

Shift

Putting Principles into Practice



Implications of the UN Guiding Principles on Business and Human Rights for the Fair Labor Association

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Shift is an independent, non-profit center for business and human rights practice. It is staffed by a team that was centrally involved in shaping and writing the UN Guiding Principles on Business and Human Rights, and is chaired by the author of the Guiding Principles, Professor John Ruggie.

Shift provides the expert knowledge and guidance for businesses and governments to put the UN Guiding Principles into practice. Based on lessons from this work, Shift develops public guidance materials to support improved practices for the respect and protection of human rights globally.

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1.EXECUTIVE SUMMARY

Following the adoption of the UN Guiding Principles on Business and Human Rights in 2011, the FLA asked Shift to conduct a review of the implications of the Guiding Principles for its own work. The review was conducted through a high-level desk-based analysis of the FLA's written policies and procedures, its programs, complaints mechanism, governance structures, and information on its website portal to identify correlations, strengths and weaknesses with regard to the UN Guiding Principles.

The review focused on the second pillar of the UN Guiding Principles – the corporate responsibility to respect human rights. This focuses on the kinds of policies and processes that a business needs to have in place in order to ensure that it avoids infringing on human rights and addresses any adverse impacts with which it is involved.

This review is not an assessment of the impact of the FLA's work on the lives of workers; nor is it an assessment of how far company participants in the FLA meet the UN Guiding Principles. Rather, it focuses on what the FLA itself requires of its Participating Companies and how it knows and shows whether they meet those requirements in practice. The review sought to take into account new developments in the FLA's evolving approach to the improvement of labor standards.

There are many ways in which the FLA's policies, processes and practices are well aligned with the UN Guiding Principles. The revised Workplace Code of Conduct provides a clear set of labor rights outcomes, in line with international standards, and the Principles of Fair Labor and Responsible Sourcing closely parallel the UN Guiding Principles' six core requirements regarding a policy commitment, four due diligence steps and remediation processes. The inclusion in the Principles of Fair Labor and Responsible Sourcing of key aspects of purchasing/sourcing practices is notable in filling a previous gap with regard to embedding respect for human rights across all relevant company departments.

Also noteworthy is the FLA's recent move away from pure compliance auditing towards the incorporation of more root cause analysis and capacity building approaches, aimed at more effective and sustainable mitigation of risks to workers' rights. The FLA has strong verification and reporting practices with regard to Participating Companies' suppliers, and provides considerable transparency through the publication of its independent monitoring/assessment reports. Transparency has also been a strong feature of the FLA's Third Party Complaints mechanism, which has achieved some notable remediations of complex labor rights impacts over the years. The FLA also has a strong set of commitments and practices regarding stakeholder engagement.

In order to achieve further alignment with the UN Guiding Principles, Shift recommends that the FLA:

- improve its ability to track the performance of Participating Companies with regard to the Principles of Fair Labor and Responsible Sourcing, including by helping Participating Companies develop the capacity to know and show that their own activities (including sourcing/purchasing decisions) are consistent with respect for human rights.

- pay particular attention to the role that performance incentives for staff making purchasing decisions play in driving respect for labor rights compliance in the supply chain. Participating Companies could be requested to include information on this in their annual reporting to the FLA.
- define a process for coming into line with its own Charter commitments with regard to reporting on the performance of Participating Companies, and keep external stakeholders apprised of its plans and progress in this regard.
- clarify the grievance mechanism requirements in the Workplace Code, including with regard to what makes for an effective grievance mechanism. This might be elaborated in supporting materials to the Code and based on UN Guiding Principle 31.
- provide greater clarity on what Participating Companies should themselves provide by way of grievance reporting channels for workers, with due allowance for their varying resources and capacities.
- ensure a full description of the FLA's Third Party Complaints process is again made available on its website in key languages, pending the completion of the current review process.
- ensure that the FLA Charter is updated to be consistent with revised FLA policies and principles, and keep stakeholders apprised via its website and other communications of current or future FLA reforms.

The FLA might also consider:

- Discussing with Participating Companies the extent to which they apply the same standards to their corporate employees as they expect their suppliers to apply to workers, and the implications of any discrepancies for the FLA's mission.
- Using the move to its new Sustainable Compliance program to promote more explicitly the development of human rights due diligence processes at the suppliers of Participating Companies, and sharing the learning about how to achieve this in a small factory setting.
- Providing clearer timelines and pathways for smaller licensees to meet the full range of FLA standards in a manner appropriate to their resources and human rights impacts, to avoid the risk of these companies having de facto exemptions from provisions that are integral to the UN Guiding Principles.

Shift thanks the FLA for its confidence in seeking out this analysis of the implications of the UN Guiding Principles for its work. It is also grateful to the FLA's senior executives and Board members who took time to discuss their knowledge and views of the FLA's policies, processes and practices as part of this review.

2.INTRODUCTION

2.1. BACKGROUND

The Fair Labor Association (FLA) is a nonprofit organization dedicated to protecting workers' rights and improving working conditions worldwide. It is comprised of an alliance of universities, civil society organizations and socially responsible corporations that work to increase accountability and transparency from manufacturers, factories and others involved in global supply chains, and to create lasting solutions to exploitative labor practices.

Since its inception as the Apparel Industry Partnership and the development of its Workplace Code of Conduct and principles on code implementation, the FLA has both revised these documents and developed a range of procedures and programs aimed at driving through positive change in supply chains. It is also expanding its membership base beyond the apparel industry to include companies in other sectors that face significant challenges related to respect for workers' rights in their supply chains, including the agriculture, food and beverage and electronics industries.

Following the adoption of the UN Guiding Principles on Business and Human Rights (hereafter 'the UN Guiding Principles') in 2011, the FLA expressed an interest in having a review conducted of the implications of the Guiding Principles for its own work.¹ They requested that Shift – a non-profit center for business and human rights practice – undertake this review for them and provide a report. The Shift team was centrally involved in shaping and writing the UN Guiding Principles and is chaired by their author, Professor John Ruggie.²

This report consists of five sections. Following the Executive Summary, this Introduction section includes an outline of the methodology used in conducting the review. Section Three highlights a number of key features of the second pillar of the UN Guiding Principles – the corporate responsibility to respect human rights – that are particularly relevant to companies that participate in the FLA. Section Four then analyzes the policies and process of the FLA against each of the key six elements of the corporate responsibility to respect human rights: the policy commitment, the four due diligence steps (assessing, integrating and acting, tracking, and communicating) and remediation processes. In each case, it looks at the parallels between these written documents and the UN Guiding Principles, the FLA's verification and reporting on how they are translated into practice, and finally sets out some issues of note, including areas of particular strength as well as discrepancies with the Guiding Principles. Section five sets out a number of conclusions, including key strengths of the FLA's work with regard to the UN Guiding Principles, and recommendations for further alignment. It also notes some additional considerations that lie beyond the immediate scope of this review, but are relevant to the implementation of the UN Guiding Principles by companies involved with the FLA.

¹ John Ruggie, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March, 2011 (A/HRC/17/31) [hereafter UN Guiding Principles].

² For more on the work of Shift, see www.shiftproject.org.

2.2. METHODOLOGY

The work was conducted through a high-level desk-based analysis of the FLA's written policies and procedures, its programs, complaints mechanism, governance structures, and information on its website portal for members about its wider activities. Shift then analyzed these materials against the UN Guiding Principles to identify correlations, strengths and weaknesses. In doing so, we used an analytical framework that assessed the materials against each core element of the Corporate Responsibility to Respect Human Rights in the UN Guiding Principles in turn.³ This framework was based on the following key questions:

- What does the FLA require of Participating Companies (and, through them, their relevant suppliers⁴)?
- How does the FLA know whether these requirements are being met?
- How does the FLA show that these requirements are being met (whether privately to other FLA members or publicly)?
- Does the FLA offer any support to Participating Companies (and their relevant suppliers) to help them meet the requirements?

Based on this analysis, we undertook a small number of interviews with senior FLA staff and Board members from university, NGO and business constituencies, to address outstanding questions.

There were a number of important limitations to this project. First, it was not an assessment of the impact of the FLA's work on the lives of workers. That lies far beyond the scope of this kind of high-level, desk-based analysis. Nor was it an assessment of how far company participants in the FLA meet the UN Guiding Principles. Rather, it focused on what the FLA itself requires of its Participating Companies and how it knows and shows whether they meet those requirements in practice. Finally, the FLA includes university licensees as well as brand companies and suppliers (hereafter 'Participating Companies'). Certain categories of licensees have lesser requirements under the FLA than do Participating Companies. While the report touches briefly on this distinction in Section 5.3.3, the analysis focuses in general on the highest level of obligations that apply to Participating Companies.

It is also worth noting that this review took place at a time of some flux for the FLA. In 2011 it had revised and updated its Workplace Code of Conduct and adopted new Principles of Fair Labor and Responsible Sourcing to replace the former 'Participation Criteria' for companies. At the time of this research, the FLA was still in the process of adapting its approach to auditing Participating Companies' suppliers, based on its experience that "conventional audits do little to prevent recurring violations or drive sustainable and progressive improvements in working conditions".⁵ They are therefore moving from 'Independent External Monitoring' visits and reports – which followed classic auditing approaches – to a new approach of 'Sustainable Compliance', which involves 'Independent External Assessments' focused on "uncovering root causes of problems and providing systemic, sustainable solutions so that problems are fixed in a lasting way."⁶ It was difficult for this review to take into account these new developments in any detail, but it reflects, wherever possible, an awareness of this evolution in the FLA's approaches.

