

October 12, 2010

***Via Electronic Mail***

U.S. OECD National Contact Point Review  
U.S. Department of State  
Email: [input@state.gov](mailto:input@state.gov)

**Re: Accountability Counsel Comments on the U.S. OECD National Contact Point**

Dear U.S. OECD National Contact Point Review Staff:

Accountability Counsel is pleased to submit the following comments concerning the Administration's review of the U.S. National Contact Point ("NCP") for the OECD Guidelines for Multinational Enterprises ("Guidelines").

Accountability Counsel is a San Francisco-based organization that works around the world to support communities using accountability mechanisms to uphold environmental and human rights. Among our clients are oil-affected indigenous villages in the Peruvian Amazon, small farmers in Papua New Guinea, and dam-affected communities in Mexico. We also work at the policy level to ensure that accountability systems are robust, fair and effective. We therefore take great interest in the Department of State's review of the U.S. NCP, because it has the potential to assist in the resolution of disputes between communities we represent that are in need of such a mechanism, and U.S.-based multinational enterprises ("MNEs").

For the past year, Accountability Counsel has been in close communication with the U.S. NCP, urging the State Department to make current U.S. NCP procedures public (which was done in April 2010), and requesting the review process that is now underway. We thank the Department of State for this opportunity to comment, and hope that this is only the beginning of engagement with civil society on the design and operation of the U.S. NCP.

We provide general comments below, followed by more specific suggestions aimed to help the U.S. NCP fulfill its mandate under the Guidelines,<sup>1</sup> while taking advantage of advances in accountability mechanism design. These comments are based on our extensive experience regarding the design, implementation and practice of international financial institution ("IFI")

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<sup>1</sup> Organization for Economic Cooperation and Development, OECD Guidelines for Multinational Enterprises 34 (2008), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> ("The NCP will offer a forum for discussion and assist . . . [concerned parties] deal with the issues raised in an efficient and timely manner and in accordance with applicable law.").

accountability mechanisms,<sup>2</sup> as well as a thorough review of the NCPs in other OECD countries. To provide support for our own suggestions, wherever possible, we have referenced similar features within other successful accountability mechanisms, including other NCPs.

## I. General Comments

Accountability mechanisms are essential to the credibility and legitimacy of rules in the international system. Accordingly, the OECD Guidelines would have little worth without the accountability mechanisms established through NCPs. For people harmed by MNE operations, access to NCPs to resolve disputes is particularly important when they serve as the only available complaint system due to weak, corrupt, inaccessible, or poorly functioning local or national judicial systems. Additionally, even with access to an effective judicial system, use of NCP dispute resolution services can be a cost-efficient and timely alternative to litigation. These are among the reasons why NCPs are important avenues for “access to effective remedies”<sup>3</sup> when MNE activities violate the Guidelines and impact peoples’ rights. In addition, because many of the Guidelines implicate human rights, NCPs can and should be effective grievance mechanisms for redress of the human rights dimensions of the Guidelines.

As we have seen in countries where NCPs are well structured, they can be useful tools for affected groups and MNEs to resolve their disputes.<sup>4</sup> In the United States, however, the current NCP has a poor history, having never had a role in successful resolution of a dispute pertaining to the Guidelines. Despite the U.S. commitment to implementation of the Guidelines dating back to their establishment in 1976, and a recommitment during their revision in 2000,<sup>5</sup> the U.S. NCP has failed at its objectives: to promote the Guidelines, and to assist in resolution of disputes pertaining to the Guidelines. Even within the United States, the mechanism is little known, and not widely used. Furthermore, complaints that have been submitted are not fully addressed and

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<sup>2</sup> Accountability Counsel’s Executive Director, Natalie Bridgeman Fields, was the consultant hired by the EBRD to review and revise their accountability mechanism in 2008-2009, and has been involved over the last decade with the design, implementation and/or functioning of each of the IFI accountability mechanisms as a consultant, lawyer for complainants and policy advocate.

