

February 1, 2013

Via Electronic Mail

European Commission Human Rights Sector Guidance Project Team
34b York Way
London N1 9AB
United Kingdom
Email: sectorguidance@ihrb.org

Re: Comments on the European Commission's Draft Guidance for the Oil and Gas Sector on Implementing the UN Guiding Principles on Business and Human Rights

Dear Project Team:

Accountability Counsel is pleased to provide the following comments regarding the European Commission's Draft Guidance for the Oil and Gas Sector on Implementing the UN Guiding Principles on Business and Human Rights ("Draft Guidance"). Accountability Counsel, an organization based in San Francisco, California, works to support communities around the world seeking to use accountability mechanisms to uphold environmental and human rights. We work at the policy level to ensure that accountability systems are robust, fair, and effective. We therefore take great interest in the European Commission's creation of the Draft Guidance, as it marks a significant commitment by European Commission to ensure that the UN Guiding Principles on Business and Human Rights ("Guiding Principles") are implemented and integrated into the operations of oil and gas sector businesses. Several of Accountability Counsel's recent cases have involved human rights abuses perpetrated by oil and gas companies,¹ and we believe the Draft Guidance – with our suggested improvements – could prove valuable to companies seeking to avoid the abuses we have seen in our work. Our comments will focus on Section E of the Draft Guidance pertaining to remediation and operation-level grievance mechanisms.

We are pleased to see the inclusion of provisions pertaining to grievance mechanisms in the Draft Guidance, as they reflect an integral component for protection and respect of human rights. The Draft Guidance's provisions for remediation and operational-level grievance mechanisms are important steps toward greater human rights accountability for businesses in the oil and gas sector. There are, however, shortcomings in the remedies envisaged by the Draft Guidance,

¹ See our work in the Peruvian Amazon and Sakhalin Island, Russia, at Accountability Counsel's website: <http://www.accountabilitycounsel.org/communities/>.

primarily related to the limitation of grievance mechanisms to the operations level. We provide a number of recommendations that would move the Draft Guidance’s approach to grievance mechanisms closer to fulfilling the standards established by the Guiding Principles and international best practice for effective remedy.

I. General Comments

Access to remedy is a critical component of the Draft Guidance. Grievance mechanisms are rightly recognized as important for addressing, and even preventing, violations of human rights standards that may not be enshrined in domestic law in countries where the oil and gas sector operates. However, situating these mechanisms only at the operational level, as the Draft Guidance does, is inadequate to systemically address violations of the Guiding Principles, sector guidance notes, corporate policies, and international best practice.

There is a need for a centralized grievance mechanism as it relates to business and human rights violations for the oil and gas sector to ensure that companies fully implement many of the principles expressed in the Guiding Principles – oversight, transparency, sharing lessons, and legitimacy. Therefore, the Draft Guidance should establish a sector-level grievance mechanism for oil and gas, or a mechanism housed in the European Union, to address human rights violations and grievances by companies from, or operating in, EU countries.

Structurally speaking, operational-level grievance mechanisms are equipped only to address the isolated impacts of a single company’s operation in an individual project location. The limitations of such mechanisms render them poorly suited to address widespread violations or problematic practices across a company’s entire operations or across the sector as a whole. It is a significant, nearly insurmountable challenge for these individual mechanisms to operate uniformly in a manner consistent with the standards of international best practice. As we have seen in our own work in this area, inconsistency leads to deficits in the real and perceived legitimacy of these mechanisms, which impairs their effectiveness as affected communities lose trust in their functioning and independence. Moreover, relying on isolated operational-level grievance mechanisms renders difficult the possibility for meaningful oversight of these mechanisms’ effectiveness. The Draft Guidance should therefore *additionally* offer stakeholders an avenue toward recourse through an external, impartial, transparent, and legitimate process.

The Guiding Principles recognize that industry, multi-stakeholder, and other collaborative initiatives that are based on respect for human rights standards should ensure availability of effective grievance mechanisms.² They go on to caution that the legitimacy of such collaborative initiatives may be jeopardized if they do not provide effective mechanisms for remediation of adverse human rights impacts.³ The aforementioned limitations of operational-level grievance mechanisms do not make them – acting alone – sufficiently effective mechanisms to secure affected communities’ access to remedy. Rather, they should form part of an ‘accountability framework’ where operational and sector or international level mechanisms work simultaneously.

² UN Guiding Principles on Business and Human Rights (“Guiding Principles”), ¶30, p 32.

³ Guiding Principles, ¶30, pp 32-33.