³ UN Guiding Principles 11-24.

⁴ The reference to 'relevant suppliers' reflects that a Participating Company may designate which suppliers and products are to be included in the scope of compliance monitoring with FLA standards, within certain parameters set out in the Fair Labor Association's Charter. See Charter Document: Fair Labor Association, February 2010 [hereafter, FLA Charter], available from http://www.fairlabor.org/sites/default/files/fla_charter.pdf

⁵ FLA Website: <http://www.fairlabor.org/our-methodology>.

⁶ Ibid.

3. THE UN GUIDING PRINCIPLES: AN OVERVIEW, WITH A FOCUS ON SUPPLY CHAIN ISSUES

The UN Guiding Principles on Business and Human Rights were unanimously endorsed by the UN Human Rights Council in June 2011.⁷ They were the product of a six-year process led by the then Special Representative of the UN Secretary-General for Business and Human Rights, Professor John Ruggie. Through a process of evidence-based research and multi-stakeholder consultation, Prof. Ruggie first developed the UN ‘Protect, Respect and Remedy’ Framework in 2008 as a means to help everyone better understand, differentiate and further discuss the roles and responsibilities of states and companies with regard to human rights. The UN Guiding Principles then built upon this Framework to articulate in more detail the implications of that Framework for the decisions and actions of states, companies and other relevant actors.

The UN ‘Protect, Respect and Remedy’ Framework is based upon three pillars:

- The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication⁸;
- The corporate responsibility to respect human rights, that is, to act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved;⁹ and
- The need for greater access by victims to effective remedy, both judicial and non-judicial.¹⁰

The remainder of this section highlights a number of key features of the second pillar of the UN Guiding Principles – the corporate responsibility to respect human rights – that are particularly relevant to companies that participate in the FLA.

3.1. A FOCUS ON ON-GOING PROCESSES

Many human rights-related codes, or other standards developed by, or for, companies articulate a set of human rights that should be respected by the companies concerned. In other words, they state the desired outcome in terms of the rights that should be observed. The UN Guiding Principles, by contrast, take the outcome of respect for human rights as their starting point, and make clear that all internationally-recognized human rights are relevant in this regard.¹¹ They then focus, in addressing companies, on the kinds of policies and processes that are needed in order for any business “to know and to show” that it has done what can reasonably be expected to achieve that outcome in practice.¹² They equip and empower companies with a blueprint for how to go about this challenge.

7 United Nations Human Rights Council resolution A/HRC/17/31, adopted on 16 July, 2011.

8 UN Guiding Principles 1-10.

9 UN Guiding Principles 11-24.

10 UN Guiding Principles 25-30.

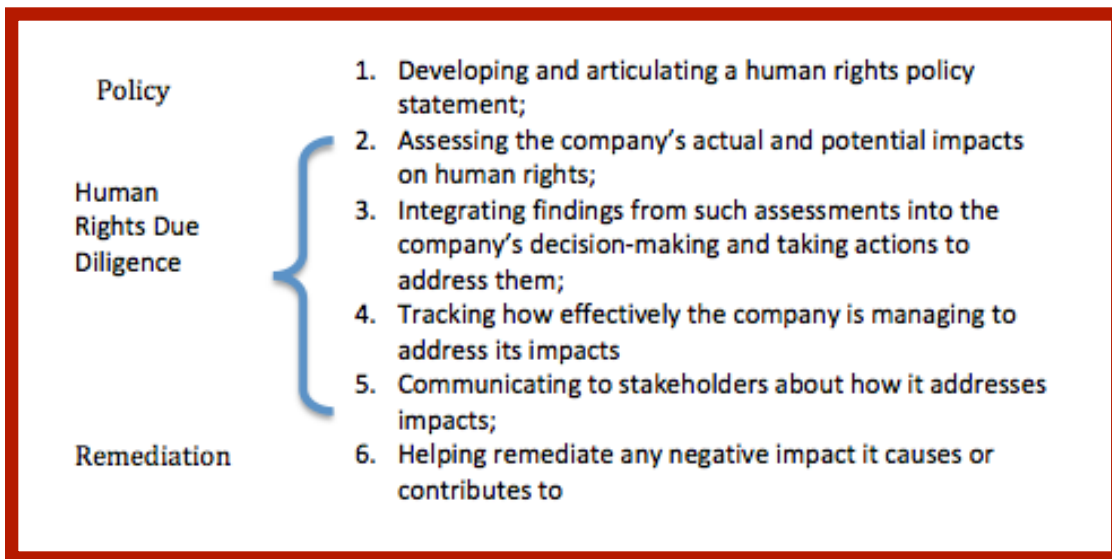
11 Internationally-recognized human rights are understood at a minimum as including the Universal Declaration of Human Rights, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; and the eight core conventions of the International Labour Organization, which address child labor, forced labor, non-discrimination and freedom of association. In certain situations other human rights documents may also be relevant.

12 UN Guiding Principle 15.

This said, the UN Guiding Principles necessarily remain at a certain level of generality, since they are applicable to all companies in all sectors, of all sizes and in all situations. They are not a manual to direct the daily decisions and actions of a manager on the ground or in a particular division or department of a company. But they provide the basis for developing such ‘manuals’ or equivalent, tailored guidance. That is to say, they indicate the questions that any company needs to be asking itself as it designs and implements its policies, procedures and systems, to ensure that they are aligned with, enable and advance respect for human rights within the company.

Similarly, the UN Guiding Principles are highly relevant to any industry or multi-stakeholder initiative with a focus on respect for human rights. They provide a means of assessing how far that initiative is fulfilling the role of requiring, enabling and supporting its corporate members to improve their own practices in order to meet their shared commitment to respecting the rights that are core to the initiative’s purpose.

The UN Guiding Principles set out six procedural elements that are essential for a company to know and show that it is respecting human rights, four of which are grouped together under the concept of ‘human rights due diligence’.¹³ These are:



These elements of the corporate responsibility to respect human rights are deliberately articulated as processes not products. They may include, for example, ‘an assessment’ or ‘a report’, but as part of on-going and iterative activities of ‘assessing’ and ‘communicating’ that must respond to the evolving context in which a company works. For an FLA Participating Company, this evolving context may include changes in the countries it sources from; changes in the risks to human rights in particular sourcing countries; changes in the supplier base within a country; and emerging information about particularly egregious human rights risks at more remote levels in the supply chain, such as with Uzbek cotton or conflict minerals.

¹³ See in particular, UN Guiding Principles 17-22.

3.2. THREE DIFFERENT MODES OF CORPORATE INVOLVEMENT IN HUMAN RIGHTS IMPACT

It is significant that in all these processes the UN Guiding Principles are focused on risk to human rights, not risks to the company. The latter is increasingly influenced by the former, but the focus is on addressing the potential impacts on human rights themselves.

It is also important to understand the three distinct scenarios the UN Guiding Principles identify, in which a company may be involved with human rights impacts: cause, contribution and linkage.¹⁴

The idea of a company directly causing a negative human rights impact is clear. An example would be the direct employment of forced or indentured labor, or the failure to respect freedom of association by one's own employees. The concept of 'contribution' is also relatively self-evident, though it may occur through two distinct patterns. In the one, the contribution is via a third party – most likely a supplier in the case of an FLA participating company. This can occur where a decision or action by a brand or retail company creates strong incentives for a supplier to breach labor standards. The oft-cited example is of last-minute changes to an order that necessitate the retraining of workers and reorganizing of production lines, but without any change to deadline or pricing, thereby leading a supplier to conclude that the only way to meet the contract is to require unpaid overtime of workers.

The second mode in which a company can contribute to an impact is in parallel with a third party. For example, a factory located in an area that is dangerous for women during certain hours of night might change its shifts requiring women workers to leave or arrive within those hours; women may become subjects of attacks as they go to and from work as a result. This impact on their security is not caused by the supplier but results from a failure to foresee indirect consequences of its decision.

Finally, a company might find a negative impact on human rights is directly linked to its products, through a business relationship with a supplier, even though it has neither caused nor contributed to the impact. For instance, it might have a clear code of conduct against the use of child labor and sub-contracting; it might put requirements on compliance with that code into all supplier contracts, screen out suppliers known for the use of child labor, and then monitor and audit for compliance by its suppliers. Yet it might still find that a supplier sub-contracts work on its products to a provider that uses child labor. Clearly the brand/retailer is not responsible for the impact, since it has done all that could reasonably be expected to prevent it; but it does have a forward-looking responsibility to take steps to prevent its continuation or recurrence, given that its own products are involved.