<sup>3</sup> See John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Business and Human Rights: Further Steps Toward the Operationalization of the “Protect, Respect and Remedy” Framework* 18 (2010), available at <http://www.reports-and-materials.org/Ruggie-report-2010.pdf>.

<sup>4</sup> See e.g., United Kingdom NCP Cases, Department for Business Innovation and Skills, <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases> (Nov. 2008) (facilitating a successful agreement between G4S securities group and UNI in which the parties agreed to specific commitments including a commitment to honor national law and to respect core ILO rights such as the freedom of association and collective bargaining); United Kingdom NCP Cases, Department for Business Innovation and Skills, <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases> (Nov. 2009) (achieving a settlement after a long conflict between Unilever and the IUF over the rights of precarious workers at the company's Lipton/Brooke Bond tea factory in Khanewal, Pakistan).

<sup>5</sup> U.S. Department of State, *OECD Guidelines for Multinational Enterprises: What are They?*, <http://www.state.gov/e/eeb/ifd/oia/usncp/140610.htm>.

there has been no transparency of process. This failure is a loss for all potential users of this mechanism, including communities where MNEs operate, labor unions, civil society groups, and MNEs themselves.

We appreciate the first steps that the State Department has taken to address these deficiencies, starting with the April 2010 publication of a brochure summarizing the steps required for filing a complaint, and procedure the U.S. NCP follows thereafter.<sup>6</sup> We note, however, that the U.S. NCP's newly public procedures remain vague and lack necessary guarantees of visibility, accessibility, transparency and accountability that the OECD Guidelines recognize as "core criteria."<sup>7</sup> Our detailed recommendations below are summarized as follows:

- Regarding **visibility** and **accessibility**, the U.S. NCP should widely distribute rules of procedure and an easy-to-understand guide to filing complaints regarding specific instances. The information should be translated into major world languages. The U.S. NCP should have no unnecessary barriers to entry and should accept complaints in an accessible manner. The U.S. NCP should regularly consult with civil society groups and should conduct outreach to make the U.S. NCP more visible.
- Regarding **transparency**, all major steps in the U.S. NCP process should be published on a public website and communicated to the parties involved; these include the receipt of a complaint for a specific instance, the completion of an assessment, the issuance of a final statement and any relevant recommendations, issuance of any monitoring reports, and any action of the Review Board.
- Regarding **accountability**, this additionally requires that the U.S. NCP show indicia of independence, fairness, and effectiveness.
  - Regarding **independence**, we propose that the U.S. NCP be moved to a new independent office jointly reporting to the Bureau of Economic, Energy, and Business Affairs ("EEB") and the Bureau of Democracy, Human Rights, and Labor ("DRL"). We propose that staff be independent, professional, and that the U.S. NCP compose the entirety of their work.
  - Regarding **fairness**, we propose that the U.S. NCP follow: (1) detailed rules of procedure that enable a process for all sides to a specific instance to voice their views to the U.S. NCP, (2) a timeline so that the U.S. NCP process is predictable, and (3) a commitment to issue a Final Statement in each case. Finally, fairness requires the creation of an independent

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<sup>6</sup> See, e.g., U.S. Department of State, *Brochure: OECD Guidelines for Multinational Enterprises and the U.S. National Contact Point*, available at <http://www.state.gov/documents/organization/140823.pdf>.

<sup>7</sup> OECD Guidelines for Multinational Enterprises 33, 56-57 (2008), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

Review Board to oversee the NCP, and the opportunity for parties to request Review if the rules of procedures are not followed.

- Regarding **effectiveness**, the U.S. NCP’s Final Statement regarding specific instances should be provided to the parties to the dispute, the Review Board and relevant federal agencies. Monitoring reports regarding compliance with the OECD Guidelines should be an important feature of the mechanism. Lastly, for the U.S. NCP to be effective, it must be given sufficient budgetary resources to carry out its mission.

