



March 26, 2012

Office of the United Nations High Commissioner for Human Rights  
c/o Ms. Lene Wendland  
Research and Right to Development Division  
OHCHR  
CH-1211 Geneva 10  
Switzerland

By email: [registry@ohchr.org](mailto:registry@ohchr.org)

**Re: Call for input: Report on business and human rights and the UN system**

Dear Ms. Wendland:

We are writing in response to the request for input for the Secretary-General's report on how to implement and disseminate the Guiding Principles on Business and Human Rights<sup>1</sup> throughout the UN system.<sup>2</sup> We commend the UN for its continuing efforts to engage stakeholders on its crucial work in the area of business and human rights.

With approximately C\$5 billion in assets under management, NEI Investments' approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will build long-term sustainable value for all stakeholders and provide higher risk-adjusted returns to shareholders. Through our company evaluations, active engagement with the companies in our funds, and issues research, we have developed considerable understanding of good practices as well as challenges that corporations face with respect to human rights. We endeavour to share this experience in the context of consultations on public policy and standards.

We wish to follow up on an issue that we have raised in two earlier submissions - first during the consultations on the Guiding Principles,<sup>3</sup> and again in response to the request for input for establishing a work plan for the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises.<sup>4</sup> We believe that the UN could advance the

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<sup>1</sup> United Nations (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>

<sup>2</sup> Office of the High Commissioner for Human Rights (n.d). <http://www.ohchr.org/EN/Issues/Business/Pages/CallforinputreportonbusinessandHRandtheUNsystem.aspx>

<sup>3</sup> NEI Investments (2011). Re: Guiding Principles for the implementation of the United Nations "Protect, Respect and Remedy" Framework. <https://www.neiinvestments.com/neifiles/PDFs/5.5%20Public%20Policy%20and%20Standards/Ruggie%20-%20HR%20Guiding%20Principles.pdf>

<sup>4</sup> NEI Investments (2011). Re: Work program for UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises.

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human rights agenda as well as the implementation of the Guiding Principles by explicitly addressing the role of investors in supporting the corporate duty to respect human rights. To do this, we encourage the UN to ensure that the Guiding Principles are disseminated and implemented within its initiatives in the area of responsible investment.

### **Fiduciary duty and the responsibility to respect human rights**

Principle 3 of the Guiding Principles appropriately raises the need to ensure that laws and policies governing business enterprises do not constrain, but rather enable, corporate respect for human rights. In addition, Principle 8 helpfully identifies various stakeholders that shape business practice and have a role to play in creating an enabling environment for corporations to respect human rights. However, the Guiding Principles do not address directly the special position of influence held by investors, as the owners of public companies, to support or hinder the efforts of those companies to implement robust human rights policies and due diligence processes. Nor do the Guiding Principles emphasize that the responsibility of all businesses to respect human rights also applies to investment institutions. These are significant gaps.

Traditionally, the fiduciary duty of investment institutions has been interpreted as an obligation to focus on the immediate financial interests of their beneficiaries. Recently, with rapid growth in the number of institutions adopting responsible investment principles, there has been increasing acceptance of the position that fiduciaries can and should take into account all factors that may be material to the performance of assets under their control – including long-term environmental, social and governance (ESG) factors. The UN Environment Program Finance Initiative (UNEP-FI) and the Principles for Responsible Investment (PRI) have played an important role in mainstreaming these ideas. The Freshfields report, conducted under the auspices of UNEP-FI, is widely regarded as the most authoritative argument for the legality of considering ESG issues in investment decisions.<sup>5</sup> The report, and its 2009 follow-up, recognized that the definitions of moral and legal standards of behaviour are in constant evolution.<sup>6</sup>

Companies with poor performance on human rights may face operating restrictions, litigation, reputational damage, and erosion of the social license to operate. As a result, many investors now identify human rights issues as material risks to the value of companies, and accept that good fiduciaries should take them into account in investment decision-making. However, this does not equate to a universal responsibility to respect human rights at all times. If it is not generally accepted that investment institutions have a duty to support public companies to respect human rights, human rights measures undertaken by management of a public company could be opposed by some or all of the company's shareholders, because they are seen as contrary to profit maximization, or because the risks the measures are intended to address are not considered to be material.

### **Integrating the Guiding Principles to UN initiatives for responsible investment**

To address the potential conflict between materiality-based interpretations of fiduciary duty and a universal corporate responsibility to respect human rights, we encourage the UN to ensure the Guiding Principles are integrated within its initiatives in the field of responsible investment, UNEP-FI and PRI, as well as within the UN Global Compact. These initiatives have established relevant networks and expertise at the intersection of investment, corporate and human rights issues, and have played a key role in disseminating evolving perspectives on the linkage of ESG considerations to fiduciary duty. They

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<https://www.neiinvestments.com/neifiles/PDFs/5.5%20Public%20Policy%20and%20Standards/111208%20%20Human%20rights%20working%20group%20-%20NEI%20Investments%20FINAL.pdf>

<sup>5</sup> UNEP FI (2009). Fiduciary Responsibility II: Legal and practical aspects of integrating environmental, and social and governance issues into institutional investment <http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf>

<sup>6</sup> Freshfields (2005). A legal framework for the integration of environmental, social and governance issues into institutional investment. [http://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf)



could now collaborate on further analysis with the objective of clarifying the investor role in supporting the corporate responsibility to respect human rights.

In summary, we encourage the Secretary-General to ensure that UN initiatives in the field of responsible investment collaborate to explore how the corporate responsibility to respect human rights relates to investment, and how it can be integrated within the scope of fiduciary duty. If you would like to discuss the issues raised in this letter further, please contact **Michelle de Cordova, Director, Corporate Engagement & Public Policy, NEI Investments (mdecordova@NEIinvestments.com, +1-604-742-8319)**.

Sincerely,

**NEI Investments**

A handwritten signature in black ink, appearing to read "Robert Walker", with a long horizontal flourish extending to the right.

Robert Walker  
Vice President, ESG Services & Ethical Funds

CC:

Board of Directors, NEI Investments

Dr. Wolfgang Engshuber, Chair, Principles for Responsible Investment

Dr. James Gifford, Executive Director, Principles for Responsible Investment

Ms. Barbara J. Krumsiek, Co-Chair, UNEP Finance Initiative Steering Committee

Mr. Richard Burrett, Co-Chair, UNEP Finance Initiative Steering Committee

Ms. Philippa Birtwell, Co-Chair, UNEP Finance Initiative Human Rights Work Stream

Dr. Rory Sullivan, Co-Chair, UNEP Finance Initiative Human Rights Work Stream

Mr. Georg Kell, Executive Director, UN Global Compact