardous materials and the prevention of environmental accidents, as well as more general environmental management areas, such as environmental impact assessment procedures, public relations, and environmental technologies."[52]
- In addition, the other OECD Due Diligence Guidance provide detailed examples of more specific prevention and mitigation steps enterprises can take to address adverse impacts:
  - OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (3rd edition 2016)
  - OECD-FAO *Guidelines* for Responsible Agricultural Supply Chains (2016)
  - OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (Draft February 2016)

Prioritising the potentially most severe impacts

- The *Guidelines* direct enterprises to **prioritise severe adverse** RBC risks and impacts for response, for example highlighting concerns about serious damage to the environment, to human health and safety, to public health[53] and the human rights of groups at risk of further marginalization. While not articulated in the *Guidelines* text themselves, the UNGPs provide a useful framework for identifying and comparing the relative severity of impacts.[54] (See Box 19).

Box 17: Explanation Box
Severity Criteria

The severity of an adverse impact is based on any of the three following characteristics. It is not necessary for an impact to have more than one of these characteristics to be reasonably considered "severe", although it is often the case that the greater the scale or the scope of an impact, the less it is "remediable".

- ***Scale*** refers to how **grave** the impact is on the **enjoyment of a human right** – how far does it take someone from being able to exercise their rights at all? In cases of life threatening impacts or serious criminal offense such as forced labour, this may be more obvious but it also includes other situations where there is little scope to exercise the right – strict limitations on the right to freedom of expression or association for example.
- ***Scope*** refers to how **widespread** the impact is – does it affect a large number of individuals, large amounts of land or resources, etc.? Are facilitation payments repeatedly involved in transactions?
- ***Irremediable character*** refers to the **irreversibility** of the impact – would it be impossible or at least very difficult to restore the person or a place or a situation to the way it was before an impact. Has a water source dried up, have children's growth been compromised, have consumers been disabled by a malfunctioning product?

Example: Widespread undermining of workers' right to join trade unions is a severe issue because the impact is widespread (scope), can have serious consequences (scale) because it is an enabling right that then undermines respect for other human rights of workers and may be irremediable where workers are dismissed and not reinstated in their jobs and other workers are then discouraged from attempting to form trade unions even in the future.

- **Severe RBC risks should be prioritized even if they are less likely to happen**. Many risk management systems de-prioritize a severe risk if it is considered less likely to happen. At least for human rights, any potential severe human rights impact identified should be prioritized even if it is less likely to happen. Human rights that are at risk of being the most severe negative impact within the context of the enterprise's activities or business relationships are increasingly being referred to as **"salient"** human rights risks and prioritised for action.
- Risk prioritization is about **sequencing** responses in the event that not all impacts can be addressed at once. It does not mean that other RBC risks or impacts identified do not need to be addressed at all. An enterprise is still accountable for addressing *all* its actual and potential impacts - once the more severe RBC risks are dealt with, it should move on to the next ones. It is important to note that this prioritisation will not supersede any liability under relevant domestic laws for other impacts not addressed as priorities.
- Enterprises will likely be able to **simultaneously address** a range of different kinds of RBC risks that may be handled through parallel processing by different departments – across different types of risks (consumer protection versus environment), across different operations, different locations, etc.
- While traditionally enterprises may prioritise contractors or suppliers who hold the biggest contracts or are most important to its business, consistent with the approach under the *Guidelines*, the priority should be where the severity of potential RBC impacts of those **business relationships** operations, products or services that are directly linked to the enterprise. (See Box 20).

Box 118: Good Practices Box
Prioritising Business Relationships Based on Potential Severity

This would mean prioritizing business relationships:

- based in **locations where there are known RBC risks**, such as limits on the right to form and join a trade union or other high-risk context
- with a track record of **poor performance on bribery and corruption**
- that **provide key products or services** that **themselves pose risks** such as safety or health hazards
- that are **local, smaller or new suppliers/contractors** who may **lack awareness of RBC issues** or the capacity to address them
- in a **high-risk stage** in the supply chain such as stages **where illegal subcontracting is common**
- **high-risk counterparty**, such as a government with a reputation for corruption transaction is by nature is high-risk, for example, because cash is used, or involves unknown parties

3. Using leverage with business relationships to prompt responses to potential or actual impacts

- **Responsibility and leverage are separate concepts** and should not be confused but sometimes are; enterprises have responsibility for addressing their adverse RBC impacts under the *Guidelines* whether they have leverage or not. What this means in practice is that due diligence should not begin and end with business relationships where significant leverage exists and go no further; to the contrary, focused due diligence and subsequent steps towards mitigation and remedy should begin with the most severe impacts.
- Where an enterprise contributes to or is directly linked to an adverse impact with a business relationship, it will be expected to **use its leverage** to persuade its business relationships to take action on the adverse impacts they create. The point is to try to persuade the business relationship to stop the harm - whether this is a pollution incident or widespread disregard for sexual harassment in the workplace.
- If an enterprise does not have any leverage **it should try to create it**. (See Box 17) Leverage is not a mathematical formula that necessarily equates with a minority investor's holding in a company or a partner's joint venture percentage or the purchasing power of a buyer vis-à-vis a supplier. It can be created and changed. As noted elsewhere in this Guidance, this is often most effectively done at the beginning of establishing business relationships or business relationship networks. This in turn highlights another key message of the *Guidelines* – the importance of taking a systematic approach and integrating RBC approaches into routine steps so that RBC becomes a part of day-to-day business, including negotiating with business relationships.

Box 129: Good Practices Box
Examples of Approaches to Creating Leverage

- ***In the marketplace:*** consolidating relationships to increase leverage with a reduced number of business partners, using a leadership or dominant position to impose requirements within the limits of competition rules, providing reputational benefits to business partners; through incentives such as additional business or renewal of business
- ***As a condition to developing a relationship:*** through pre-qualification or screening requirements
- ***In contractual requirements:*** through contractual incentives and disincentives for RBC performance, through procurement requirements, by building RBC requirements into industry-wide standard form agreements
- ***In management arrangements*** such as voting trusts, board positions in JVs covering RBC issues
- ***Through soft-power:*** exercising its leadership or its ability to bring along its peers, refusing to participate in an industry association that advocates an irresponsible approach to a societal problem created by the industry, through a "demonstration effect."[55]
- ***In collaboration with other partners:*** through industry initiatives or multistakeholder initiatives. The *Guidelines* highlight numerous examples where collaboration can enhance responses to issue covered by the *Guidelines* – such as through private or multi-stakeholder initiatives and social dialogue on responsible supply chain management,[56] in contributing to sustainable development more generally[57] and strengthening public support for anticorruption measures and enhancing transparency and public awareness of the problems of corruption and bribery.[58]