We would be pleased to share more specific suggestions and criteria for the design and operation of a proposed sector- or EU-level grievance mechanism to ensure it comports with the Guiding Principles and international best practice related to accountability mechanisms.⁴

II. Specific Comments

Our support for a sector-wide mechanism notwithstanding, this section offers our comments on the proposed operational-level grievance mechanisms in the Draft Guidance.

As companies attempt to create these operational-level mechanisms, many questions and issues requiring technical assistance will likely arise. As such, the Draft Guidance should establish a body or mechanism to furnish information and resources to provide companies – that are not in the business of running such mechanisms – with continued guidance as they confront issues in designing, implementing, and operating their grievance mechanisms. This body could additionally act as a forum for companies to share lessons learned and best practices. The mechanism could also provide needed oversight of companies’ grievance mechanisms across the sector to promote uniformity, consistency, and effectiveness.

There is a wide range of issues that companies should address when designing and operating a grievance mechanism, all of which should be reflected in the Draft Guidance. In addition to the Guiding Principles, international best practice outlined in the International Financial Corporation’s *Good Practice Note: Addressing Grievances from Project-Affected Communities: Guidance for Projects and Companies on Designing Grievance Mechanisms*⁵ and the Compliance Advisor/Ombudsman’s *Advisory Note: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*⁶ serve as bases for the following specific comments on improving the operational-level grievance mechanisms.

1. Lowering Barriers to Eligibility

We are pleased that the Draft Guidance explicitly envisions grievance mechanisms as a channel “for individuals *or their legitimate representatives* to raise concerns about impacts *without having to show a breach of any standard*, including human rights” (emphasis added).⁷ We applaud the Draft Guidance for permitting legitimate representatives of project-affected individuals to approach a company with grievances, as a variety of factors, including literacy and

⁴ Accountability Counsel has expertise in the design and best practice of such mechanisms, and we have co-authored a proposal for a “Foreign Investor Accountability Mechanism” that could serve as a useful model here. See <http://www.accountabilitycounsel.org/policy/fiam/>.

⁵ International Financial Corporation. *Good Practice Note: Addressing Grievances from Project-Affected Communities: Guidance for Projects and Companies on Designing Grievance Mechanisms*, Sept. 2009, available at <http://www1.ifc.org/wps/wcm/connect/cbe7b18048855348ae6cfe6a6515bb18/IFC+Grievance+Mechanisms.pdf?MOD=AJPERES&CACHEID=cbe7b18048855348ae6cfe6a6515bb18>.

⁶ Compliance Advisor/Ombudsman, *Advisory Note: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*, 2008, available at <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>.

⁷ European Commission’s Draft Guidance for the Oil and Gas Sector on Implementing the UN Guiding Principles on Business and Human Rights (“Draft Guidance”), Section E, p 37.

educational level, lack of resources, fear of reprisal, and confidentiality, among others, may prevent an affected individual from voicing his or her legitimate project-related concerns. We recommend, however, that the Draft Guidance explicitly include “groups” as entities, along with individuals and their legitimate representatives, who can raise grievances. As we have seen in our own work, human rights abuses often impact individuals who may not feel safe to file complaints alone. Cultural reasons may also necessitate collective submission of complaints.

We are concerned that the Draft Guidance may introduce an inappropriate barrier to eligibility for seeking a remedy by providing that a company needs to engage in remediation only when “it recognises that it has played a role in causing or contributing to adverse impacts.”⁸ This implies that if a company does *not* recognize its role in causing or contributing to an adverse impact, then it is within a company’s discretion not to participate in a grievance process. This reading is reinforced by footnote 39, which suggests that when a company contests a claim that it caused or contributed to an adverse impact, the dispute should be adjudicated by “independent state-based mechanisms.”⁹ It is a significant barrier to access to limit eligible grievance cases to those in which the company acknowledges its role in bringing about the impact from which a grievance arises. The availability of remediation should not be contingent upon a company’s recognition of its role in the impact, but instead the Draft Guidance should make explicit that the availability of remediation should include all those cases where causal claims of adverse impacts are contested or not by the company involved.

Finally, the Draft Guidance’s treatment of the issue of accountability in business relationships constitutes another significant barrier to eligibility to grievance mechanisms. The Draft Guidance provides that a company has no obligation to address adverse impacts that “are directly linked to an O&G company’s operations by a business relationship.”¹⁰ Instead, the Draft Guidance should encourage companies to take responsibility for those impacts caused or contributed to by their business relationships. In doing so, the Draft Guidance would be in accord with international best practices and existing obligations, as expressed in the OECD Guidelines for Multinational Enterprises.¹¹

2. Ensuring Awareness and Accessibility

Though the Draft Guidance recognizes accessibility as important in creating a grievance mechanism, this issue requires more discussion to ensure fair and effective access to remedy.¹² The Draft Guidance could be improved by addressing the multiple aspects of accessibility that

⁸ Draft Guidance, Section E, p 36.