Our specific comments below are designed to address the weaknesses in the current U.S. NCP system and to provide suggestions for bringing the U.S. NCP in line with these best practice principles.

## II. Specific Comments

The following specific comments fall into four issue areas: (A) Structure, Independence and Oversight, (B) Procedures for Handling Specific Instance Complaints, (C) Monitoring, Reporting and Enforcement, and (D) Promotion and Outreach. The comments with regard to procedures follow the current U.S. NCP brochure regarding “*What Happens Once a Request is Received by the NCP?*”.

### A. Structure, Independence and Oversight

With regard to structure, the U.S. NCP is currently located in EEB, a unit that reports to the Under Secretary for Economic, Energy and Agricultural Affairs in the U.S. Department of State. According to the U.S. NCP website, “the NCP is assisted by the State Department’s Bureau of Democracy, Human Rights, and Labor, as well as with other agencies, including the Departments of Labor, Commerce, Justice, Treasury, the Environmental Protection Agency, and the U.S. Trade Representative.”<sup>8</sup> There is no description of how the U.S. NCP is assisted by these federal agencies, at what point in the process they have influence, and the result of this influence.

As a first recommendation, in order for the U.S. NCP to better meet the principle of independence, ***the U.S. NCP should be an independent office within the Department of State that jointly reports to EEB and DRL.*** Both Bureaus have subject matter expertise in the type of issues that relate to the Guidelines. Situation of the NCP under their joint purview would send a message that the U.S. NCP is not simply a tool of U.S. economic interests (per the mission of EEB), but is truly a mechanism capable of promotion of the multi-issue Guidelines and is available for assistance with dispute resolution. For practical purposes, this may be most important for budgeting, though it is also important for the mechanism’s credibility and perception for stakeholders worldwide.

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<sup>8</sup> U.S. Department of State, *U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises*, <http://www.state.gov/e/eeb/ifd/oia/usncp/index.htm>.

United Nations Special Representative for Business and Human Rights John Ruggie has identified this conflict-of-interest risk with unitary agency NCPs. As a “solution[,]” he has noted the example of the Dutch NCP, which is governed by multi-stakeholder group.<sup>9</sup> In the U.S. context, while locating the NCP externally may not be practical, the structure of the NCP should at least include reporting jointly to EEB and DRL, and having dedicated U.S. NCP staff (preferably two or more) appointed by both Bureaus to work only on U.S. NCP activities.<sup>10</sup>

In order to ensure the independence of U.S. NCP staff, and thereby the independence of the mechanism, the NCP should ensure that its staff have no conflict-of-interest with regard to the issues raised in complaints about specific instances of conduct.<sup>11</sup> By assigning independent staff to the U.S. NCP (and not people otherwise in charge of promoting U.S. business interests abroad, as has been the case for the past decade), this will ensure that those responsible for providing government-sponsored corporate benefits, for example, would not have any role at all.

At the individual level, procedures should be required so that, for example, staff working on a specific instance complaint who own more than a *de minimus* amount of stock in or have family in a leadership position at an MNE that is the subject of a complaint should disclose that conflict and, where appropriate, be required to recuse themselves of work on that particular complaint. U.S. NCP staff should have at least some training in dispute-resolution. They should be hired based on their ability to comport with the highest standards of objectivity, ethics and professionalism.<sup>12</sup>

#### **Proposed Role of the Review Board**

- Confirm that any rejected complaints do not meet basic criteria;
- Receive copies of all major reports;
- If requested, review Final Statements and respond to the U.S. NCP with any follow-up issues;
- Review any allegations by parties of the U.S. NCP’s non-compliance with its rules of procedure; and
- Participate in the regular review of the U.S. NCP.

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<sup>9</sup> John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development* 26 (2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

<sup>10</sup> See e.g., Netherlands National Contact Point, *Organization*, <http://www.oecdguidelines.nl/ncp/organisation/> (last visited Oct. 11, 2010) (3 full-time staff members); United Kingdom National Contact Point, Contact UK NCP, <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/contact-us> (2 permanent members).