- If there are concerns with a business relationship, the enterprise should try to **use its leverage** to persuade the business relationships to make changes. That may take some time and effort. The enterprise may engage with its business relationship to improve their performance, for example, through training and capacity building to support them to integrate RBC into their own practices. At the same time, the business partner should demonstrate willingness to change and be taking steps to address the adverse impacts. The enterprise may manage the risk by:[59]
  - ***Continuation of the relationship*** with a business relationship throughout the course of risk mitigation efforts while continuing to exert ongoing leverage
  - ***Temporarily suspending the relationship*** where there are more serious concerns while the business relationship pursues ongoing risk mitigation – this can send an important signal about how seriously the enterprise takes the issue and provides good motivation for prompt action
  - ***Disengaging from the supplier or business relationship as a last resort***, either after failed attempts at mitigation, or where the enterprise deems mitigation not feasible (See Box 18).
- The *Guidelines* recognize that there may be **practical limitations** on the ability of enterprises to effect change in the behaviour of their suppliers resulting from product characteristics, the number of suppliers, the structure and complexity of the supply chain, or the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain,[60] for example, where suppliers have a monopoly or dominant position or are larger than the enterprise making the purchase. Where such **practical limitations** exist and the **enterprise has little to no leverage** and cannot create it, and is unable persuade the business relationships to take action to prevent or mitigate adverse RBC impacts, then where there are potential or actual severe impacts, the enterprise should consider other options, including **disengaging**[61] from the business relationship as a last resort. Disengagement is not a silver bullet – it means that the enterprise loses all opportunity to improve the business practices of a business relationship. At the same time, disengagement may be necessary to send a signal to the partner and the wider market and dissociate the enterprise from partners who do not share its commitment to RBC.

Box 20: Good Practices Box
Factors to Consider in Disengaging

- ***How severe are the impacts of concern*?** The more severe the adverse impact, or in the case of bribery, the seriousness of the offense, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. If the business relationship has created an irremediable impact, a corrective action plan is unlikely to be appropriate – only termination may be appropriate to disassociate the enterprise from the action and to send a strong signal of disapproval to the market.
- ***Has the business relationship shown the will to prevent or mitigate adverse impacts?*** Has the business partner shown any real commitment to change or is it just stringing the enterprise along to keep its business? Was the adverse impact was the result of a deliberate decision in light of awareness of the negative consequences? If the enterprise takes steps to engage with a business relationship on corrective action and it shows no signs of taking action in a timely or acceptable fashion, credible threats of disengagement or actual disengagement may be the only motivator for change.
- ***What is the potential impact of disengagement?*** The potential social and economic impact of disengagement through loss of jobs, for example, should be balanced against continued adverse impacts of the operations themselves. This is often not an easy call to make. The enterprise should adopt a planned approach, which may include consultation with those affected by both the continuing operations and the decision to disengage and work with the business relationship concerned and potentially others to mitigate the effects of a decision to withdraw.[62]
- ***Is the business relationship crucial for the enterprise?*** In the case of a supplier, if the product or service is essential to the enterprise's business, and no reasonable alternative source exists, then the enterprise faces difficult decisions. In this situation, both ending the relationship and staying in raise serious concerns. For as long as it stays in the relationship, the enterprise should continue to look for ways to maintain pressure on the relationship for change and account for its decisions in its communication while being prepared to accept any consequences – reputational, financial or legal – of the continuing connection.
- ***Who may replace the enterprise?*** The demonstration effect of a business partner committed to RBC is important. If the enterprise withdraws, what type of partner may step in? This is often a difficult call to make but one that should not just be used as a continued excuse for the status quo.

- **Preventing & mitigating impacts deep in supply chains and/or beyond immediate business relationships**: Given the depth and breadth of global supply chains and other business relationships, some priority impacts are likely to be deep in supply chains or beyond immediate business relationships, all the way back to the mine site or family farm or homeworking arrangement. On the one hand, identifying such risks is becoming easier through on-line research and specialized knowledge exchanges, prompting large companies to disclose their supply chain. At the same time, taking action to prevent and mitigate adverse impacts in the deep supply chain is often far more challenging and often requires further collaborative action. (See Box 23).

Box 21: Good Practices Box
Preventing & Mitigating Impacts Beyond Immediate Business Relationships

- ***Collaborating*** with others to create leverage and collectively pressure for a change can be effective. The *Guidelines* specifically encourage enterprises to participate in private or multi-stakeholder initiatives and social dialogue, such as those undertaken as part of the *Guidelines* proactive agenda and to engage with suppliers and other entities to improve their performance.[63] While certainly not uniformly the case, severe RBC risks deep in the supply chain may reflect systemic risks, endemic to the sector or context, rather than being specific to particular business relationships. In such cases, a top-down, contractual cascading of RBC requirements may do little to stimulate the needed changes. Bottom-up engagement that involves collaboration with other enterprises, civil society and or government or existing on-the-ground initiatives in likely sourcing areas may prove more cost effective and sustainable in the long run in addressing adverse RBC impacts across the sourcing area.
- ***Identify and work with control or choke points in supply chains***. They are likely to have leverage over the enterprises on the ground causing the adverse impacts directly linked to the enterprise's products or operations because they provide unique processing of commodities, an important transformation step in the supply chain or a key departure or entry point in a trade route. A key challenge may be in getting the choke point enterprise to align with RBC requirements; in the conflict minerals area, legal requirements have provided the necessary leverage.
- ***Work with certification initiatives*** can be an option, especially where they have a presence on the ground, bearing in mind considerations highlighted in above.

II.C Due Diligence: Tracking Performance

A. PURPOSE

An enterprise should account for how it has addressed adverse RBC impacts throughout its operations and with its business relationships. It can only do that if it has sufficient information about the steps it is taking and whether its approaches are effective or need adjustment. Tracking also lays the groundwork for accurate disclosure and communications. It is part of the "know" of "knowing and showing" how the enterprise is managing impacts.

B. KEY ACTIVITIES

1. Develop or adapt **systems to track** how it is responding to RBC risks and impacts and monitor implementation of any management plan against established objectives, goals and timelines
2. Identify **trends and patterns** that highlight recurring problems and issues that have been missed
3. **Feedback lessons learned** into improving due diligence and its outcomes in the future

Incorporating RBC expectations and policies into supplier or other business relationships, including into contracts or other forms of written agreements with its business partners.

C. EXPLANATION OF KEY ACTIONS

1. Developing or adapt tracking systems

- Given the different areas covered by the *Guidelines*, enterprises will **likely need different types of systems to track** their responses to RBC risks and impacts and are likely to have the basics of some systems in place (such as quality control or human resource systems) that can be adjusted and maximised to cover these issues, supported by appropriate resources and expertise. (See Box 20).