⁹ Draft Guidance, Section E, p 36, footnote 39. We note that a state may or may not have independent state-based mechanisms available. In Accountability Counsel’s work, our client communities have not been able to access independent state-based mechanisms in the areas where we work.

¹⁰ Draft Guidance, Section E, p 39.

¹¹ OECD Guidelines for Multinational Enterprises, 2011, ¶3, p 31, *available at* <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/48004323.pdf>. The Guidelines provide “Enterprises should . . . [s]eek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.”

¹² Draft Guidance, Section E, Box C, p 37 & Box 13, p 39.

companies should consider when designing their grievance mechanisms, which include, for example, awareness of the mechanism, language, literacy and educational level, costs, communications infrastructure, physical location, and fears of reprisal.¹³ Additionally, the Draft Guidance should provide information on where to obtain technical advice and support on how to remove barriers to access.

As a first step to promote awareness among affected communities, we recommend that the Draft Guidance include provisions outlining methods for proactive communication about legal protections for communities and available grievance mechanisms. For example, this could include distribution of written materials in the local language that are contextually appropriate, or trainings on the remedies available to communities that may potentially be affected by project operations.¹⁴ We also recommend that information about the grievance mechanism be included in all project documents—including executive summaries—that are distributed during preliminary stages of the project, such as consultations. We are pleased with the Draft Guidance’s prescription for provision of a range of access points and modalities, including written and non-written forms of communication, ensuring that complainants need not possess special skills to take complainants to a grievance mechanism.¹⁵

The Draft Guidance notably provides that “[i]t will be important to identify where complainants are members of potentially vulnerable groups and take this into account during the handling of their complaint and in identifying appropriate remedies,”¹⁶ but this treatment of this crucial issue is overly vague. As the commentary to Guiding Principle 26 notes, “[i]ndividuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.”¹⁷ The Draft Guidance should prescribe that procedures be established to ensure access to the grievance mechanism by vulnerable individuals or groups prior to initiation of the grievance process, in addition to developing culturally appropriate procedures for handling grievances from members of a vulnerable population once a complaint is lodged. These procedures should take into account and be sensitive to the culturally-specific dynamics present as they relate to particular vulnerable groups within the local community. The Draft Guidance should also highlight the reality that often the most vulnerable members of the population have the least access to education and may have the least understanding of the redress options available, as well as the manners by which to lodge grievances through conventional channels.¹⁸

There are some protections that grievance mechanisms should incorporate, particularly when it comes to complainants’ fear of reprisal. Approaching a grievance mechanism carries with it risks of harm, particularly if the complaint involves sensitive issues related to corruption or

¹³ Guiding Principles, ¶31, p 34.

¹⁴ International Financial Corporation. *Good Practice Note*, p 12.

¹⁵ Draft Guidance, Section E, Box 13, p 39.

¹⁶ Draft Guidance, Section E, Box 13, p 40.

¹⁷ Guiding Principles, ¶26, p 29.

¹⁸ International Financial Corporation. *Good Practice Note*, p 12.

monetary compensation or interferes with social norms, especially including gender norms.¹⁹ The Draft Guidance, accordingly, should make clear that companies must provide a mechanism free of retribution that assesses potential risks to complainants and incorporates methods to mitigate dangers. These measures include a clearly articulated policy of non-retaliation and measures to ensure physical protection of complainants, a practiced commitment to confidentiality, protection of any personal data associated with a complaint, and options for submitting anonymous grievances.²⁰

It is also important in this context for the Draft Guidance to provide that affected communities are fully informed of alternative avenues of recourse that should not be foreclosed by their choice to avail or not avail themselves of the company's grievance mechanism. They should also be made aware that these avenues of recourse are available to them if they are not satisfied with the company's handling of their grievance.

Finally, the Draft Guidance does not explicitly note that grievance mechanisms should be free of cost to communities. The methods of access to the grievance mechanism should reflect the company's commitment to cost-free access for communities, and the Draft Guidance should encourage companies to provide resource assistance in necessary circumstances to enable communities to lodge grievances with access to all necessary information.²¹ Where affected stakeholders have limited access to information and expert resources, and do not have the financial means to obtain them, this imbalance in relation to the company's financial resources "can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions."²²

3. Promoting Transparency

We agree with the Draft Guidance on the importance of standardizing procedures, "including by acknowledging receipt of complaints, providing indicative timeframes and updates, and reporting externally on the mechanism."²³ These practices enhance the transparency and predictability of the grievance mechanism, which can contribute to stakeholders' perceptions of reliability and fairness, as well as increase their trust in the process. We recommend that the Draft Guidance also encourage companies to disclose information about the grievance process, the results of resolutions in individual cases, and share lessons with other affected communities. Furthermore, companies should monitor compliance with and fulfillment of agreements reached through the grievance mechanism and should regularly report to communities and to the public on the actions taken to resolve grievances.²⁴

4. Incorporating Lessons Learned into Institutional and Sectoral Practice

¹⁹ International Financial Corporation. *Good Practice Note*, p 15.

²⁰ International Financial Corporation. *Good Practice Note*, p 15.

²¹ International Financial Corporation. *Good Practice Note*, p 12.

²² Guiding Principles, ¶31, p 34.

²³ Draft Guidance, Section E, Box 13, p 40.

²⁴ International Financial Corporation. *Good Practice Note*, p 14.

The Draft Guidance recognizes the importance of capturing lessons from a grievance mechanism as part of a company’s ongoing learning and improvement.²⁵ However, it does not provide sufficient guidance to companies regarding the establishment of mechanisms whereby lessons learned from resolving grievances can be communicated and institutionalized throughout the company. A structural risk associated with relying solely on operational-level grievance mechanisms can be the lack of identification of common issues and communication of lessons learned across the company. The Draft Guidance should provide more robust guidance on lessons learned in greater consonance with the UN Guiding Principles, which provide that “regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm.”²⁶ It is crucial to analyze trends and patterns in grievances and responses thereto in order for businesses to identify systemic problems and adapt their practices accordingly. This can help ensure that a grievance mechanisms will be sufficient to address possible issues and to initiate organizational or operational adaptations accordingly.²⁷

Furthermore, lessons learned should be shared not only within a company, but throughout the sector and, ideally, throughout the business community. A system for sharing lessons between mechanisms and communities would help protect the rights of communities and avoid the same mistakes from being committed between operations. As mentioned above, the Draft Guidance should create a centralized body, or provide for other mechanisms, to facilitate the sharing of lessons learned related to the design and operation of grievance mechanisms.

5. Improving Oversight

We are encouraged that the Draft Guidance recommends appropriate senior-level oversight to ensure that cross-functional coordination occurs once a grievance is lodged.²⁸ However, the Draft Guidance would benefit by providing more substantial discussion and guidance related to establishing clear channels of communication and reporting lines, tracking processes, and systematic forms of oversight from higher levels of a company, including senior management, at all stages of the formation and operation of the grievance mechanism.

Improved oversight can enhance the degree to which application of effective remedies and best practices can be applied consistently in all of a company’s project locations. The Draft Guidance should therefore recommend the creation of a centralized system of oversight, ideally at the sector level, but that could also be implemented at the company level. This oversight mechanism could help ensure that companies’ particular operational-level mechanisms adequately implement the Guiding Principles and standards of international best practice, by providing technical assistance and serving as a clearinghouse for information and resources on the effective functioning of grievance mechanisms. A central body could also be useful in cases where an operational-level mechanism was unable to resolve a complaint. Greater consistency across

²⁵ Draft Guidance, Section E, p 38 & Box 13, p 40.

²⁶ Guiding Principles, ¶31, p 35.

²⁷ Compliance Advisor/Ombudsman, *Advisory Note*, p 3.

²⁸ Draft Guidance, Section E, p 38.

mechanisms and more predictable outcomes creates greater trust and sense of legitimacy in the grievance mechanisms, leading to better overall outcomes.

6. Ensuring Independence

We underscore the importance of the Draft Guidance’s provision for adherence by companies to the effectiveness criteria for grievance mechanisms expressed in Guiding Principle 31.²⁹ However, independence is a key element required for affected people to trust an accountability mechanism, and this criterion is not adequately addressed in the Guiding Principles or the Draft Guidance.

We are concerned that the Draft Guidance expresses the importance of involving “the department responsible for any decision or action underlying a complaint to take ownership of the response” and then acknowledges that “[w]here it is not appropriate for the relevant department to take the lead in addressing the complaint (perhaps due to conflicts of interest where a serious allegation is concerned), it certainly needs to be involved in the process of learning lessons in order to prevent repetition.”³⁰ The independence of the grievance mechanism can be impaired by automatically involving the department directly responsible for a challenged decision or action. Although it is important for the concerned department to be involved in resolving a dispute and in learning lessons to prevent repetition, it will rarely be possible to ensure a sufficient level of independence by giving the responsible department “ownership of the response.”³¹ Hence, the Draft Guidance should clarify that involving the department responsible for any decision or action underlying a complaint is only appropriate in limited circumstances, when doing so does not risk jeopardizing the independence of the grievance process.