Each of these three scenarios requires slightly different responses on the part of the company when an impact is identified. Simply ceasing the negative impact is most likely to be in a company's full control if it has directly caused it. Where it has contributed, that may also be possible, for instance by buyers avoiding making changes to an order at the last minute if it risks incentivizing rights abuses. Yet for a company which operates in a competitive environment where these practices and 'just in time' manufacturing are the norm, and which traditionally rewards or penalizes its buyers on criteria that incentivize such decisions, changing course is not always a simple proposition. Indeed the speed and complexity of the internal decisions on these issues alone can make change challenging. Moreover, in some situations, other actors may hold important parts of the

¹⁴ See in particular, UN Guiding Principle 13.

answer, including government authorities with responsibility for upholding labor standards. This does not reduce the responsibility of the company to act appropriately, but reflects a reality that it is often difficult to address systemic problems overnight.

A company often has the least control over impacts that are simply linked to its products, without it having caused or contributed to them. This is where the concept of ‘leverage’ becomes most significant. The UN Guiding Principles point to the importance of considering how the company can use its leverage to mitigate the impact; and where leverage is lacking, how it can find ways to increase it, for example through incentives, alliances with other businesses, engagement of government or other means.¹⁵

One notable aspect of the UN Guiding Principles is that they do not permit a conclusion that if you source below a certain percentage of your product from a supplier, or if you represent less than a certain percentage of a supplier’s business, you have no responsibilities for human rights abuses in the manufacture of your products by that supplier. The linkage to the impact makes it necessary to take some kind of action. Critical considerations include both the company’s leverage and how crucial the supplier is to the company, as well as how severe the impact on human rights is, and what the implications for human rights are of ceasing to do business with the supplier. The Interpretive Guide to the Corporate Responsibility to Respect Human Rights (issued by the Office of the UN High Commissioner for Human Rights with the support and involvement of Professor Ruggie), articulates the decision processes required through the matrix in Figure 1 below.¹⁶

	Have leverage	Lack leverage
Crucial source/partner	<ul style="list-style-type: none"> Mitigate the risk that the abuse continues/recurs If unsuccessful 	<ul style="list-style-type: none"> Seek to increase leverage If successful, seek to mitigate risk that the abuse continues/recurs If unsuccessful, consider ending the relationship**; or be able to demonstrate efforts made to mitigate abuse, recognizing possible consequences of remaining.
Non-crucial source/partner	<ul style="list-style-type: none"> Try to mitigate the risk that the abuse continues/recurs If unsuccessful, take steps to end the relationship* 	<ul style="list-style-type: none"> Consider ending the relationship*

* take account of credible assessments of potential harm to human rights from ending relationship

** take account of severity of impact; the more severe, the more quickly change should be seen before decisions are reached on whether to end the relationship

15 Guiding Principle 19.

16 Office of the High Commissioner for Human Rights, “The Corporate Responsibility to Respect Human Rights: an Interpretive Guide”. Geneva: Nov 2011, (HR/PUB/12/02) [hereafter ‘Interpretive Guide’].

3.3. UNDERSTANDING IMPACT AND LEVERAGE

As a company seeks to identify and assess its actual and potential impacts on human rights, the question naturally arises as to what the boundaries of its responsibilities are in this regard. The idea of a ‘sphere of influence’ has sometimes been seen as the answer to this question.¹⁷ This draws concentric circles out from the company’s own employees, to its suppliers, to the wider marketplace, to communities, to governments, and has been understood to mean that the company’s influence, and therefore its responsibilities, reduce as one progresses outwards. But when applied to respect for human rights – which is the baseline expectation of all companies – this idea of ‘influence’ confuses two significantly different concepts: impacts and leverage. A company may impact the human rights of its employees and communities, while it may have leverage over its business partners and sometimes over the decisions or behavior of a government.

The UN Guiding Principles make clear this distinction between impact and leverage. They underline that a company’s responsibilities flow from its impacts, while leverage becomes the most significant (albeit not the sole) factor when considering what the company can reasonably do to address those impacts. The previous section has addressed some of the ways that that issue of leverage becomes relevant in decision-making.

3.4. ‘EMBEDDING’ AS THE PREREQUISITE TO SUCCESSFUL ‘INTEGRATION’

Another important, but often overlooked, aspect of the UN Guiding Principles is the distinction between what is called ‘embedding’ and ‘integrating’.¹⁸ The Interpretive Guide to the UN Guiding Principles puts the distinction between the two as follows:

“‘Embedding’ is the ‘macro’ process of ensuring that all personnel are aware of the enterprise’s human rights policy commitment, understand its implications for how they conduct their work, are trained, empowered and incentivized to act in ways that support the commitment, and regard it as intrinsic to the core values of the workplace. It is one continual process, generally driven from the top of the company. ‘Integration’...is the ‘micro’ process of taking the findings about a particular potential impact, identifying who in the enterprise needs to be involved in addressing it, and securing effective action. It is repeated as each new impact is identified and will often be driven from the department with responsibility for human rights. Where the embedding process has been successful, the potential for the successful integration of findings and timely and sustainable responses to them is greater, and human rights risks are reduced.”¹⁹

Shift’s experience in talking and working with companies suggests that many of the blockages between having good intentions and sound practices on the one hand, and achieving sustainable success in respecting human rights on the other, lies in a failure fully to embed respect for human rights within the company. As a result, the

¹⁷ For more on the origins and challenges of this concept, see John Ruggie, “Clarifying the Concepts of ‘Sphere of influence’ and ‘Complicity’: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises”. Geneva: May 2008, (A/HRC/8/16)

¹⁸ Guiding Principles 16 & 19.

¹⁹ Interpretative Guide, p.42

department charged with overseeing respect for human rights can find itself repeatedly working at odds with departments whose decisions and actions play a substantial role in causing or contributing to negative impacts. In the case of FLA Participating Companies the department most critical in this regard is typically the purchasing/sourcing department. Where respect for labor rights has not been embedded in that department's work, there is a reduced chance of success when compliance staff approach them for support in addressing an actual or potential breach of labor rights by a supplier: the shared values, interests and incentives are simply not there to drive a sustainable and systemic solution for the company as a whole.

3.5. STAKEHOLDER ENGAGEMENT

The UN Guiding Principles include references to the importance of consulting with stakeholders at a number of key points, including in assessing impacts, tracking performance and handling grievances.²⁰ Stakeholder engagement is in many ways a cross-cutting principle that reflects the fact that the purpose of human rights due diligence is to address risks to people, not risks to a company alone. In practice, it is often hard to understand the full nature of such risks without consulting those affected.

The UN Guiding Principles do, however, recognize that consulting directly with affected stakeholders may not always be feasible, particularly for small companies or those in sectors where potentially-affected individuals are highly dispersed geographically (such as in the ICT industry). In such cases, the UN Guiding Principles point towards identifying other stakeholders or expert resources (human or written) that can credibly convey the likely perspectives or concerns of those directly affected.

4. THE UN GUIDING PRINCIPLES AND THE WORK OF THE FLA

The previous section looked at some of the implications of the corporate responsibility to respect human rights, as defined in the UN Guiding Principles, for companies' decisions and actions. This section looks at the implications that they in turn have for the Fair Labor Association as an initiative whose purpose is to advance respect for the human rights and well-being of workers in supply chains.

As described in the methodology, Shift reviewed the FLA's standards, processes and activities against four key questions:

- What does the FLA require of Participating Companies (and, through them, their relevant suppliers)?
- How does the FLA know whether these requirements are being met?
- How does the FLA show that these requirements are being met (whether privately to FLA members or publicly)?
- What supporting systems or activities does the FLA offer to Participating Companies (and their suppliers) to help them meet FLA requirements?

This section of the report reflects key findings that emerged from the review process. The findings are divided across the six core procedural elements of the corporate responsibility to respect human rights.

²⁰ See in particular UN Guiding Principles 18, 20, 21, 29 & 31.

4.1. POLICY COMMITMENT

4.1.1. Parallels with the UN Guiding Principles:

The UN Guiding Principles underline that a company's express commitment to meet its responsibility to respect human rights is the starting point for embedding that responsibility into its business. To do so, the policy commitment needs to be approved at the most senior level; informed by relevant expertise (internal and/or external); stipulate the enterprise's expectations of personnel, business parties and others linked to its work; be publicly available and communicated to all relevant parties; and be reflected in operational policies and procedures throughout the company.

The FLA has very clear commitments that it requires of Participating Companies. They are reflected primarily in two documents. The first is the 'Workplace Code of Conduct', which was revised in 2011 along with the supporting 'Compliance Benchmarks'.²¹ The second document is the 'Principles of Fair Labor and Responsible Sourcing', which addresses Participating Companies' own policies and procedures.²² These Principles were adopted in 2011 as a revision of the former Participation Criteria in the FLA Charter. These two documents have been developed and revised with input from the different stakeholders within the FLA: companies, universities and colleges, and civil society organizations.

The Principles of Fair Labor and Responsible Sourcing require that a Participating Company 'establish and articulate' workplace standards that meet or exceed the Workplace Code of Conduct and Compliance Benchmarks; that the company's leadership formally commit to uphold the standards and to integrate them into company business practices; and that training be provided to staff on the standards and on their integration into business practices. The Principles also require that the standards be formally conveyed to suppliers, who must provide written acknowledgement and commit to uphold them. The Participating Company must also ensure they are conveyed onward to workers, managers and supervisors at suppliers, that those groups be periodically educated on them and that future business with suppliers be predicated on continuous improvements in compliance with them. Taken together, these provisions show close alignment with UN Guiding Principle 16.