> **Box 22: *Guidelines* Box**
> **Examples of Building on Existing Tracking Systems to Align with the *Guidelines***
>
> - The *Guidelines* encourage enterprises "to respect workers' ability to remove themselves from a work situation when there is reasonable justification to believe that it presents an imminent and serious risk to health or safety."[64]
> - Many enterprises will have health and safety monitoring systems in place. Incorporating information on these kinds of incidents into the tracking would provide a basis for meeting the *Guidelines*, being able to accurately disclose such incidents and provide insights into workplace safety situations that need to be changed.

- Designing tracking systems may provide opportunities to **identify potentially conflicting approaches** where different parts of the enterprise are working at cross-purposes with its RBC objectives and to achieve greater coherence and integration across systems to achieve a more nuanced picture of an enterprise's integrated impacts – for example:
  - While the enterprise may track water usage for its industrial operations or as part of its environmental monitoring, particularly in water stressed areas, this will be a relevant consideration as well on impacts on the communities' right to water and therefore to tracking its human rights impacts as well.
  - Where the enterprise's resource efficiency tracking highlights purchasing practices that fail to account for resource efficiency.

- In some areas, the *Guidelines* provide **specific recommendations on issues that should be tracked** and monitored. (See Box 20).

> **Box 133: *Guidelines* Box**
> **Specific Recommendations in the *Guidelines* on Tracking and Monitoring**
>
> - "Call on the board of the parent entity to ensure the strategic guidance of the enterprise, the effective monitoring of management and to be accountable to the enterprise and to the shareholders, while taking into account the interests of stakeholders. In undertaking these responsibilities, the board needs to ensure the integrity of the enterprise's accounting and financial reporting systems, including independent audit, appropriate control systems, in particular, risk management, and financial and operational control, and compliance with the law and relevant standards." [65]
> - "The Principles extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries. Furthermore, the board's monitoring of governance includes continuous review of internal structures to ensure clear lines of management accountability throughout the group." [66]
> - "This is particularly the case with greenhouse gas emissions, as the scope of their monitoring is expanding to cover direct and indirect, current and future, corporate and product emissions; biodiversity is another example." [67]
> - "[It] is particularly appropriate to monitor the transfer of environmentally harmful activities to partners." [68]
> - "Recommends that enterprises carry out human rights due diligence. The process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed." [69]
> - "Establish and maintain a system of environmental management appropriate to the enterprise, including: …
>   - collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities; …
>   - regular monitoring and verification of progress toward environmental, health, and safety objectives or targets." [70]
> - "Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, …. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion." [71]

- As noted above, where enterprises have a large number of business relationships, there will be practical limitations on their ability to track and affect change with all; **prioritization of business relationships for tracking should be based on the projected severity of impacts**. (See Box 25).

Box 144: *Guidelines* Box:
OECD Work on Conflict Minerals to Track Mineral Supply Chains

OECD work on due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas helped to pioneer innovative approaches for companies to identify, prevent and mitigate the risk of severe RBC impacts linked to raw materials in complex global supply chains, often many 'tiers' beyond their direct business relationships. Given the severity of impacts related to the sourcing of minerals from conflict-affected and high-risk areas – such as gross human rights abuses, widespread sexual violence, torture, forced labour, worst forms of child labour and war crimes – a number of programmes have been developed to help refiners and smelters of minerals engage with very complex upstream supply chains.

The approach in mineral supply chains focuses on the smelter and refiner stage as the so-called 'control point' as that is where the smallest number of companies handle the largest amount of minerals and the last point in the supply chain where minerals can be traced physically before they are smelted / refined. Given the severity of the impacts in conflict areas, mineral production from such areas today is often traced with bagging and tagging due diligence systems and even though refiners and smelters are sometimes several tiers removed from mineral production, they are expected to use on-the-ground risk assessment teams to carry out enhanced due diligence in such high-risk / high-impact areas.

2. Looking for patterns and trends

- **Tracking trends and patterns** can highlight **recurrent problems** across the enterprise that may require more systemic changes to policies or processes and detects good practices that can be shared across the enterprise. More senior oversight of the combined tracking feedback can provide a more complete picture across the business, particularly where there are multiple operating locations. Tracking systems that build on local incidents but are reported back to headquarters or to a centralized department helps identify trends in adverse RBC impacts more widely and can be used as a basis for sharing lessons learned across the enterprise
- **Qualitative approaches** such as staff or user satisfaction surveys or focus groups, can provide useful insights from workers, customers, local communities on whether prevention and monitoring steps are effective – or not. **While such surveys are tools, they do not replace the social dialogue with workers.** Involving workers, trade unions and workers organisations can be a useful way of tracking worker perspectives on the enterprise's performance in dealing with its workers.
- **Quantitative data** that tracks trends and patterns can provide important insights on what systems are working well and which are not. Balancing process-focused indicators with outcome indicators can help capture the outcomes set out in the *Guidelines* chapters.

3. Feeding back to improve earlier due diligence steps

- Tracking information can **help improve due diligence**. The analysis of **what was missed**, and what did not work well can be fed back into the previous due diligence steps so they can be adjusted: identification / assessment processes can be updated to look for RBC risks that had not been systematically identified previously and the prevention and mitigation step revised to prevent recurrence. Tracking also helps identify and assess **unexpected RBC risks and impacts** – points that were not anticipated in order to understand where systems have not been effective, as well as good practices that can be shared more widely.
- **Feedback from / involving stakeholders** and through an enterprise's grievance mechanism or from other avenues of remedy will be **particularly valuable in picking up on adverse RBC impacts that were missed or not handled well** and that need to be designed into due diligence processes going forward. Customers and local communities may have a different perspective about whether prevention and mitigation actions have been effective or not in preventing risks to them. Engaging with stakeholders is an effective way for the enterprise to test its own assumption about how well it is doing and build trust with stakeholders by taking their views into account and adjusting systems as

appropriate. Enterprises may need to draw on expertise in developing indicator and tracking to follow some of the more "hidden" impacts identified in the *Guidelines* such as bribery, corruption, extortion, forced labour and discrimination. (See Box 27).

Box 25: Good Practices Box

Tracking Approach

- ***Collaborative approaches***: Enterprises may want to develop some collaborative systems to track and monitor that are designed with and involve stakeholders –
  - such as community monitoring or joint community monitoring such as around environmental emissions
  - consumer or user-led tracking.
- ***Transparent sharing***: Enterprises may choose to (or are sometimes required to) make specific monitoring and tracking information available, such as around environmental emissions. Making this information available in a user-friendly approach can help consumers understand the information. Making it available real-time and/or via a credible third-party source, can raise credibility of the information.
- ***Tracking commitments***: Where enterprises make specific commitments to stakeholders as part of their stakeholder engagement process, the commitments and their follow through can also be tracked and evaluated.[72] Communicating the results to stakeholders and giving them an opportunity to express their satisfaction or lack thereof is a transparent way of following up on tracking.