<sup>11</sup> Methods to avoid staff conflict-of-interest are common in judicial and non-judicial accountability mechanisms. See e.g., Netherlands National Contact Point, *Filing Complaints (procedure)*, para. 3, <http://www.oecdguidelines.nl/ncp/filing-complaints/> (“If there may be a conflict of interests or an appearance of such conflict, the NCP member concerned will waive his or her involvement in the procedure.”); European Bank for Reconstruction and Development, *Project Complaint Mechanism Rules of Procedure*, para. 51, available at <http://www.ebrd.com/downloads/integrity/pcmrules.pdf> [hereinafter EBRD PCM]; International Finance Corporation, Compliance Advisor Ombudsman, *Operational Guidelines*, para. 1.3 and 4.3, available at <http://www.cao-ombudsman.org/howwework/filecomplaint/documents/EnglishCAOGuidelines06.08.07Web.pdf> [hereinafter IFC CAO].

<sup>12</sup> See, e.g., EBRD PCM, *supra* note 11 at para. 47; IFC CAO, *supra* note 11 at para. 1.3.

The U.S. NCP should be given budgetary resources sufficient to carry out the NCP’s mission, including budget for salaries, resources to conduct fact-finding and field visits, budget to engage external experts and mediators, and sufficient resources to conduct outreach.

With regard to oversight, *the U.S. NCP should have a Review Board, made up of a government representative from the State Department’s Office of the Legal Advisor, and external stakeholders from business, labor, and public-interest advocacy groups.*<sup>13</sup> The Review Board would receive copies of all major reports and be responsible for reviewing various stages of the process, including complaints about the U.S. NCP’s non-compliance with its rules of procedure. A detailed discussion of the Review Board’s proposed role is discussed in Section B, below.

In addition, the Review Board should evaluate the U.S. NCP every three years to ensure that it is meeting its objectives with regard to addressing complaints and communication with the public about the Guidelines.<sup>14</sup>

The currently underutilized U.S. NCP Inter-Agency Committee should be composed of representatives from the Environmental Protection Agency, and the Departments of Labor, Justice, Treasury, and Commerce.<sup>15</sup> The Inter-Agency Committee would receive copies of all Final Statements and any enforcement recommendations based on findings of non-compliance.

## **B. Procedures for Handling Complaints**

### Requirements for Filing a Complaint

We applaud the U.S. NCP for publishing a brochure in April 2010 regarding how to file a complaint and the process that follows.<sup>16</sup> We agree with the list of requirements in the section on “*How to Request Assistance from the NCP[,]*” but suggest that number 5 include the words “if possible.” It may be the case that communities in areas where OECD-based MNEs operate do not have the ability to interpret particular chapters or parts

#### **Proposed U.S. NCP Timeline**

Initial Receipt of Complaint – immediately (**5 days maximum**)

Initial Assessment Report – **90 days** from receipt of complaint

Mediation/Investigation Period – unless both parties agree that productive dialogue continues, no more than **8 months**, culminating in

Issuance of Final Statement – within **1 year** of the initial submission of the complaint

Monitoring Reports – every **6 months** until there is a finding of compliance with the Guidelines and/or recommendations have been implemented.

<sup>13</sup> These public interest advocacy groups should include international human rights, development and environmental organizations. For examples of other oversight committees with the power to review, see the United Kingdom National Contact Point, Opportunity to Review, <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/complaints-procedures>.

<sup>14</sup> See, e.g., EBRD PCM, *supra* note 11 at para. 69 (mandating review of the Project Compliant Mechanism every three years).

<sup>15</sup> Based on our informal survey of members of the current Inter-Agency Committee, it appears that they have had a very limited role in the U.S. NCP process of handling specific instances.

<sup>16</sup> U.S. Department of State, *Brochure: OECD Guidelines for Multinational Enterprises and the U.S. National Contact Point*, available at <http://www.state.gov/documents/organization/140823.pdf>.

of the Guidelines or may not have access to a copy of the Guidelines. Based on the principle of accessibility and in accordance with the requirements for filing complaints at IFI accountability mechanisms and other NCPs, we recommend that number 5 be discretionary.<sup>17</sup> For similar reasons, the U.S. NCP rules of procedure should note that requests are permitted in major world languages.<sup>18</sup>

We note that the U.S. NCP should allow requestors to amend, update or supplement complaints if new relevant information becomes available subsequent to filing.

### Confidentiality

As a general comment, the default position of the U.S. NCP should be transparency, not secrecy. Regarding confidentiality of the complaint mentioned at the bottom of the “*How to Request*” section, we agree that the U.S. NCP should seek to “resolve specific instances in a transparent matter[,]” however, the last sentence should be clarified. “All parties are expected to respect the confidentiality of the proceedings” should be changed to: ‘To the extent the parties agree to proceed through a confidential dialogue, the U.S. NCP will respect that confidentiality.’ Furthermore, the section should state that ‘while anonymous complaints are not accepted, the requestor may request confidentiality and that confidentiality will be respected by the U.S. NCP.’ Confidentiality should not be a justification for failing to post major milestones in the process on the U.S. NCP website.<sup>19</sup> To the extent reports must be redacted in part based on confidentiality requirements, un-redacted portions or summaries must be posted.

### Actions Upon Receipt of a Complaint

We agree with the first step under the heading “*What Happens Once a Request is Received by the NCP?*” that a “response is sent to the requestor to confirm receipt of the inquiry.” However, we request that this be a time-bound step; we suggest that the language be

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<sup>17</sup> See e.g., United Kingdom National Contact Point, *UK National Contact Point (NCP) Procedures for Dealing with Complaints Brought Under the OECD Guidelines for Multinational Enterprises* at 3.2.2, available at <http://www.bis.gov.uk/files/file53070.pdf>; EBRD PCM, *supra* note 11 at para. 20 (a Complaint should include, where possible, the Relevant EBRD Policy that has allegedly been violated); The Inter-American Developmental Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism* at para. 31, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768> (noting that a complaint need not follow any particular format); IFC CAO, *supra* note 11 at para. 2.2.

<sup>18</sup> See EBRD PCM, *supra* note 11 at para. 6 (accepting complaints in any of the working languages of the Bank including, but not limited to English, French, German, or Russian); The Inter-American Developmental Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism* at para. 32, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768> (Feb. 2010) (accepting Spanish, English, Portuguese and French. Requests will be processed if received in other languages, although additional time for processing and translations may be necessary).

<sup>19</sup> See, e.g., EBRD PCM, *supra* note 11 at para. 60; United Kingdom National Contact Point, *UK national contact point (NCP) procedures for dealing with complaints brought under the OECD guidelines for multinational enterprises* at 2.5, available at <http://www.bis.gov.uk/files/file53070.pdf> (Sept. 2009); IFC CAO, *supra* note 11 at para. 1.5 and 3.4.

changed to state that ‘a response to the requestor confirming receipt of the inquiry is sent immediately, and in no case later than five days after receipt of the inquiry.’

After confirmation of receipt and notification given to the MNE about the complaint, in order to ensure transparency, the U.S. NCP should publicly post the fact of the submission of the complaint on a docket on its website.<sup>20</sup>

If the U.S. NCP determines immediately after registering the complaint that it does not meet basic criteria (i.e. does not pertain to a dispute about MNE compliance with the Guidelines involving the U.S. as a home or host country), the U.S. NCP should send notice to the Review Board who will have five days to approve the finding on a no-objection basis. If there are no objections at the end of five days, the U.S. NCP will mark the case as closed, posting the decision and reasoning on the U.S. NCP website and notifying the parties and the Review Board. If there are objections to closing the case by any member of the Review Board, they may request that the U.S. NCP consider additional information or further explain the reasoning for the decision to close the case. A record of the Review Board’s request and the NCP’s response should be posted on the NCP website.