The Workplace Code of Conduct and Compliance Benchmarks define desired outcomes in terms of labor rights and working conditions in the workplace of suppliers, while the Principles for Fair Labor and Responsible Sourcing focus on processes at the level of the Participating Company. The FLA is deliberate and explicit in this approach of focusing on what is designed to be 'due diligence' at the level of Participating Companies, with the aim of achieving compliance with the Workplace Code at the level of their suppliers. In this, it is also highly compatible with the approach of the UN Guiding Principles as applied to supply chain relationships.

4.1.2. FLA verification and reporting

The FLA has certain processes to 'know and show' the extent to which Participating Companies are meeting the standards required of them in relation to their policy as well as process commitments.²³ Participating Companies must monitor (audit) suppliers against the Workplace Code's standards, and must make the reports

²¹ FLA Workplace Code of Conduct, available from http://www.fairlabor.org/sites/default/files/fla_code_of_conduct.pdf

²² Principles of Fair Labor and Responsible Sourcing, available from http://www.fairlabor.org/sites/default/files/fla_principles_of_fair_labor_responsible_sourcing.pdf

²³ See UN Guiding Principle 15, which requires that companies "know and show" that they respect human rights.

of these audits available to the FLA on request. This process should monitor whether the Workplace Code's standards are being communicated by suppliers to their workers, managers and supervisors. In addition, the FLA requires Independent External Monitoring (IEM) visits by independent, FLA-approved auditors on 5% of Participating Companies' suppliers annually. Both monitoring processes – internal and external – have to be in line with the Compliance Benchmarks linked to the Workplace Code of Conduct, and the FLA's Principles of Monitoring. Reports from IEM visits are publicly available on the FLA's website, including any corrective actions recommended, as are reports from verification visits that review implementation of corrective actions in a subset of instances.

IEM visits are now being replaced with Independent External Assessments under the new Sustainable Compliance program. These are designed to go beyond compliance monitoring and look also at root causes of non-compliance and identify sustainable responses. This development is discussed further under Section 4.4 on 'tracking performance'. It will be important to see the extent to which these new processes retain or improve on the FLA's ability to understand how far implementation of the Workplace Code is occurring in practice and enable continued transparency in this regard.

When it comes to internal actions by Participating Companies, the FLA's processes for verification are less robust. Their strongest point comes through the accreditation process that new members undergo at the end of the 'implementation period' allowed for them to come into line with membership obligations. At this point – usually 3-4 years after joining the FLA – the FLA conducts a document review, headquarter visits, shadowing of the company's monitoring visits to suppliers, and review of its performance and remediation efforts under independent external monitoring visits. This should provide a good basis for initial assessment of performance in many regards.

However some aspects will likely remain difficult to assess through these methods, such as the alignment of on-going decisions and practices in the purchasing division with the Principles of Fair Labor and Responsible Sourcing. And beyond this point of accreditation, the FLA relies on annual reports submitted by the Participating Companies themselves for information on the extent to which they continue to meet these Principles. With regard to a company's policy commitment, these reports may be the only insight the FLA has over subsequent years into whether a company continues to provide for internal dissemination and training on the FLA standards and their integration into its own business practices. Verification is a challenge. This is discussed further under Section 4.4.3.b below.

4.1.3. Issues of note

Focus on outcomes at supplier level: As noted, the Workplace Code of Conduct is supplemented by fairly detailed Compliance Benchmarks.²⁴ These include measures that relate both to outcomes and to procedural steps, as well as a few that set requirements for systems. For example, the requirement that prohibits child labor includes outcome benchmarks that "Employers shall not employ anyone under the age of 15 or under the age for completion of compulsory education, whichever is higher";²⁵ procedural benchmarks, such as a requirement for an employer to keep documentation regarding parental consent on-site at all times for

²⁴ These are published with the FLA Workplace Code of Conduct in the one document, FLA Workplace Code of Conduct and Compliance Benchmarks, Revised October 5, 2011, available from <http://www.fairlabor.org/our-work/labor-standards>.

²⁵ Workplace Code of Conduct and Compliance Benchmarks, p.21.

inspection; and even a benchmark requiring that they have a “system for identifying work stations and operations that are inappropriate for young workers according to applicable laws”.²⁶

Furthermore, one of the 2011 revisions to the Workplace Code was to require that suppliers have human resource management procedures along the entire factory employment lifecycle, from recruitment and hiring to terms and conditions of employment, administration of compensation, work rules and discipline, and termination and retrenchment. This said, the procedural and systems requirements in the Code do not amount to a due diligence process on the part of the suppliers. The focus remains on the outcomes.

It appears, however, that the FLA’s new Sustainable Compliance program may expand the range of issues assessed at suppliers to include their own processes and systems for identifying and addressing impacts on labor rights. If so, this might come closer to constituting a review of suppliers’ own human (labor) rights due diligence systems, as understood in the UN Guiding Principles. This would be an important development, but its extent remains unclear at the moment.

The ‘living wage’ issue: Since the FLA’s inception, the issue of a ‘living wage’ has been a challenge for the organization. Given the lack of clarity as to what constitutes a ‘living wage’ in varied and fluctuating economic circumstances around the world, the FLA originally judged that it was better not to include a living wage provision in its Workplace Code. This was driven by its wish to ensure that whatever was in the Workplace Code constituted a real commitment to something that could be achieved, rather than an aspirational reference.

The organization has continued to debate the issue over the years, and in its revised Workplace Code provides new language requiring employers, “working with FLA, to take appropriate actions that seek to progressively realize a level of compensation that meets basic needs and provides some discretionary income.”²⁷ This language arguably brings the Workplace Code into alignment with the language of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This requires that remuneration, at a minimum, provide workers with a decent living for themselves and their families, while also allowing for ‘progressive realization’ where standards are challenging to reach.

The UN Guiding Principles state that the minimum reference points for companies with regard to respect for ‘internationally-recognized human rights’ should be the International Bill of Human Rights, which includes ICESCR, and the core ILO Conventions. While arguments will remain as to the exact interpretation of ‘basic needs’ and the speed of ‘progressive realization’, the new provision is important in terms of alignment with the UN Guiding Principles. It is also notable that the FLA is working with experts to develop tools to support its practical implementation.

Outcome standards not applied to Participating Companies: A further point of note is that the Workplace Code of Conduct and Compliance Benchmarks relates to suppliers of Participating Companies (which may be wholly-owned, but are most typically external to those companies), rather than to a Participating Company’s own practices. This can lead to a situation where a company requires, for example, freedom of association at its suppliers but does not apply the same standard to the workforce at its own headquarters. While the FLA’s mandate is clearly focused on supply chain workers, this may lead to a perception that it endorses double standards of practice by Participating Companies.

²⁶ Ibid.

²⁷ Workplace Code of Conduct and Compliance Benchmarks, p.4 and 34.

4.2. HUMAN RIGHTS DUE DILIGENCE: ASSESSING IMPACTS

4.2.1. Parallels with the UN Guiding Principles

UN Guiding Principle 18 requires that companies identify and assess their actual or potential adverse impacts on human rights, drawing on internal and/or external expertise and with meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to context. Actual and potential impacts include those that the company might cause, might contribute to, or which may be linked directly to its products through a business relationship.

The FLA's Principles of Fair Labor and Responsible Sourcing require that Participating Companies “monitor an appropriate sampling of suppliers regularly to assess compliance with workplace standards”, and that they do so in line with the FLA's Principles of Monitoring.²⁸ They must ensure that monitoring includes worker interviews as well as management interviews.

The Principles of Fair Labor and Responsible Sourcing include an entire principle dedicated to the issue of stakeholder consultation, requiring, in summary, that a Participating Company “establishes and maintains relationships with labor non-governmental organizations, trade unions and other civil society institutions”.²⁹ The purpose of doing so is explicitly to gain an understanding of local compliance issues in the context of FLA standards, as well as to gain input into the design and implementation of compliance program strategies, trainings, worker communication channels, or remediation plans, and to get inputs to audit and remediation processes.

4.2.2. FLA verification and reporting

The FLA Charter requires that companies applying to participate in the FLA as ‘affiliates’ should submit their internal compliance program to the FLA for approval, as a prerequisite to acceptance. This enables a review of the ability of that program to identify and assess (and also address) non-compliances in the supply chain.³⁰ A Participating Company must make available to the FLA reports of its own monitoring visits at the request of the FLA.

As mentioned, the FLA also provides for Independent External Monitoring visits conducted by independent auditors of 5% of all suppliers covered by the FLA each year. Those auditors are measured against standards of professional competence and independence and their reports are public. While Participating Companies cover the costs of those monitoring visits, it is not apparent that this would limit their independence and professionalism given the intermediating role of the FLA, the specific standards required of these auditors, and the transparency of the reports they produce. However, this would need further assessment in practice to draw firm conclusions.

These processes in principle provide a strong basis for FLA insight into, verification of, and public reporting on, the assessment of non-compliances with the Workplace Code – or ‘actual impacts’ in the terms of the UN Guiding Principles. Limitations on their capacity lie predominantly in the inherent constraints of traditional auditing approaches, as acknowledged by the FLA and discussed further under section 4.4.3.

