



April 26, 2011

UN Working Group on Human Rights and
Transnational Corporations and Other Business Enterprises
By email: wg-business@ohchr.org

Re: UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises: Consultation on Forum on Business and Human Rights

Dear Working Group members:

We are writing in response to your request for input on themes and modalities for the first UN annual Forum on Business and Human Rights, scheduled for December 2012.¹ We commend the Working Group's initiative to engage stakeholder input on the Forum.

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, our active engagement with the companies in our funds, and our issues research, we have developed considerable understanding of good practices as well as challenges corporations face with respect to human rights, which we endeavour to share in the context of consultations on public policy and standards. We believe that actively incorporating the investor perspective is an important element for the successful implementation of the UN Guiding Principles on Business and Human Rights.²

We write to suggest that the Forum include a session on the role of investment institutions in supporting companies in their implementation of the Guiding Principles on Business and Human Rights, focusing on challenges and opportunities. Questions that could be addressed at such a session include:

- The integration of the "responsibility to respect" human rights to interpretations of fiduciary duty.
- The potential for clashes between the universal corporate "responsibility to respect" and environmental, social and governance (ESG) investment perspectives based on considerations of materiality.
- Modalities for moving beyond a focus on human rights as an investment down-side risk, towards positive investment valuations for companies that excel in human rights performance.

¹ Working Group on the issue of human rights and transnational corporations and other business enterprises (2012). Forum on Business and Human Rights 4-5 December: Concept and discussion note for consultation with stakeholders on 10 May 2012

<http://www.ohchr.org/Documents/Issues/Business/ConceptNoteStakeholderConsultationBHRForum.pdf>

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>

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We further suggest that the Working Group could liaise with the UN Principles for Responsible Investment, the UNEP Finance Initiative and the UN Global Compact to organize the session. This letter has been copied to those initiatives.

We make these suggestions to follow up on earlier submissions, which we have appended to this letter for your convenience, on the need to add the concept of fiduciary duty to the list of influential areas of business law and policy that require review with a human rights lens.

If you have any questions regarding this letter, or wish to discuss the content further, please contact **Michelle de Cordova, Director, Corporate Engagement & Public Policy, NEI Investments** (mdecordova@NEIinvestments.com 604-742-8319).

Sincerely,

NEI Investments

A handwritten signature in black ink, appearing to read "Robert Walker", followed by a long horizontal line 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
Mr. Georg Kell, Executive Director, UN Global Compact

Attached:

- Letter of March 26, 2012 to the Office of the UN High Commissioner for Human Rights: *Report on Business and Human Rights and the UN System*
- Letter of December 8, 2011 to the UN Working Group on Business and Human Rights: *Work Program*



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

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 Rights¹ throughout the UN system.² 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,³ 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.⁴ We believe that the UN could advance the

¹ 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>

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

³ 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>

⁴ 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.⁵ The report, and its 2009 follow-up, recognized that the definitions of moral and legal standards of behaviour are in constant evolution.⁶

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

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

⁵ 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>

⁶ 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



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

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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



December 8, 2011

UN Working Group on Human Rights and
Transnational Corporations and Other Business Enterprises
By email: wg-business@ohchr.org

Re: Work program for UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises

Dear Working Group members:

We are writing in response to your request for input on establishing a work plan for the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises.¹We commend the Working Group's initiative to engage stakeholder input on the work plan.

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, our active engagement with the companies in our funds, and our issues research, we have developed considerable understanding of good practices as well as challenges corporations face with respect to human rights, which we endeavour to share in the context of consultations on public policy and standards. We believe that actively incorporating the investor perspective is an important element for the successful implementation of the "Protect, Respect and Remedy" framework.²

We write to follow up on an issue that we raised in an earlier submission during the consultations on the Guiding Principles for the implementation of the UN "Protect, Respect and Remedy" Framework: namely, the need to add the concept of fiduciary duty to the list of influential areas of business law and policy that require review with a human rights lens.³

Principle 3 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

¹Office of the High Commissioner for Human Rights. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11567&LangID=E>

²United 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>

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

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public companies, to either support or hinder the efforts of companies to implement robust human rights policies and due diligence processes. Nor do they emphasize that the responsibility of all businesses to respect human rights also applies to investment institutions. We believe 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. More recently, with rapid growth in the number of institutions adopting responsible investment principles, there is 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 UN Principles for Responsible Investment (PRI) have played an important role in mainstreaming these ideas. The Freshfields study, conducted under the auspices of UNEP-FI, is widely regarded as the most authoritative argument in support of the legality of considering ESG issues in investment decisions.⁴ The report, and its 2009 follow-up, recognized that the definitions of moral and legal standards of behaviour are in constant evolution.⁵

Companies with poor performance on human rights may face operating restrictions, litigation, reputational damage, and erosion of the social license to operate. 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 corporate responsibility to respect human rights at all times. If it is not generally accepted that a duty to support the corporate responsibility to respect human rights extends to investment institutions, it is possible that human rights due diligence measures 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.

In summary, we encourage the Working Group to explore how the corporate responsibility to respect human rights applies to investment institutions, and how it can be integrated within the scope of fiduciary duty. We further suggest that the Working Group could liaise with the UN Principles for Responsible Investment and the UNEP Finance Initiative to further this exploration. If you have any questions regarding this letter, please contact Michelle de Cordova, Manager, Corporate Engagement & Public Policy, NEI Investments (mdecordova@NEIinvestments.com 604-742-8319).

Sincerely,

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Robert Walker
Vice President, ESG Services & Ethical Funds

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⁴ UNEP FI (2009). Fiduciary Responsibility II: Legal and practical aspects of integrating environmental, and social and governance issues into institutional investment. Accessed December 1, 2011 from: <http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf>

⁵ Freshfields (2005). A legal framework for the integration of environmental, social and governance issues into institutional investment. Accessed December 1, 2011 from: http://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf