

## Summary

The U.N. Special Representative for Business and Human Rights, Professor John Ruggie, released an advance copy of his "Guiding Principles on Business and Human Rights" ("Guiding Principles") in March. The U.N. Human Rights Council will vote on the Guiding Principles at its June 2011 session.

The Principles are not binding international law. Nevertheless, they are the most authoritative international statement to date regarding the responsibilities of business with respect to human rights. It is likely that they will begin to influence national law and policy in jurisdictions including the United States and Europe. Perhaps most importantly, they provide useful guidance to companies regarding how they can mitigate risk related to human rights. Guidance on how to manage these human rights impacts is essential because they can create legal, reputational, and operational risk for companies. The Guiding Principles address all companies because human rights-related risk affects all industries, and includes potential impacts ranging from labor violations in company supply chains; to security-related human rights abuses that occur in the context of large-scale projects; to emerging privacy concerns in the information technology sector.

The Guiding Principles consist of three pillars:

- The state duty to protect human rights, under which governments should protect individuals from human rights abuses by third parties, including business;
- The corporate responsibility to respect human rights, which means to not infringe upon internationally recognized human rights by avoiding, mitigating, or preventing adverse impacts; and
- The need for victims of human rights abuses to have access to remedy, both judicial and non-judicial.

Business should focus on and incorporate the Guiding Principles because:

- They provide a global standard for companies regarding how they should address human rights that applies across national jurisdictions;
- They are intended as a tool to avoid or mitigate human rights impacts, which in turn reduces risk to companies; and

- They are likely to be increasingly incorporated into national law and other standards that govern companies.

## How the Guiding Principles Relate to Other Initiatives

A number of non-binding international guidelines address business and human rights. For instance, the OECD Guidelines for Multinational Enterprises and the U.N. Global Compact call on companies to respect human rights, but provide limited guidance regarding how to do so. The Guiding Principles provide more in-depth guidance regarding how businesses can ensure respect for human rights. It is widely expected that the new version of the OECD Guidelines, which will be released this year, will mirror the due diligence framework that the Guiding Principles set forth, indicating the influence that the Guiding Principles are likely to have on policy-making.

## Background on the Guiding Principles

The U.N. Special Representative was appointed by the U.N. Secretary-General in 2005. The Guiding Principles are the result of in-depth consultation with industry, as well as other stakeholders, including civil society, governments, and investors. The Special Representative has held forty-seven consultations around the world with representatives of business, including corporate lawyers, civil society organizations, governments, and other stakeholders to support the development of the Guiding Principles. Ten companies also road-tested the section of the Guiding Principles that addresses corporate human rights due diligence.

## Expectations for Companies

The Guiding Principles suggest that companies should respect human rights, meaning that they should not infringe on the human rights of others, and they should address adverse human rights impacts with which they are involved.

The Guiding Principles state that the responsibility to respect human rights is independent of the legal duty of governments to protect human rights. Companies should respect internationally recognized human rights, even if they are not

recognized under national law. Additionally, when national law conflicts with international law, companies should seek to honor the principles of the international standards, while complying with domestic law. Finally, companies should address the risk of contributing to gross human rights abuses as an issue of legal compliance.

## **I. Respect all internationally-recognized human rights**

The Guiding Principles call on companies to respect all internationally recognized human rights, which include the Universal Declaration on Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Social, Economic, and Cultural Rights. The Guiding Principles note, however, that some companies are more likely to affect particular human rights, depending on the industry and the context. Companies therefore should pay heightened attention to these rights. For instance, electronics companies with suppliers in developing countries are likely to particularly affect labor rights, and might focus on those potential impacts.

## **II. Scope of human rights issues a company should address**

According to the Guiding Principles, companies should ensure that their own activities do not cause or contribute to adverse human rights impacts. Additionally, they should seek to prevent or mitigate impacts that are directly linked to their operations, products, or services by their business relationships, even if they did not contribute to those impacts. Business relationships include relationships with business partners, the value chain, or any state entity linked directly to its business operations, products, or services.