²⁸ Principles of Fair Labor and Responsible Sourcing, 5.

²⁹ Principles of Fair Labor and Responsible Sourcing, 9.

³⁰ FLA Charter, p.18

The two areas less clearly covered in terms of what the FLA can ‘know and show’ about assessments relate to potential impacts and to the possible role of a Participating Company in contributing to them. These are discussed below.

4.2.3. Issues of note

- a. **Contribution to impacts:** Given the FLA’s focus on labor rights compliance in supply chains, it is unlikely – except possibly where suppliers are wholly-owned³¹ – that a Participating Company would be involved in directly causing an infringement on a right. By contrast, as set out in Section 3 above, there may well be instances of contribution to an impact, for example as a result of buying decisions that incentivize unpaid, forced or excessive overtime. And there are inevitably instances where non-compliance is linked to a Participating Company’s products through its relationship with a supplier, where that supplier fails to meet the Workplace Code standards, despite a Participating Company’s best efforts.

The focus of the FLA’s processes is, in practice, predominantly on the ‘linkage’ scenario. Its activities first and foremost aim to support the implementation of the Workplace Code, through monitoring processes and a range of capacity-building programs designed to help prevent or remediate non-compliances by suppliers. This approach suggests an implicit assumption that most non-compliances occur in spite of the efforts of Participating Companies. It recognizes that in this situation the Participating Companies nevertheless have a responsibility to take action to prevent the continuation or recurrence of the non-compliance in connection with their products.

However – and indeed as many Participating Companies would recognize – a significant concern remains with regard to the risk of their contributing to non-compliance, particularly through the decisions of the purchasing/sourcing department. The new Principles of Fair Labor and Responsible Sourcing take an important step in naming this issue, which did not appear in the original Participation Criteria that they replaced. The Principles require that Participating Companies “[analyze] orders to ensure that sourcing criteria are consistent with workplace standards”; provide a mechanism for the timely resolution of any conflicts between sourcing criteria and workplace standards on a particular order; and analyze their supply chains “on a quarterly basis to identify negative impacts of sourcing decisions on compliance and [make] necessary adjustments”.³²

This is a significant development in terms of the FLA’s work, and reflects a critically important aspect of the UN Guiding Principles. The new provision points to a need for more careful assessment of when and how Participating Companies may contribute to impacts as a result of conflicts between workplace standards and sourcing criteria. Industries with significant supply chain dependency are rife with examples of such conflicts in practice. The remaining challenge for the FLA is in how they know and show whether Participating Companies are acting upon this new provision. This appears to remain the subject of internal discussion, and is certainly not a simple issue for Participating Companies themselves.

- b. **Actual vs potential impacts:** The FLA’s processes and those it requires of Participating Companies focus on the retrospective assessment of non-compliance with core labor rights by suppliers – what the UN

³¹ This is not to suggest that where suppliers are wholly-owned they are likely to be infringing on workers’ labor rights, but rather that the possibility of such direct infringement arises in those circumstances.

³² Principles of Fair Labor and Responsible Sourcing, 8.

Guiding Principles call ‘actual impacts’. The UN Guiding Principles are as much concerned with the identification of potential impacts (that is, human rights risks) that can be prevented or mitigated, as it is with actual impacts that require remediation. Of course, actual impacts are themselves important indicators of potential impacts, given that patterns of non-compliance tend to repeat.

It is particularly in the situation of engaging a new supplier that the assessment of potential risks becomes important. The FLA supports Participating Companies, where needed, with reports on the labor rights situation in particular countries they are looking to source from, which facilitates some forward-looking assessments of potential labor rights risks. The Principles of Fair Labor and Responsible Sourcing also require that Participating Companies conduct pre-sourcing assessments of new suppliers to review their compliance with workplace standards. Although the consequences that should flow from such assessments are not articulated in FLA documentation, the FLA Secretariat reports that a Participating Company should be sure that any new supplier can rise to meet the Workplace Code standards at least with some help from the Participating Company, and that if they can’t, they should not work with that supplier.

In practice, given frequent pressure on companies to find capacity for orders at short notice, many would argue that pre-assessment processes are often not followed through in this manner. Shift has no basis for judging whether that is the case for Participating Companies in the FLA or not. However, reporting from Participating Companies to the FLA, with appropriate metrics, on how they meet this provision on pre-sourcing assessments would help provide that clarity, especially if it were backed up by some means of verification.

4.3. HUMAN RIGHTS DUE DILIGENCE: INTEGRATING AND ACTING ON FINDINGS

4.3.1. Parallels with the UN Guiding Principles

Guiding Principle 19 is particularly significant when it comes to successfully addressing a company’s impacts on human rights. It requires that companies should “integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action”. This must be supported by the assignment of responsibility to the appropriate level and function in the company, as well as internal decision-making, budget allocations and oversight processes that enable effective responses to such impacts. The Principle highlights the role of leverage in identifying what the appropriate response is to any impact identified.

The second principle under the Principles of Fair Labor and Responsible Sourcing requires that Participating Companies identify all staff responsible for implementing their workplace standards compliance program, and ensure they have appropriate competencies and suitable training, updated at regular intervals. It also requires that “all staff (including sourcing) and relevant service providers are trained on the company’s commitment to standards and the integration of standards into business practices”.³³ In this context, the new Principle 8 of the Principles of Fair Labor and Responsible Sourcing, briefly discussed above, is particularly significant and worth restating in full:

³³ Principles of Fair Labor and Responsible Sourcing, 2.

“8.1 Company Affiliate analyzes orders to ensure that sourcing criteria are consistent with workplace standards.

8.2 In the event of conflicts between sourcing criteria and workplace standards in an order, Company Affiliate provides a mechanism to resolve them in a timely manner to avoid negative impacts on workplace standards and reports to the FLA on those mechanisms annually.

8.3 Company Affiliate analyzes its supply chain on a quarterly basis to identify negative impacts of sourcing decisions on compliance and makes necessary adjustments.”

As explained in Section 4 above, the UN Guiding Principles make a crucial distinction between on the one hand ‘embedding’ a commitment to respect human rights across a company and on the other hand ‘integrating’ the findings of specific impacts. ‘Embedding’ requires the alignment of policies, processes and incentives in all relevant departments, including purchasing/sourcing, with the goal of respecting rights. ‘Integrating’ means engaging other relevant departments in addressing specific impacts effectively when they arise. The latter is inevitably much harder to achieve absent the former. Embedding is unlikely to be a one-time process in a large company with complex supply chains. As reflected in Principle 8.3, adjustments can be made in the light of experience to improve the alignment of sourcing decisions with the workplace standards. Principles 8.1 and 8.2, which address conflicts that arise over a particular order, will be hard to implement without that structural alignment.

4.3.2. FLA Verification and reporting

The FLA notes that while there are efforts and discussions afoot to look at workable ways to measure the compliance of Participating Companies with the Principles of Fair Labor and Responsible Sourcing, Principle 8 is not only new but also challenging. It remains extremely hard for them to ‘know and show’ that it is being implemented in practice. Moreover, it may currently be quite difficult for representatives of Participating Companies to know and show that it is being implemented, given the different types of supply chain relationships they have and the complexity and speed of decision-making in this area. However, given the centrality of this issue to ultimate success with regard to supply chain labor rights compliance, it reflects an important challenge for the organization.

4.3.3. Issues of note

- a. **Aligning incentives:** The Principles of Fair Labor and Responsible Sourcing talk about the alignment of purchasing/sourcing criteria (or policies) with workplace standards. The necessary, but unspoken, corollary of that requirement is that the processes or systems that underpin the policies should also be aligned with the objectives of workplace standards. But perhaps the piece that is most importantly missing in the Principles of Fair Labor and Responsible Sourcing is a reference to the alignment of incentives. If the incentives to buyers are driven entirely by commercial factors that are divorced from, and easily fall into tension with, the observance of workplace standards, there will always be conflicts arising in practice. As the FLA moves its attention to root cause analysis of non-compliances in supply chains, this will be a critical issue to address.

4.4. HUMAN RIGHTS DUE DILIGENCE: TRACKING EFFECTIVENESS

4.4.1. Parallels with the UN Guiding Principles

UN Guiding Principle 20 focuses on the need for companies to track the effectiveness of their responses to those human rights impacts with which they are involved, using appropriate qualitative and quantitative indicators and drawing on feedback from both internal and external sources, including affected stakeholders.

In practice, there is a significant overlap between ‘assessing impacts’ and ‘tracking performance’ in terms of what the FLA requires. Comments raised in Section 4.2 of this report on assessment processes therefore also have relevance here. In addition, the Principles of Fair Labor and Responsible Sourcing require that Participating Companies not only collect and manage information on suppliers’ compliance with workplace standards, but also analyze non-compliance findings to identify trends, including persistent and/or egregious forms of noncompliance, and report to the FLA on such analysis. They also require that monitoring by Participating Companies include worker interviews as well as management interviews, and also seek input from local, legitimate trade unions and NGOs.

4.4.2. FLA verification and reporting

The requirements for Participating Companies to monitor suppliers and make available to the FLA their monitoring reports, combined with the FLA’s own Independent External Monitoring reports and verification reports, should, in principle, provide solid insights into how well non-compliances are being addressed by suppliers. The Compliance Benchmarks that accompany the Workplace Code of Conduct provide a range of quantitative and qualitative indicators. As previously stated, the weakness of the FLA’s ability to verify companies’ compliance over time – beyond the initial accreditation process – with the Principles of Fair Labor and Responsible Sourcing remains a problem.

4.4.3. Issues of note

- a. **Limits of auditing:** In practice, it is widely recognized that auditing, as a tool for top-down compliance enforcement, has significant limitations, both as a measure of true performance (due to suppliers providing false records or coaching workers on what to say to auditors) and as a tool for driving sustainable improvements in practices.³⁴ The FLA itself explicitly recognizes these limitations, when it states that “conventional audits do little to prevent recurring violations or drive sustainable and progressive improvements in working conditions”³⁵.

This recognition by the FLA has motivated the development, still underway, to move from Independent External Monitoring visits to Independent External Assessments as part of its new Sustainable Compliance program. As discussed, the purpose is to put more emphasis on root cause analysis of noncompliance and systemic solutions.

³⁴ Locke, Richard. M, Amengual, Matthew and Mangla, Akshay, “Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains.” *37 Politics and Society* 3 (2009), 319-851.

³⁵ FLA Website: <http://www.fairlabor.org/our-methodology>

This development has raised concerns for some constituents that it may come at the price of clarity and accountability with regard to suppliers' compliance with the Workplace Code standards. From the perspective of the UN Guiding Principles, it will be important for the new program to retain or recreate a credible means of tracking progress in suppliers' compliance with workplace standards, but in a manner compatible with the program's more collaborative approaches to suppliers. It will also be important to retain transparency of the results of these new processes. The first high-profile application of the new process to the review of Apple supplier Foxconn's facilities suggests that in fact compliance, collaborative approaches and extensive transparency can all be integral to the new system.

- b. **Tracking Participating Company performance:** Achievements in tracking supplier performance are limited if they do not encompass analysis of the extent to which sourcing decisions by Participating Companies may at times contribute to non-compliance. Once again, the new Principle (under the Principles of Fair Labor and Responsible Sourcing) that addresses Participating Companies' sourcing criteria and decisions has the potential to fill this gap and align the FLA's work fully with the UN Guiding Principles. But without an ability for the FLA to know clearly whether this and other Principles of Fair Labor and Responsible Sourcing are being implemented by Participating Companies, it will remain unclear how far practices are really improving.

Distinct from the challenge of verifying information that is self-reported by Participating Companies, is the question of developing Key Performance Indicators (KPIs) that would enable greater standardization of information reported and could also facilitate comparisons between the performance of different Participating Companies. Shift understands that the FLA is developing a new computerized tool that would use KPIs to capture compliance by companies with the Principles of Fair Labor and Responsible Sourcing. It would also enable reporting from Participating Companies on a more real-time basis than is currently possible. However, it appears that there will remain problems with publishing reports based on this data. This is in part due to the continuing challenge with verifying self-reported information, and in part due to the sensitivities within the FLA of any move towards enabling comparative analyses.

4.5. HUMAN RIGHTS DUE DILIGENCE: COMMUNICATING

4.5.1. Parallels with the UN Guiding Principles

The UN Guiding Principles require that companies be prepared to communicate externally on how they address their human rights impacts. This is distinguished from formal reports, which may be advisable for larger companies (and are necessary from companies with significant human rights risks), but are not a requirement of all companies. Rather, the priority for all companies is that they be able to respond when concerns are raised by or on behalf of affected stakeholders. 'Being able' to communicate means that companies need to have the information available themselves – not least as a result of their tracking processes.

The UN Guiding Principles recognize that there can be legitimate limitations on making information public, where doing so may “pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality”.³⁶ The Interpretive Guide notes that “the legitimate requirements of commercial confidentiality would typically extend to confidentiality of information crucial to negotiations regarding a

³⁶ UN Guiding Principle 21.

significant business transaction, for the duration of those negotiations. They would also include information legally protected against disclosure to third parties.”³⁷

Participating Companies that are not themselves suppliers, or do not have wholly-owned suppliers, are at least one step removed from actual impacts on workplace rights in the supply chain. Communication with workers about how impacts are being addressed therefore lies most immediately with the management of the supplier itself.

The focus of the FLA’s reporting requirements on Participating Companies is primarily on communication to the FLA about how ‘non-compliances’ are addressed. Meanwhile, communication between Participating Companies and workers themselves in this regard appears to fall predominantly to the role of grievance procedures or equivalent channels (see Section 4.6). That said, those companies with regional representation may have additional opportunities for engagement with workers regarding remediation.

4.5.2. FLA verification and reporting

The FLA provides for considerable transparency in many areas of its work, and is notably more progressive in this regard than many multi-stakeholder and industry initiatives in the field of labor rights. As noted, all the reports from its Independent External Monitoring or Verification visits are available on its website. While the names of individual suppliers are not revealed, the reports are linked to the relevant Participating Companies that buys from them. Moreover, the FLA also provides considerable transparency in its handling of complaints from third parties about breaches of the Workplace Code of Conduct (see ‘Grievance Mechanisms’). However, when it comes to providing public information about the compliance by FLA Participating Companies with the standards that address their own decisions and actions – that is, the Principles of Fair Labor and Responsible Sourcing – there are notable gaps (see below).

4.5.3. Issues of note

- a. **Reporting on Participating Company reports:** The FLA requires, under the Principles of Fair Labor and Responsible Sourcing, that Participating Companies complete a standardized annual report to the FLA on fulfillment of these Principles and that they respond to FLA requests for documentation, contracts, information and clarification in a timely manner. These reports are seen only by a limited number of people within the FLA’s management team, and are not accessible to members of the FLA Board.

The FLA Charter provides for annual FLA reports of progress by individual Participating Companies. In practice, this has never been done. In its early years, the FLA did compile the annual reports from the Participating Companies themselves. However, the information in them was unverified and, as such, felt to be of questionable value. As a result, these reports were dropped. Instead, the FLA includes some verified aspects of the reports from Participating Companies in its accreditation reports on Participating Companies, which issue every three years. However these too are not public, albeit the Charter provides that they should be. Furthermore, there remains great uncertainty over whether, and when, the FLA might be able to report publicly on Participating Companies’ compliance with the Principles of Fair Labor and Responsible Sourcing, even following finalization of its new tool to track their compliance.

³⁷ Office of the High Commissioner for Human Rights, “The Corporate Responsibility to Respect Human Rights: an Interpretive Guide,” Geneva: Nov 2011. Section 8.7

- b. **Reporting on Independent External Assessments:** The FLA has been notable for the transparency it has provided by posting the reports from Independent External Monitoring or Verification visits on its website. This has provided important accountability for the independence of those reports and thereby reinforced the credibility of the FLA's work. It appears that new Independent External Assessments (IEA) will result in reports that combine continued insights into compliance with Workplace Code Standards by suppliers with new information about suppliers' own processes and systems.

There was some uncertainty at the time of the research for this report as to the extent to which IEA reports would be public in the same way as their predecessors were. However, evidence from the first application of this new process in the case of Foxconn indicates that it will maintain strong standards of transparency.

4.6. REMEDIATION AND GRIEVANCE MECHANISMS

4.6.1. Parallels with the UN Guiding Principles

Under the UN Guiding Principles, the corporate responsibility to respect human rights requires that where a company has caused or contributed to an adverse impact, it should provide for, or cooperate in, its remediation through legitimate processes. This may involve direct remediation by the company, remediation together with or through other actors involved, or cooperation in third-party processes, including administrative or judicial mechanisms of the state. This provision applies where a company recognizes that it has caused or contributed to the impact identified. If it contests that it has any involvement, it cannot be expected to volunteer remediation, but may find itself subject to some third-party adjudication.

This provision of the UN Guiding Principles requiring engagement in remediation does not apply where a negative impact is linked to a company's products, but without the company having contributed to the impact in any way. In such circumstances, the company's responsibility does not include providing remediation – even though companies do sometimes take on such a role. But the company does have a responsibility, as described in Section 4, to take action to avoid the continuation or recurrence of the impact in connection with its own products. This is broadly compatible with the FLA's approach of requiring Participating Companies to ensure that corrective actions for non-compliances are in place at the level of the supplier and that patterns in non-compliance are identified and addressed systemically.

However, embedded in these approaches is an assumption that there is indeed no contribution on the part of the Participating Company to the impacts identified. Experience suggests that it is unlikely that there is never any such contribution. The introduction of provisions into the Principles of Fair Labor and Responsible Sourcing that address sourcing criteria and decisions would appear to reflect recognition that these criteria and decisions indeed can and do play a role. However, there is nothing that provides for such factors to be assessed and taken into account when defining what remediation should include. Specifically, if a non-compliance is in part the result of pressure from a Participating Company's buying decisions, any remediation by the supplier is unlikely to be sustainable unless those contributing factors are also addressed.

Beyond the question of processes for remediation, the UN Guiding Principles also address remedial mechanisms. They require that companies establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted. Such mechanisms should provide a means to identify, address and remediate grievances early, before they escalate. To be effective, the

UN Guiding Principles stipulate that they should be: legitimate, accessible, predictable, equitable, rights-compatible, transparent, based in dialogue and engagement, and a source of continuous learning. The UN Guiding Principles further specify that collaborative initiatives such as the FLA should also have their own grievance mechanisms.