7. Designing Mechanisms in Consultation with Communities

Companies’ operational-level grievance mechanisms should be designed in consultation with the potentially affected communities. We view as positive the Draft Guidance’s recognition that “grievance mechanisms need to fit an [oil and gas] company’s local operating context and take full account of local culture.”³² The Draft Guidance partially addresses effective stakeholder consultation in posing the question: “Are our mechanisms designed with inputs from those stakeholders for whose use they are intended, to ensure they take account of cultural specificities, including how they feel comfortable raising and addressing concerns?”³³ However, the Draft Guidance fails to provide sufficient advice for how to achieve meaningful engagement with affected stakeholders.

The Draft Guidance notes that “[w]here trust in the company or the mechanism is low, joint oversight or at a minimum, affected stakeholder input into design, consultation on a draft design or evaluation will be critical to ensuring that those for whom the mechanism is intended are

²⁹ Draft Guidance, Section E, Box C, p 37.

³⁰ Draft Guidance, Section E, p 38.

³¹ Draft Guidance, Section E, p 38.

³² Draft Guidance, Section E, p 39.

³³ Draft Guidance, Section E, p 40.

willing to use it.”³⁴ Meaningful stakeholder participation in the design and operation of the grievance mechanism – both through joint oversight or affected stakeholder consultations – should be standard practice for companies when administering operational-level grievance mechanisms, and not be restricted solely to instances in which “trust in the company or the mechanism is low.”³⁵

The Draft Guidance should outline the approach a company can undertake to ensure that the operational-level grievance mechanism is designed in consultation with affected stakeholders, including members of vulnerable populations within the affected community. Companies should convene public meetings, focus groups, outreach meetings, and employ other communication methods—taking into account culturally appropriate methods of information gathering to include all community members, groups, and sub-groups—to receive information and understand community members’ concerns, objections, perceptions, suggestions, and expectations regarding a grievance mechanism. This process can help identify ways in which traditional forms of dispute resolution present in the community may play a role in the grievance mechanism. An effective consultation process engages all stakeholders to assist in designing the grievance mechanism and enhances transparency related to the process of a company’s creation of a grievance mechanism.³⁶

The Draft Guidance mentions that the design of the grievance mechanism should take into account cultural specificities.³⁷ As outlined by IFC’s CAO, the Draft Guidance should further consider “cultural differences, such as communities’ preferences for direct or indirect negotiation; attitudes toward competition, cooperation, and conflict; the desire to preserve relationships among complainants; authority, social rank, and status; ways of understanding and interpreting the world; concepts of time management; attitudes toward third parties; and the broader social and institutional environment.”³⁸ Additionally, a company should endeavor to understand cultural attributes that may contribute to or impair different groups’ and subgroups’ ability to express their grievances, owing to differential roles and responsibilities that may characterize various and vulnerable subgroups within a community.³⁹ Such consultations should ensure that the design and operation of the grievance mechanism is sensitive to and reflects these unique cultural characteristics. The Draft Guidance should capture these elements above as well as the importance of repeated and ongoing consultation with affected stakeholders, not solely prior to the initial design, to refine the mechanism and enable its continued improvement through analysis and incorporation of community feedback.

8. Mainstreaming Institutional and Sectoral Support

We support the Draft Guidance’s recommendation to mainstream a general human rights policy commitment throughout a company. The Draft Guidance should go further to encourage

³⁴ Draft Guidance, Section E, Box 13, p 39.

³⁵ Draft Guidance, Section E, Box 13, p 39.

³⁶ Compliance Advisor/Ombudsman, *Advisory Note*, p 22-23.

³⁷ Draft Guidance, Section E, p 40.

³⁸ Compliance Advisor/Ombudsman, *Advisory Note*, p 2.

³⁹ International Financial Corporation. *Good Practice Note*, p 9.

companies to foster an internal culture of accountability through the creation and dissemination of operational and procedural manuals detailing relevant human rights norms and methodologies for handling grievances.⁴⁰

We appreciate the opportunity to comment on the European Commission Draft Guidance for the Oil and Gas Sector, and we look forward to continuing engagement on this important endeavor. We invite members of the European Commission Human Rights Sector Guidance Project Team to contact us with any questions.

Sincerely,



Natalie Bridgeman Fields, Esq.
Executive Director
Accountability Counsel, USA
natalie@accountabilitycounsel.org

⁴⁰ International Financial Corporation. *Good Practice Note*, p 14.