II.D. Due diligence: Communicating

A. PURPOSE

An enterprise should account for its how it has addressed adverse RBC impacts throughout its operations and with its business relationships by communicating about what it is doing. Effective communication and disclosure requires that enterprises have the previous due diligence steps in place to be able to understand and track their RBC risks and impacts so they can be accurately communicated, disclosed and reported. The Guidelines highlight the importance of disclosing clear and complete information on enterprises to a variety of users (from shareholders and the financial community to other constituencies such as workers, local communities, special interest groups, governments and society at large) to improve public understanding of enterprises and their interaction with society and the environment. This kind of disclosure can help build trust with workers and other stakeholders, demonstrate reliability as partners, and gain broader credibility in society. Communicating is about more than the act of disclosing or reporting information – it is also about engaging with stakeholders through a variety of different ways to provide fit-for-purpose information. Communication is the "show" part of "knowing and showing" how the enterprise is managing impacts.

B. KEY ACTIONS

Enterprises can take the following actions to communicate how it has addressed adverse RBC impacts:

1. **Disclose timely and accurate information on all material matters** regarding their activities, structure, financial situation, performance, ownership and governance as set out in the *Guidelines*[73] and the OECD Principles of Corporate Governance, if applicable.
2. **Disclose additional information** as set out in the *Guidelines*[74] to improve understanding of the operations of the enterprise.
3. **Communicate with stakeholders** to account for how the enterprise has addressed actual and potential adverse RBC impacts, adapting communication channels as necessary to stakeholders.

C. EXPLANATION OF KEY ACTIONS

1. Disclosure of timely and accurate information on all material matters

- The disclosure recommendations of the *Guidelines* reflect the disclosure recommendations of the **G20/OECD Principles of Corporate Governance**,[75] listing information considered "material" which is defined as "information whose omission or misstatement could influence the economic decisions taken by users of information."[76] (See Box 28). While much of the information in the list is about corporate governance and financial performance, some are directly relevant to the *Guidelines* and their implementation and indicate that these issues are already considered material to companies and their investors. This includes in particular information about **foreseeable risk factors and issues regarding workers and other stakeholders**.[77]

Box 26: *Guidelines* Box
Disclosure of Material Information Recommended by the *Guidelines*[78]

" Disclosure policies of enterprises should include, but not be limited to, material information on:

- the financial and operating results of the enterprise;
- enterprise objectives;
- major share ownership and voting rights, including the structure of a group of enterprises and intra-group relations, as well as control enhancing mechanisms;
- remuneration policy for members of the board and key executives, and information about board members, including qualifications, the selection process, other enterprise directorships and whether each board member is regarded as independent by the board;
- related party transactions;
- foreseeable risk factors;
- issues regarding workers and other stakeholders;
- governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process"

- As set out in the *Guidelines*, there may be a difference between risks an enterprise considers material to itself and RBC risks. Just as the *Guidelines* recommend that enterprise risk management systems are adjusted to include managing RBC risks – whether they are material or not -- the disclosure recommendations also recommend **adjusting disclosure policies to make information available on RBC risks**.[79] (See Box 29 below). The *Guidelines* also draw attention to the evolving nature of reporting standards for non-financial information, such as RBC risks, but this is also the same for what is considered "material information." The OECD/G20 Principles of Corporate Governance and their disclosure requirements around material information were updated in 2015 and while not all RBC risks will be considered material, they increasingly are.

Box 27: *Guidelines* Box
Disclosure of Additional Information Recommended by the *Guidelines*

Enterprises are encouraged to communicate additional information that could include:

- value statements or statements of business conduct intended for public disclosure including, depending on its relevance for the enterprise's activities, information on the enterprise's policies relating to matters covered by the *Guidelines*;
- policies and other codes of conduct to which the enterprise subscribes, their date of adoption and the countries and entities to which such statements apply;
- its performance in relation to these statements and codes;
- information on relationships with workers and other stakeholders"80

- Disclosure policies of enterprises should be **tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality** and other **competitive** concerns.[81]
- Enterprises are recommended to "**be transparent** in their operations and responsive."[82] More particularly they are **encouraged to disclose additional information** as set out in the *Guidelines*

Disclosure Chapter on a broader set of issues than financial performance, to improve public understanding of enterprises and their interaction with society and the environment. [83] (See Box 25). These recommendations and the further specific recommendations (See Box 26) reinforce the points made at several places in the *Guidelines* about the **importance of disclosure** of such information as manner of **demonstrating commitment to "socially acceptable practices**"[84], further noting that business conduct is increasingly considered by consumers when making purchasing decisions, hence the need for information on the relevant policies and their implementation.[85]

- Other chapters of the *Guidelines* include **specific disclosure recommendations**. (See Box 26) that reinforce the scope of the **public's "increasingly sophisticated demands for information**."[86]

Box 28: *Guidelines* Box
Disclosure of Information Recommended under Other Chapters of the *Guidelines*

The *Guidelines* recommend that enterprises disclose a range of information relevant to their performance on RBC:

- "Paragraph 5 recommends that enterprises carry out human rights due diligence. The process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed."[87]
- "Provide information to workers' representatives which is needed for meaningful negotiations on conditions of employment."[88]
- "Provide information to workers and their representatives which enables them to obtain a true and fair view of the performance of the entity or, where appropriate, the enterprise as a whole."[89]
- "In considering changes in their operations which would have major employment effects, in particular in the case of the closure of an entity involving collective lay-offs or dismissals, provide reasonable notice of such changes to representatives of the workers in their employment and their organisations, and, where appropriate, to the relevant governmental authorities, and co-operate with the worker representatives and appropriate governmental authorities so as to mitigate to the maximum extent practicable adverse effects."[90]
- "Provide the public and workers with adequate, measureable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and
- "Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation."[91]
- "Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, including accidents and emergencies; and mechanisms for immediate reporting to the competent authorities."[92]
- "Promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise, including, by providing accurate information on their products (for example, on greenhouse gas emissions, biodiversity, resource efficiency, or other environmental issues);"[93]
- "Reporting and communication are particularly appropriate where scarce or at risk environmental assets are at stake either in a regional, national or international context;"[94]
- "Providing information about the activities of enterprises and about their relationships with sub-contractors and their suppliers, and associated environmental impacts is an important vehicle for building confidence with the public, especially when information is provided in a transparent manner and when it encourages active consultation with stakeholders such as employees, customers, suppliers, contractors, local communities and with the public-at-large so as to promote a climate of long-term trust and understanding on environmental issues of mutual interest."[95]
- "Not make illegal contributions to candidates for public office or to political parties or to other political

organisations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management."[96]