The Principles of Fair Labor and Responsible Sourcing require that Participating Companies make sure workers have access to grievance procedures at supplier production sites and confidential reporting channels to the Participating Company itself. Workers must receive training and communication about both options, as well as protection from punishment or prejudice against those who use them. The Principles do not set out criteria for these procedures and channels, although parts of the Workplace Code that refer to grievance mechanisms for workers specify variously that they be ‘known’, ‘timely’ and/or provide for confidentiality and non-retaliation.

The FLA itself provides a Third Party Complaints Mechanism that is designed as “a safeguard for any person, group or organization to report serious violations of workers' rights in facilities used by any company that has committed to FLA labor standards”.³⁸ The procedures for the Third Party Complaints mechanism and complaints forms are available on the FLA’s website in English, Bahasa, Hindi, Khmer, Mandarin, Spanish and Thai.³⁹ If a complaint is verified as being about a factory that produces for a Participating Company or university licensee of the FLA, and contains information about a specific and verifiable non-compliance with the Workplace Code, then the FLA follows a four-step process, set out in its Charter, that it summarizes as follows:

“FLA contacts participating companies sourcing from the factory in question and gives them 45 days to conduct an internal assessment and develop a remediation plan. If warranted, FLA may conduct its own investigation with the help of an independent, impartial assessor or ombudsperson. Based on these assessments, FLA makes recommendations for remediation and engages all the players - brands, suppliers and the complainants - to address the issues in a lasting way.”⁴⁰

4.6.2. FLA verification and reporting

With regard to grievance procedures at the level of suppliers, the monitoring reports of Participating Companies and the Independent External Monitoring reports of FLA auditors are intended to verify and report on what is in place. The verification of a Participating Company’s own procedures is, as discussed, reliant on reports by the Participating Company to the FLA. The FLA provides considerable transparency around its own Third Party Complaints mechanism, reporting publicly on the progress in addressing complaints throughout each complaint-handling process, as well as on their outcomes. These updates and reports are available on its website.⁴¹

4.6.3. Issues of note

- a. **Multiple requirements of suppliers:** There is a general requirement of suppliers in the Workplace Code of Conduct and Compliance Benchmarks, that they provide a mechanism “that allows workers to report harassment and grievances confidentially, including any concerns or problems they may be experiencing

38 FLA Website: <http://www.fairlabor.org/third-party-complaint-process>.

39 Ibid.

40 Ibid.

41 Ibid.

around legally-owed payments during a retrenchment process”.⁴² For these mechanisms, suppliers are required to have written procedures that allow a direct settlement of the grievance by the worker and his/her immediate supervisor, and/or “additional options for senior management review and consideration”⁴³. Other provisions of the Workplace Code require that there be procedures for workers to raise “health, safety and environmental concerns”, and a “system through which workers can dispute compensation and receive clarifications in this respect in a timely manner”⁴⁴. Separate provisions cover the need for procedures through which workers and worker representatives can raise issues regarding compliance with a collective bargaining agreement, as well as the right of unions to represent their members in individual grievances within the limits of the law.

There are clearly distinctions to be drawn between industrial relations processes and grievance mechanisms, and the latter should not undercut the former. However, the multiplicity of required procedures for grievance handling under the Workplace Code, even beyond formal industrial relations processes, may create a lack of clarity for suppliers and workers alike, and undermine understanding and use of these channels in practice.

b. **Lack of effectiveness criteria for grievance mechanisms of suppliers or Participating Companies:**

Although some of the compliance benchmarks for grievance handling under the Workplace Code specify that these processes should be ‘timely’, ‘known’ or ensure non-retaliation against complainants, they do not do so consistently. Overall, there is little clarity on what these processes need to provide to be effective in practice. This said, the FLA has developed self-assessment tools for suppliers – for completion separately by workers and management – to look at the quality of their grievance mechanisms, and also provides training on how to improve them in practice. Notwithstanding, some greater written clarity on quality standards for suppliers’ grievance mechanisms would be needed for this to translate into benchmarks for monitoring that could be tracked through monitoring by Participating Companies and IEM reports.

As regards the requirement for confidential reporting channels to Participating Companies themselves, there is even less clarity. Clearly, the size and resources of Participating Companies varies greatly – some having regional teams and others being far more stretched in terms of staff. Moreover, by participating in the FLA, companies can benefit from the FLA’s own mechanism as a point of recourse if suppliers’ mechanisms prove inadequate. However, it would be worth reviewing whether some greater guidance might be provided directly to Participating Companies on what their own channels could or should offer.

c. **Third Party Complaints Mechanism review:** The Third Party Complaints Mechanism itself is currently the subject of an internal review involving the different constituencies in the FLA. This will look in detail at the quality of processes involved and how well it is working in practice, including how it matches up to the effectiveness criteria in the UN Guiding Principles, and other relevant benchmarks. This is not the place to pre-empt that review. However, at a summary level, the mechanism clearly provides a high level of transparency with regard to the handling of individual complaints (once accepted) and their outcomes. It also provides for follow-through to monitor the implementation of agreed remediations and the current review process bears witness to a commitment to continuous improvement of the mechanism.

42 FLA Workplace Code of Conduct, p.10.

43 Ibid.

44 Ibid., p.12, 37.

In the past there has also been a good degree of ‘predictability’ about the FLA’s Third Party Complaints mechanism, as understood in the UN Guiding Principles. A description of the various steps provided for under the mechanism were clearly accessible on the FLA’s website. However, it does not appear to be available in the same way on the new website, and one would have to know that a description can be found in the FLA’s Charter in order to track it down. The FAQs that are provided simply state that “[c]omplaints with a verifiable violation of the FLA Code of Conduct will be investigated by FLA staff, and when necessary, the FLA Executive Director will initiate steps involving relevant actors in the factories – including the applicable FLA company(ies)”.⁴⁵ It will be important to provide more information about the complaints process, including indicative timeframes, to help potential users assess whether they wish to access it.

Over the ten years of the mechanism’s existence, it has handled a little over thirty complaints. It will be important to understand from the review whether this relatively limited uptake of the mechanism reflects deficits in how known, accessible or trusted it is, and whether the intention that the mechanism be a last resort has set the bar too high. This question will have to be addressed against the backdrop of the real resource and time challenges that the mechanism represents for the FLA and with an understanding of what efforts and resources are being, or need to be, dedicated to ensuring other ‘tiers’ in the grievance mechanism system – at the levels of both supplier and Participating Company – are fulfilling their own role. It is worth noting that the FLA has put considerable efforts in recent years into developing tools to help suppliers reinforce their own grievance mechanisms, notably through its FLA 3.0 program.

5. CONCLUSIONS AND RECOMMENDATIONS

The above analysis suggests a number of key conclusions for the FLA’s consideration. These are divided below into key strengths of the organization with regard to the UN Guiding Principles; recommendations for further alignment with the UN Guiding Principles; and additional points for consideration.

5.1. KEY STRENGTHS IN RELATION TO THE UN GUIDING PRINCIPLES

There are many ways in which the FLA’s policies, processes and practices are well aligned with the UN Guiding Principles. The revised Workplace Code of Conduct provides a clear set of labor rights outcomes, with considerable detail provided through the Compliance Benchmarks. While the issue of a ‘living wage’ provision has been difficult, the revised Code arguably addresses it and the FLA has worked rigorously to find ways to make this implementable, adhering to its principled approach of ensuring that commitments are real and not aspirational. The Principles of Fair Labor and Responsible Sourcing in most regards closely parallel the UN Guiding Principles’ six core requirements of policy commitment, four due diligence steps and remediation. The previous significant gap regarding embedding the commitment to respect human rights into the purchasing/sourcing department, not just the social/workplace compliance department, has largely been addressed in this new set of Principles.

The FLA’s requirements regarding reporting from Participating Companies on their internal compliance program and access to their documentation of supplier audits provides significant insights into achievements and

⁴⁵ Fair Labor Association old website: http://oldsite.fairlabor.org/what_we_do_third_party_complaints_e2.html.

challenges in implementation. This has been further reinforced by the independence of the FLA's own external monitoring program and the public reporting and verification of those visits and remediation requirements. The FLA is notable for its transparency in posting the results of its Independent External Monitoring visits. Its Third Party Complaints Mechanism has also provided for significant transparency, providing public updates on the progress of complaints that have been accepted, and their outcomes. It has been clear that where non-compliance by a Participating Company has been identified, this has real consequences in terms of membership suspension and public notification. This reinforces the seriousness of the commitments that affiliation with the FLA entails.

Also notable has been the continual evolution of the FLA's work. The recent revisions to the Workplace Code and the new Principles of Fair Labor and Responsible Sourcing, in replacement of the former Participation Criteria, are the latest evidence of this. However, the FLA has also constantly innovated in its supporting programs, providing training, self-assessment tools and the use of collective leverage and problem-solving approaches. Some initiatives have been more successful than others, but the effort towards continuous learning in often uncharted waters related to supply chain performance is striking. The latest innovation is the move towards Independent External Assessments, with their increased emphasis on root cause analysis and joint solution-seeking. While there have been some understandable stakeholder concerns about this move, it represents a continued commitment to finding better answers to persistent challenges in supply chain management.