## **III. Conducting human rights due diligence**

The Guiding Principles propose that companies:

- Develop a policy commitment to respect human rights;
- Assess actual and potential human rights impacts;
- Integrate and act upon the findings of such assessments; and
- Track or audit how impacts are addressed; and
- Communicate regarding how the impacts are addressed.

### *A. Establishing a human rights policy*

A company should express its commitment to respect human rights through a publicly available policy. The policy should be approved by the highest levels of the organization, and it should state the company's expectations of its employees, business partners, and other parties linked to its activities. The policy should then be reflected in operational procedures throughout the organization.

### *B. Assessing actual and potential human rights impacts*

The Guiding Principles call on companies to assess actual and potential human rights impacts. They state that this should include meaningful consultation with potentially affected groups and other stakeholders, and should draw on human rights expertise.

Ideally, human rights assessments should first occur prior to the commencement of an activity, and occur periodically thereafter. They can be integrated into other impact assessments, such as environmental or social impacts, although human rights experts may need to be involved to ensure human rights issues are identified.

### *C. Integration of human rights assessment findings*

Integration of human rights assessment findings is a key step in risk mitigation. The Guiding Principles recommend that companies assign responsibility for addressing impacts and ensure that appropriate decision-making and oversight processes are in place.

According to the Guiding Principles, the steps that a company should take to address its impacts depend on whether the company causes the impact, contributes to it, or is simply involved through its business relationships. It also depends on how much leverage the company has to address the impact. When a company does not have leverage to prevent or mitigate adverse impacts caused by a business partner, it should consider ending the relationship, while taking into account the risk that doing so could itself cause human rights problems.

### *D. Tracking or auditing how impacts are addressed*

The Guiding Principles note that human rights issues can be integrated into existing tracking mechanisms, such as audits, performance reviews, and on-the-ground grievance mechanisms. The Guiding Principles state that tracking should utilize both qualitative and quantitative indicators, and

it should draw on the feedback of both internal and external stakeholders, including those affected by the company. Companies should take particular care to track their impacts on marginalized or vulnerable populations, which presumably include women, youth, and indigenous peoples, among others.

### *E. Communicating regarding how the impacts are addressed*

The Guiding Principles claim that “the responsibility to respect requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights. Showing involves communication...” Communication may occur through in-person meetings, consultation with affected stakeholders, annual reports, and other mechanisms. The Guiding Principles stipulate that formal reporting is expected when there are risks of severe human rights impacts. The Guiding Principles do not define these “severe human rights impacts,” although they likely include the risk of involvement in crimes against humanity, war crimes, genocide, forced labor, and possibly infringements on the integrity of the person, such as torture or the violation of the right to life.

## **IV. Grievance Mechanisms**

The Guiding Principles call on companies to establish or participate in operational-level grievance mechanisms for individuals and communities that may be adversely impacted by company operations. Such grievance mechanisms allow the identification and resolution of concerns when they arise. This in turn keeps grievances from becoming more grave or widespread. The Guiding Principles suggest that the grievance mechanism should address general stakeholder concerns, rather than requiring that grievances be expressed as a human rights complaint.

## **Conclusion**

The Guiding Principles provide a globally-applicable standard for companies that is intended to help companies avoid or mitigate their human rights impacts, in turn reducing human rights-related legal, operational, and reputational risk across national jurisdictions. The Guiding Principles are already influential, and are likely to be incorporated into national law and other global standards for business, such as the OECD Guidelines for Multinational Enterprises, making it increasingly

important that companies can demonstrate to investors, civil society, and their governments that they are managing their human rights risk in accordance with the Guiding Principles. Because the Guiding Principles provide high-level guidance for a wide variety of industries, the Principles need to be interpreted in a way that is appropriate for specific business enterprises, depending on their risk profile.

## **About Foley Hoag LLP**

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