- "Enhance the transparency of their activities in the fight against bribery, bribe solicitation and extortion. Measures could include making public commitments against bribery, bribe solicitation and extortion, and disclosing the management systems and the internal controls, ethics and compliance programmes or measures adopted by enterprises in order to honour these commitments. Enterprises should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery, bribe solicitation and extortion."[97]
- "Provide accurate, verifiable and clear information that is sufficient to enable consumers to make informed decisions, including information on the prices and, where appropriate, content, safe use, environmental attributes, maintenance, storage and disposal of goods and services. Where feasible this information should be provided in a manner that facilitates consumers' ability to compare products."[98]
- "Business conduct is increasingly considered by consumers when making their purchasing decisions. Enterprises are therefore encouraged to make information available on initiatives they have taken to integrate social and environmental concerns into their business operations and to otherwise support sustainable consumption. Chapter III of the *Guidelines* on Disclosure is relevant in this regard. Enterprises are there encouraged to communicate value statements or statements of business conduct to the public, including information on the social, ethical and environmental policies of the enterprise and other codes of conduct to which the company subscribes. Enterprises are encouraged to make this information available in plain language and in a format that is appealing to consumers. Growth in the number of enterprises reporting in these areas and targeting information to consumers would be welcome."[99]

- Information should be **maintained, disclosed and communicated in a way that is relevant, accurate, timely, current, clear, user-friendly and enable intended users to access information**.[100] Enterprises are encouraged to make information available in plain language and in a format that is appealing to consumers where this is relevant[101] and to provide easy and economical access to published information but also to take special steps to make information available to communities that do not have access to printed media (for example, poorer communities that are directly affected by the enterprise's activities).[102] Enterprises should not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent or unfair.[103]
- **As a core part of accounting for how impacts are addressed,[104]** enterprise are recommended to make information available about their **RBC commitments, its performance, its risk management systems**[105] and information about the enterprise's **RBC risk identification methodology and general findings of adverse RBC impacts** and Information about the enterprise's RBC **risk prevention and mitigation strategy**.[106]
- Where enterprise's actual or potential adverse RBC impacts involve their **business relationships**, they are recommended to include information on how they are addressing these within their disclosures.[107] This may include the **activities of subcontractors and suppliers or joint venture partners**.[108] The types of information that enterprises are recommended and/or legally required to disclose[109] about their business relationships is evolving, including around their supply chains. For example an increasing number of companies in particular industries are disclosing specific information about their supply chain and suppliers, (such as smelters/refiners in mineral supply chains, suppliers in garment supply chains) transparency requirements about beneficial ownership are being adopted in some jurisdictions.
- As the *Guidelines* prompt enterprises to encourage business partners to apply RBC approaches, this can include **encouraging disclosure and communication**.
- For **formal (public) reporting**, the *Guidelines* draw attention to the use of high quality accounting and reporting standards and encourages reporting standards that enhance enterprises' ability to communicate how their activities influence sustainable development outcomes (for example, the Global Reporting Initiative).[110] Most high-quality reporting frameworks recommend that public reporting be conducted annually at a minimum and should be made publicly available.

2. Communicating with stakeholders

- In addition to disclosing information in a formal manner for example, through reporting, enterprises are encouraged to use a variety of approaches to communicate relevant information to different audiences (such as in-person meetings, online communications, and formal public reports).[111] Communications that are **fit for purpose and tailored according to the audience** – whether it is communicating with workers or locally about a particular incident or with consumers about product safety or investors about its environmental management system – are likely to be more effective.
- In addition, enterprises could put in place local feedback mechanisms where the risk profile of the operations warrant this so that local stakeholders can raise their concerns, and consequently, enterprises can **communicate and report** on those issues that are **significant to local communities and other key stakeholders**. (See also next section).
- **Consultation and communication should not be confused**. Communication and disclosure are instead about a one-way provision of relevant information. Disclosure of information about the activities of enterprises and about their business relationships and associated impacts is an important enabler for effective stakeholder engagement. Consultation with potentially affected stakeholders as part of the due diligence process requires two-way dialogue and taking stakeholders' views into account. Social dialogue structures provide a process for consultations with workers. Broader stakeholder engagement may be used to discuss broader issues, build relationships and benefit from new insights.

VI. Providing for or cooperating in remediation

A. PURPOSE

Providing remedy for harms the enterprise caused or contributed to, whether to workers, to consumers, to individual or communities, to the environment – closes the circle on an RBC approach. Remediation involves making good the harm done. A core purpose of conducting due diligence is to prevent or avoid actual adverse RBC impacts. But where adverse RBC impacts do occur and an enterprise has actually caused or contributed to them, remediation will be expected. When enterprises are directly linked to adverse RBC impacts, they are not expected to provide for or cooperate in remediation, but may choose to do so and may collaborate with other enterprises in doing so.

B. KEY ACTIONS

Actions enterprises may take to provide for, or cooperate in, remediation (when appropriate) would likely include the following:

1. **Enable remediation** for harms caused or contributed to, using a variety of avenues
2. Provide for or co-operate through legitimate processes in the **remediation of adverse human rights impacts** where they identify that they have caused or contributed to these impacts.

C. EXPLANATION OF KEY ACTIONS

1. Enable remediation for harms caused or contributed to

Box 29: Explanation Box
Remediation and Remedy

Remediation and remedy refer to both the ***processes*** of providing remedy for an adverse impact and to the substantive ***outcomes*** that can counteract, or make good, the adverse impact. These outcomes may take a range of forms, including:

- apologies
- restitution or rehabilitation
- financial or non-financial compensation (including establishing compensation funds for victims, or for future outreach and educational programs)
- punitive sanctions (whether criminal or administrative, such as fines)
- prevention of harm through, for example, injunctions or guarantees of non-repetition[112]

Remedies will vary depending on the type of harm – and there may be more than one remedy. Environmental harms may require restoration of the damaged environment, administrative sanctions and monetary compensation to those harmed. Remedies for anti-bribery and corruption under the OECD and UN Conventions[113] typically result in fines paid to the state,[114] but there are other more targeted remedies such as requiring the breaching enterprise to raise awareness and improve business practice.