Finally, the FLA has a strong set of commitments and practices regarding stakeholder engagement, at the level of the FLA (through its constituent groups and wider outreach), through its requirements of the independent external monitors it uses, and through the standards that Participating Companies must meet in terms of engagement with local, legitimate trade unions, NGOs and others. It remains regrettable that trade unions are not among the FLA's constituent groups, due to original disagreements over the inclusion of 'living wage' language in the Workplace Code, and it must be hoped that this might change in light of recent developments.

5.2. RECOMMENDATIONS FOR FURTHER ALIGNMENT WITH THE UN GUIDING PRINCIPLES

The analysis in the previous section of this report leads Shift to make the following recommendations to the FLA with regard to further alignment with the UN Guiding Principles.

5.2.1. Recognizing the role of incentives in 'embedding' respect for rights

As discussed, the recent recognition of the importance of Participating Companies' sourcing criteria and decisions as one important driver of supply chain compliance is a major advance in terms of alignment with the UN Guiding Principles. The inclusion of this Principle explicitly acknowledges that non-compliances in a Participating Company's supply chain are not always divorced from the company's own behavior, but may be contributed to by sourcing decisions.

The component that is not explicitly recognized in the eighth principle of the Principles of Fair Labor and Responsible Sourcing is the incentives under which sourcing decisions are made. The Commentary to the UN Guiding Principles states that:

“Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake.”[emphasis added] ⁴⁶

As the FLA looks at implementation of this and other Principles of Fair Labor and Responsible Sourcing, it would be important to factor in the role that incentives for internal staff – including staff responsible for purchasing decisions – play in driving performance with regard to labor rights compliance in the supply chain. Incentives include senior management messaging, training, and – importantly – financial and other performance rewards to staff. This might be something Participating Companies could be requested to include in their annual reporting to the FLA, with appropriate supporting evidence.

5.2.2. Tracking the performance of Participating Companies

The FLA has strong systems, and strong requirements of Participating Companies, when it comes to tracking the performance of suppliers against the Workplace Code. It is the first to admit that its ability to track the performance of Participating Companies against their due diligence commitments has historically been much weaker. Although renewed efforts are underway to improve the gathering of data on how companies meet the Principles of Fair Labor and Responsible Sourcing, this clearly remains a challenge. While tracking suppliers’ performance, and having the systems to do so, goes some way to meeting the UN Guiding Principles’ expectations, Participating Companies need to have the capacity to both know and show that their own activities are consistent with respect for human rights (including sourcing/purchasing decisions). Making further progress in this field should remain a priority, given the FLA’s principled stance of seeking to ensure that the commitments its affiliates make should be real and not aspirational.

5.2.3. Communicating the performance of Participating Companies

This prior point links directly to the FLA’s ability to report on the performance of Participating Companies. Clearly, the ability to track their performance is a prerequisite to reporting. The FLA’s own concern that it has not been able to verify information reported by companies has limited its willingness to make public statements about their performance. For now, it remains out of line with the requirements of its own Charter on reporting. It will naturally take time to address the gaps in verification. As it does so, it will be important for the FLA to be as open as possible about its on-going efforts in this regard, as a means of keeping external stakeholders apprised of progress.

5.2.4. Clarifying grievance mechanism requirements

Although the Workplace Code has one main reference to the need for suppliers to have a grievance mechanism in place for workers, it is unclear how other requirements at other points in the code for workers to be able to raise concerns are meant to fit with this grievance mechanism. This may be a source of unnecessary confusion (without suggesting that trade union channels, where they exist, should be merged with or subordinated to a grievance mechanism).

⁴⁶ Commentary to UN Guiding Principle 16

More importantly, there is very little guidance provided as to what makes for an effective grievance mechanism. This raises the risk of requiring the creation of a mechanism that raises worker expectations, and then fails to meet them due to a lack of understanding of what a successful grievance mechanism entails. The FLA has done notable work to build tools to support good grievance mechanisms, but some greater clarity and consistency in the basic requirements and compliance benchmarks might make an important difference, particularly where supported by advice and capacity building under the new Independent External Assessment process.

It could also be beneficial to add clarity to what Participating Companies themselves need to provide by way of additional channels for workers, recognizing the widely different resources and capacities these companies have. Moreover, the FLA should ensure a full description of the processes offered by its own Third Party Complaints Process is again placed on its website in key languages, notwithstanding the fact that the process is under review and may change in the course of this year.

5.2.5. Aligning FLA documentation to ensure clarity about its work

This report was being prepared at a time of greater-than-usual flux for the FLA. While revisions to the Workplace Code of Conduct were complete, and the new Principles of Fair Labor and Responsible Sourcing had been adopted, both the systems for monitoring/assessing suppliers and those for assessing compliance by Participating Companies remain in a process of change at the time of writing. The launch of the new website partway through this review has helped to reduce confusion between various versions of documents. At the same time, it will be important to address various redundancies and anachronisms in the FLA Charter in the near future and to share more information with interested external stakeholders (and, in some instances, its internal constituencies) as to the direction of change in areas where reform will take more time.

5.3. ADDITIONAL POINTS FOR CONSIDERATION

Two additional points are worth noting, albeit they fall outside the immediate scope of the FLA's mandate and relate more to the broader responsibilities of the Participating Companies and their suppliers with regard to human rights.

5.3.1. Avoiding double standards with regard to respect for human rights

The FLA's focus is on workplace rights, and due diligence by Participating Companies and other affiliates in working to ensure that those rights are respected in practice. This said, Participating Companies are also responsible for respecting the human rights of their own employees. Should they hold themselves to lesser standards in that regard, for example with regard to freedom of association, they would be out of line with the UN Guiding Principles in their own practices. While this lies beyond the mandate of the FLA, it may undermine the ability of the FLA and Participating Companies to effect change among suppliers if there are perceived to be double standards.

5.3.2. Human rights due diligence standards for suppliers

In general, the FLA's focus at the level of suppliers of Participating Companies is on the outcome standards in the Workplace Code. While these are supported, in the Compliance Benchmarks, by some procedural requirements, they do not raise the question of due diligence by suppliers to assess, address, track and report

on the potential human rights impacts of their own activities on their workers. That said, it has been interesting and compelling that the FLA has among its affiliates, apart from brand companies and collegiate licensees, also a number of participating suppliers. These are suppliers that have opted to take on not only compliance with the Workplace Code, but also the same responsibilities as Participating Companies for having internal compliance programs and reporting on their implementation. The intent is that this should provide Participating Companies and other non-FLA companies with greater confidence with regards to sustainable compliance in those suppliers, and bring commercial benefits to the suppliers as a result.

Under the UN Guiding Principles, all suppliers, as businesses, have their own responsibility to respect human rights. The UN Guiding Principles recognize that the scale and complexity of the means through which enterprises meet this responsibility may vary according to their size, sector, operational context, ownership and structure, and with the severity of the enterprise's adverse human rights impacts.⁴⁷ It appears that the FLA's new Sustainable Compliance program, including its Independent External Assessments, is moving toward the assessment also of suppliers' own processes and systems for identifying and addressing labor right issues in their workplaces. This would be very much in line with the UN Guiding Principles, and a significant development. Inevitably, there will be much learning to be gained about how to implement human (labor) rights due diligence in a small factory setting. It is to be hoped that this learning can be shared publicly as much as possible to enable others to benefit from the insights.

5.3.3. Human rights due diligence standards for licensees

The focus of this report has been on Participating Companies (the brands and suppliers that join the FLA) which are bound by the full range of FLA obligations. It is important, however, to recognize that another important category of members comes from university and college licensees. The initial requirements placed on licensees vary according to their size (in terms of revenues). In particular, the smallest, 'Category C' licensees are only required at the start to meet five of the ten Principles of Fair Labor and Responsible Sourcing, with the implication of then moving, once the capacity is in place, to apply all ten. In practice, however, it is unclear that these licensees are required to take on the remaining Principles - which include important provisions such as purchasing practices and grievance mechanisms - and there is no set timeframe for them to do so.

As noted, under the UN Guiding Principles, smaller companies do not have lesser responsibilities with regard to respecting human rights. However, it is recognized that their processes will need to be simpler, commensurate with their size and the scale of their impacts. While the FLA's approach is intended to provide reasonable leeway for these smaller companies to meet the same standards as others over time through processes that are proportionate to their risks and size, there is a real risk, absent clearer timeframes for this to happen, that it become a de facto exemption from certain key responsibilities. It could be worth reviewing this approach and providing clearer timelines and pathways for these licensees to meet the full range of requirements that reflect the UN Guiding Principles.

5.4. CONCLUDING REMARKS

Shift thanks the FLA for its confidence in seeking out this analysis of the implications of the UN Guiding Principles for its work. It is also grateful to the FLA's senior executives and Board members who took time to discuss their knowledge and views of the FLA's policies, processes and practices. Shift takes full responsibility

⁴⁷ UN Guiding Principle 14.

for any inaccuracies or omissions in this report, but hopes that it provides useful material for further consideration and discussion by the FLA and its stakeholders.