Remedy should be available through **state-based judicial and non-judicial mechanism** (criminal, civil and administrative) where impacts are covered by national law. The *Guidelines* and the UNGP encourage making use of a range of possible mechanisms, including non-state based mechanisms, to provide for or cooperate in remedy, including through the **OECD NCPs.**

Understanding the enterprise's relationship to remediation

- Where an enterprise has **caused or contributed to an actual adverse RBC impact**, it should be prepared to address the harm and provide for or cooperate in remedying the harm. This can involve working with business relationships (See Box 28).
- Where an enterprise has not caused nor contributed to an adverse RBC impact but where the impacts are **directly linked** to its operations, products or services through a business relationship, that business relationship should remedy the harm done. This is a reflection of the principle expressed in the *Guidelines* that they are not intended to shift responsibility from entities that are the source of harm -- the responsibility to remedy harm rests with the enterprise that caused or contributed to it. However, where an enterprise is directly linked to the harm through its business relationship, it still has a responsibility to use its leverage with the business relationship to try to prevent or mitigate the risk of such impacts continuing or recurring. It should raise the issue with the business partner concerned, request them to address it directly and confirm the outcome. It is not expected to participate in the remediation but may choose to do so, alone or in collaboration with other parties. (See Box 28).

Box 30: Good Practices Box
Options for Playing a Role in Remediation with Business Relationships

An enterprise may choose to play a role in trying to remedy a harm, even where it is not expected to do so. Options can include:

- ***Making the enterprise's own operational level grievance mechanism available*** to workers in its supply chain for example, or to sub-contracted workers on its premises.
- ***Providing support to the supplier or other business partner*** in its efforts to address the issue, helping build its capacity to do so where this is weak, help the supplier develop or improve its own grievance mechanism.
- ***Working with other enterprises sourcing from the same enterprise****:* Enterprises with co-located suppliers can consider working collectively to develop shared grievance mechanism models or processes, in collaboration with trade unions and other civil society partners wherever possible.
- ***Providing remedy through collaborative mechanisms*** in a broader coalition with a specific business partner or working on addressing impacts in the region or sector.
- ***Cooperating with local authorities****:* Depending on the circumstances, the enterprise may need to cooperate with local authorities where there have been more severe impacts and in particular where criminal activities may be involved.

- **The *Guidelines*** include **specific recommendations on remedy mechanisms** with respect to a **range of RBC risks and impacts:**

  - **human rights**[115] (see below),
  - **workers**, through negotiations with trade unions and representative organisations of workers choosing[116] on terms and conditions of employment and by removing themselves from a work situation when there is reasonable justification to believe that it presents an imminent and serious risk to health or safety[117]
  - **consumers**[118] (See Box 30)
  - the **environment**[119]

  and **generally** where there have been **adverse RBC impacts**[120]

- **The *Guidelines* also highlight a number of avenues** through which remedy can be provided through:
  - **domestic avenues** that are part of the obligation to obey domestic law; [123] where harms identified under the *Guidelines* overlap with national law, enterprises may be *required* to cooperate in state-based proceedings to address the harms.
  - the **NCPs** (see Box 33)
  - various **enterprise-based mechanisms** (see the boxes in this section and the section below on human rights)
  - **multistakeholder or other collaborative efforts** that also provide remedy.

Box 31: *Guidelines* Box
the OECD National Contact Points (NCPs)

The *Guidelines* have their own non-judicial mechanism – the NCPs. [121] They provide a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the *Guidelines* – called a "specific instance" under the *Guidelines*. Specific instances should be resolved in a manner that is impartial, predictable, equitable and compatible with the principles and standards of the *Guidelines*. [122] Trade unions, NGOs and individuals can bring specific instances against an enterprise covered by the *Guidelines* about that enterprise's implementation of the *Guidelines* wherever it operates or has business relationships anywhere in the world. The *Guidelines*' complaint process is intended to resolve alleged breaches of the *Guidelines* through conciliation and mediation, by facilitating dialogue between the parties.

- **Which avenue is the most appropriate will depend on the circumstances**, but the **core consideration** should be to find the **most effective way to provide or cooperate in providing a remedy** that puts right the harm done – and not just alert to the enterprise or the authorities to non-compliance. While whistleblower mechanisms have an important role to play, they are usually not established to provide remedy to those harmed by an enterprise's actions. (See Box 30 below). The recommendations around consumer protection mechanisms highlight **important characteristics** for such mechanisms: **fair, easy to use, timely, effective, without unnecessary cost or burden**.

Box 32: *Guidelines* Box
Whistleblower v Consumer Protection Mechanisms

The *Guidelines* highlight "**whistle-blowing" systems** that are typically designed to alert management or public authorities to non-compliance and are of particular relevance to anti-bribery and environmental initiatives. [124] And while they should include protection against discrimination and disciplinary action for the whistleblower, [125] they are typically not designed to accept and address grievance about impacts of the enterprise on particular individuals and to provide remedy. If so, they would not qualify as grievance mechanisms, but could be redesigned to do so.

Compare this to the mechanisms highlighted in the *Guidelines* **for consumers**: "Provide consumers with access to fair, easy to use, timely and effective non-judicial dispute resolution and redress mechanisms, without unnecessary cost or burden." [126]

- **These grievance mechanisms can play a** number of roles **which underlines the point that integrating remediation, like other processes under the *Guidelines,*** into company systems can make them more effective and efficient**:**
  - providing **early warning** for the enterprise of issues or patterns of issues or already matured adverse impacts that will need to be dealt with, bearing in mind that there may be other early warning mechanisms such as public mobilization, letter writing campaigns or other forms of complaint that also serve as early warnings

- providing an **early point of recourse** to identify and address the concerns of affected stakeholders before any negative impact escalates or leads to harm
- **feeding into tracking the effectiveness** of a company's response to adverse impacts
- **improving its due diligence processes** to ensure that the types of impacts complained of are proactively identified and prevented and mitigated in the future.

- A **proactive approach to remedy starts at the very beginning** of a project, new relationships, new operations. For some industries, enterprises may be required to put up performance bonds or sinking funds to ensure the availability of segregated and guaranteed funds for remediation in the case of accidents or rehabilitation after closure. While in some jurisdictions provision must be made to ensure the payment of wages of employees (and not necessarily all workers) in case of bankruptcy, these kinds of mechanisms for other areas of RBC are currently quite rare.

- In addition, enterprises are encouraged to **go beyond eliminating adverse RBC impacts**. However, providing for or cooperating in remediation for harm already done is a specific responsibility under the *Guidelines* that should not be confused with or mixed with making positive contributions.

2. In the case of human rights grievances

- The *Guidelines* set out **additional considerations to remedy human rights harms**, including highlighting the option of establishing operational level grievance mechanisms. They include specific "**effectiveness criteria**" that should guide the design and operation of any internal grievance mechanism that will address human rights grievances (See Box 35). These criteria are also relevant to designing mechanisms for other areas of the *Guidelines* as well.

Box 33: *Guidelines* Box: Effectiveness Criteria for Non-Judicial Grievance Mechanisms for Human Rights Grievances, including Operational Level Grievance Mechanisms[127]	
Legitimate	✓ Trustworthy ✓ Accountable
Accessible	✓ Known ✓ Variety of access points ✓ Assistance to overcome barriers
Predictable	✓ Clear procedures ✓ Clear timeframes
Equitable	✓ Fair access to information, advice and expertise ✓ Fair treatment
Transparent	✓ Keeping parties informed about progress of cases ✓ Providing information about the process to build confidence
Rights-compatible	✓ Outcomes and remedies must accord with internationally-recognised rights ✓ No prejudice to legal recourse
Continuous learning	✓ Identification of lessons for (i) improving the mechanism and (ii) preventing future harm
Based on engagement and dialogue	✓ Consulting 'users' (including internal users) on design and performance

- One of the most important advantages of such a mechanism is that **those adversely impacted** are be able to **receive remedy sooner** that they would receive in other processes, but the choice of which process should be left to those making the claim – an operational level grievance mechanism should **not preclude or condition access to the courts**.
- **Involving external stakeholders** who may potentially be affected by an enterprise's operations in discussing and designing its operational-level or company-level grievance mechanism is an effective way to begin to build trust in the mechanism, prompt its use as a channel to raise grievances early

and give them confidence that such mechanisms will be effective in providing remedies in accordance with internationally recognized human rights standards.[128] When it comes to working through how to remedy a particular impact, engagement with the person or persons affected to choose among remedy options, rather than presenting a fait accompli is another step in building trust and respecting rights. For example, in some circumstances, affected stakeholders might find that an apology is the most meaningful remedy. Where the mechanism is being designed to operate at a local level they can provide local views and preferences and ensure that it is culturally appropriate. Vulnerable or marginalized individuals may be particularly disempowered from raising complaints. It may be possible to identify specific ways in which they can raise concerns without increasing their vulnerability, including through third parties speaking on their behalf.

- **Complementing but not replacing other avenues**:
  - Operational-level grievance mechanisms can be important **complements to wider stakeholder engagement**, but cannot be substitute for it either; they are one part of a broader approach to stakeholder engagement.
  - **In the case of employees and other workers represented by trade unions**, industrial relations processes involving management and unions are themselves a form of operational-level grievance mechanism. The most appropriate channels for addressing complaints are often through discussions between trade unions and the management. Operational-level grievance mechanisms can be an important complement to collective bargaining processes, but cannot substitute for it. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes.[129]
- **Getting internal acceptance**: It can be challenging to build internal understanding that complaints raised through internal mechanisms are not a threat to staff nor necessarily a sign that the company is failing at its relationships. It may be helpful to explain that the process feeds into the continuous improvement process to improve performance across the enterprise. Where complaints do come in, where it is appropriate, involving thes taff or departments responsible for the issue in responding may contribute to improved uptake of prevention. However, there are situations where such involvement may not be appropriate, for example there are serious allegations around behaviour. In such cases, the enterprise will need alternative departments or avenues for assessing and responding to the grievances.

Notes

[1] Chapter II – General Policies, para. 14.
[2] Chapter II – General Policies, Commentary para. 33.
[3] G20/OECD Principles of Corporate Governance (2015).
[4] Chapter II – General Policies, Commentary, para. 8-9.
[5] Chapter II – General Policies, Commentary, para.8.
[6] Chapter II – General Policies, Commentary, para.7, Chapter II – General Policies, Commentary, para.7, Chapter III – Disclosure, Commentary para. 34, Chapter IV – Human Rights, Commentary, para.45, Chapter VI - Environment, Commentary para.60-61 and Chapter VII Combating Bribery, Bribe Solicitation and Extortion, para.7.
[7] Chapter II – General Policies, para. 15.

[9] Chapter VI - Environment, Commentary para. 61.
[10] Chapter II – General Policies, Commentary, para.14.
[11] Chapter III - Disclosure, y paras. 28.
[12] Chapter II – General Policies, Commentary para.12, Chapter VI –Environment, Chapter VII Combating Bribery, Bribe Solicitation and Extortion, Commentary para. 77.
[13] Chapter VI - Environment, para. 3.
[14] Chapter VI – Environment, para. 6 d), Commentary para. 63.
[15] For example, when companies are considering changes in their operations which would have major employment effects, the *Guidelines* recommend certain steps to mitigate impacts on workers. Chapter V – Employment and Industrial Relations, para. 6. Building in financial provisioning for workers and the environment in the event of closure is an important option for mitigating some of the types of impacts identified in the *Guidelines*.
[16] Preface, 5, II A.1.
[17] Chapter VI - Environment, Commentary para. 44; UN Guiding Principles on Business and Human Rights, para. 16.
[18] Chapter VI - Environment, para. 5.
[19] Chapter III – Disclosure, Commentary para. 34.
[20] For example, the OECD added an entirely new chapter to the *Guidelines* on human rights in 2011. Attention to that topic has grown significantly in the five years since adoption.
[21] Chapter III – Disclosure, Commentary para. 34, Chapter VI - Environment, para.7, Commentary para.73, Chapter VII – Combatting Bribery, Bribe Solicitation and Extortion, para.7.
[22] Chapter VII – Combatting Bribery, Bribe Solicitation and Extortion, para. 6.
[23] Chapter II – General Policies, para. 8.
[24] Chapter VI - Environment, Commentary, para. 4.
[25] Chapter VI – Environment, para. 4.
[26] See also Good Practice Guidance on Internal Controls, Ethics, and Compliance (2010). This Good Practice Guidance was adopted by the OECD Council as an integral part of the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 26 November 2009.
[27] Chapter VI - Environment, Commentary para. 67.
[28] Chapter IV – Human Rights, Commentary para. 40.
[29] Chapter II – General Policies, para.15.
[30] Chapter V – Employment and Industrial Relations, para. 1 c).
[31] Chapter V – Employment and Industrial Relations, para. 1 a).
[32] Chapter VI - Environment, para.5.
[33] Chapter VII – Combatting Bribery, Bribe Solicitation and Extortion, para. 1.
[34] Chapter VIII – Consumer Interests, para. 4.
[35] Chapter II – General Policies, Commentary para.16.

[36] Chapter V – Employment and Industrial Relations, Commentary para. 56.
[37] Chapter V – Employment and Industrial Relations, Commentary para. 8.
[38] Chapter II – General Policies, para. 14.
[39] Chapter VI - Environment, para.2.
[40] Chapter III - Disclosure, Commentary paras. 35.
[41] Chapter II – General Policies, Commentary para.25.
[42] Chapter I – Concepts and Principles, para. 2.
[43] Chapter VI – Environment, Commentary para. 60.
[44] Chapter I – Concepts and Principles, para. 2.
[45] Preface, 1, 5.
[46] Chapter II – General Policies, Commentary para. 23.
[47] Chapter II – General Policies, Commentary para. 23
[48] Chapter II – General Policies, para. 14.
[49] Chapter VI - Environment, para.3.
[50] Chapter VIII – Consumer Interests, para. 6
[51] Chapter V – Employment and Industrial Relations, para. 4.
[52] Chapter VI - Environment, para.7.
[53] Chapter VI - Environment, para.4.
[54] UNGPs, Commentary to Article 14.
[55] Chapter VI - Environment, Commentary, para. 72.
[56] Chapter II – General Policies, para. B 2.
[57] Chapter II – General Policies, Commentary para .12
[58] Chapter VII – Combatting Bribery, Bribe Solicitation and Extortion, Commentary para. 74.
[59] Chapter II – General Policies, Commentary para. 22.
[60] Chapter II – General Policies, Commentary para. 21.
[61] For further steps on responsible disengagement, see OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (Draft February 2016), para.70.
[62] For further steps on responsible disengagement, see OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (Draft February 2016), 70.
[63] Chapter II – General Policies, Commentary para. 23.
[64] Chapter V – Employment and Industrial Relations, Commentary para. 57.
[65] Chapter II – General Policies, Commentary para. 5.
[66] Chapter II – General Policies, Commentary para. 9.
[67] Chapter III – Disclosure, Commentary para.33.
[68] Chapter III - Disclosure, Commentary paras. 33.
[69] Chapter IV - Human Rights, Commentary para. 45.
[70] Chapter VI – Environment, para. 1.
[71] Chapter VII - Combating Bribery, Bribe Solicitation and Enforcement, para. 2.
[72] See for example, OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractives Sector (2016), Steps 5 & 6.
[73] Chapter III - Disclosure, para. 1.
[74] Chapter III - Disclosure, para. 2.
[75] The disclosure list reflects the OECD Principles that were in place at the time of the 2011 update of the *Guidelines*. The Principles and the disclosure requirements were updated in 2015. See: G20/OECD Principles of Corporate Governance (2015)
[76] Chapter III - Disclosure, Commentary paras. 30.
[77] Chapter III - Disclosure, para. 1.
[78] Chapter III – Disclosure, para. 2.
[79] Chapter III - Disclosure, Commentary paras. 33.
[80] Chapter III – Disclosure, para. 3.
[81] Chapter III - Disclosure, para. 1.
[82] Chapter III - Disclosure, Commentary para. 28.
[83] Chapter III - Disclosure, Commentary paras. 28 and 33.

[84] Chapter III - Disclosure, Commentary paras. 28 and 33
[85] Chapter VIII – Consumer Interests, Commentary para. 86.
[86] Chapter III - Disclosure, Commentary para. 28.
[87] Chapter IV – Human Rights, Commentary para. 45.
[88] Chapter V – Employment and Industrial Relations, para.2.
[89] Chapter V – Employment and Industrial Relations, para.2 and Commentary para. 55.
[90] Chapter V – Employment and Industrial Relations, para.6.
[91] Chapter VI - Environment, para. 2
[92] Chapter VI - Environment, para.5.
[93] Chapter VI - Environment, para.6 c).
[94] Chapter VI - Environment, Commentary para. 65.
[95] Chapter VI - Environment, Commentary para. 65.
[96] Chapter VII - Combating Bribery, Bribe Solicitation and Enforcement, para. 7.
[97] Chapter VII - Combating Bribery, Bribe Solicitation and Enforcement, para. 5
[98] Chapter VIII – Consumer Interests, para. 2.
[99] Chapter VIII – Consumer Interests, Commentary para. 86.
[100] From Chapters III and VIII.
[101] Chapter VIII – Consumer Interests, Commentary para.86
[102] Chapter III - Disclosure, Commentary para. 35
[103] Chapter VIII – Consumer Interests, para. 4.
[104] Chapter II – General Policies, para. 10.
[105] Chapter III - Disclosure, para. 3 and see next footnote.
[106] Including Chapter III - Disclosure, para. 3, Chapter IV - Human Rights, Commentary para. 45, Chapter VI - Environment, para. 2, Chapter VII - Combating Bribery, Bribe Solicitation and Enforcement, para. 5, Chapter VIII - Consumer Interests, Commentary para. 86.
[107] Chapter VI - Environment, Commentary para. 65.
[108] Chapter III - Disclosure, Commentary para. 33.
[109] With due regard also for legal requirements that may prohibit disclosure for competition purposes.
[110] Chapter II – General Policies, Commentary para. 34.
[111] Chapter III – Disclosure, Commentary para. 33.
[112] OHCHR OHCHR Interpretive Guide on the Corporate Responsibility to Respect Human Rights, section 2.1.13.
[113] *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997)
[114] Other sanctions may attach to a finding of bribery and corruption as well. For example, multilateral development banks have established debarment as a form of sanction when their anticorruption / integrity requirements are breached.
[115] Chapter IV - Human Rights, para. 6.
[116] Chapter V – Employment and Industrial Relations, para. 1 b).
[117] Chapter V - Employment and Industrial Relations, Commentary para. 57.
[118] Chapter VIII – Consumer Interests, para. 3.
[119] Chapter VI – Environment, Commentary para. 67.
[120] Chapter II – General Policies, Commentary para. 14.
[121] See: http://www.oecd.org/daf/inv/mne/ncps.htm
[122] Part II, Procedural Guidance, Section C.
[123] Chapter I – Concepts and Principles, para. 2.
[124] Chapter II – General Policies, Commentary para. 13.
[125] Chapter II – General Policies, para. 10. And see - G20 Anti-Corruption Action Plan: Protection Of Whistleblowers Study On Whistleblower Protection Frameworks, Compendium Of Best Practices And Guiding Principles For Legislation (2012).
[126] Chapter VII – Combatting Bribery, Bribe Solicitation and Extortion, para. 3.
[127] See OECD Due Diligence Guidance for Meaningful Engagement in the Extractive Sector, p. 60 citing A Guide to Designing and Implementing Grievance Mechanisms for Development Projects, The IFC Office of the Compliance Advisor/Ombudsman, incorporating the effectiveness criteria for non-judicial grievance mechanisms contained in the UN Guiding Principles on Business and Human Rights – Principle 31.
[128] OHCHR, Frequently Asked Questions about the Guiding Principles on Business and Human Rights, Q 40.

[129] Chapter V – Employment and Industrial Relations, Commentary para. 56 and UN Guiding Principle 29, Commentary.