If the U.S. NCP determines that the complaint does meet basic criteria, either after an objection from the Review Board or in the first instance, where the current brochures states that other “relevant NCPs” are “consulted”, we recommend that this be clarified to state that other relevant NCPs are informed of the complaint and asked for relevant information. The Review Board and all relevant parties should be advised of the decision that a complaint meets basic criteria for proceeding to an initial assessment. At that point, the MNE and other relevant NCPs should be given an opportunity to respond to the issues raised in the complaint within 30 days.

**The Docket Published on the U.S. NCP Website Should Include Records of:**

- all initial complaints filed
- eligibility determinations
- Initial Assessment Reports
- Final Statements issued
- Monitoring Reports
- record of any requests for Review
- Review Reports by the Review Board
- all agreed upon timeline extensions
- any requests by the Review Board and the NCP response to these requests

Initial Assessment Period

Upon confirmation that the complaint meets basic criteria, the U.S. NCP should begin the “initial assessment” as currently described under the fourth bullet point under the “*What Happens*” heading. We recommend that the legal term of art “good offices” be replaced throughout the document with “services.”

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<sup>20</sup> See e.g., The Inter-American Developmental Bank, *Policy Establishing the Independent Consultation and Investigation Mechanism* at para. 31, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768> (Feb. 2010); IFC CAO, *supra* note 11 at para. 2.3.2; See also Netherlands National Contact Point, *Filing Complaints (procedure)* at 4.3, available at <http://www.oecdguidelines.nl/ncp/filing-complaints/>.

The current criteria for consideration state that the U.S. NCP will consider how “similar issues have been, or are being, treated in other domestic or international proceedings.” We urge the U.S. NCP to elaborate by stating the specific procedure it intends to follow for handling a case when there are parallel legal proceedings. We recommend adopting the policy of the United Kingdom NCP, which will suspend a complaint “only where it is satisfied that it is necessary in order to avoid serious prejudice to a party to parallel proceedings and appropriate in all the circumstances.”<sup>21</sup> Most importantly, ***the existence of parallel proceedings should not of itself cause a suspension of the U.S. NCP’s involvement in any dispute.*** In cases where the U.S. NCP does feel that offering its services would prejudice criminal proceedings, the NCP should provide a clear rationale, which can be reviewed by the Review Board as part of a Final Statement.<sup>22</sup>

The Initial Assessment Report should conclude with a determination of whether the parties to the dispute are willing to engage in mediation, and if so, the report should include designation of an external mediator from a pre-determined list of approved mediators.<sup>23</sup> If the parties are not mutually willing to engage in mediation, the Initial Assessment Report should so state (including the reason behind the determination) and the U.S. NCP should begin drafting a Final Statement regarding whether there are substantiated violations of the OECD Guidelines with recommendations as to how those violations should be addressed.

The U.S. NCP should use the information provided in the complaint, information from direct follow-up communications with the requestors (including in-person communications<sup>24</sup>), and the responses, if any, from the MNE and other relevant NCPs, to complete the Initial Assessment Report within 90 days. At the conclusion of the 90-day initial assessment period, the U.S. NCP should provide a copy of the Initial Assessment Report to the parties, with a copy to the Review Board. The U.S. NCP docket on its public website should note the date of completion of the Initial Assessment Report.

### Mediation

If a mediator from the U.S. NCP’s pre-approved roster<sup>25</sup> has been appointed at the culmination of the initial assessment, the mediation should begin with both parties agreeing to

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<sup>21</sup> United Kingdom National Contact Point, *Approach of the UK NCP to Specific Instances in Which There are Parallel Proceedings* (2009), available at <http://www.bis.gov.uk/files/file53069.pdf>.

<sup>22</sup> This position is supported by both the UK NCP and the European Bank for reconstruction. United Kingdom National Contact Point, *Approach of the UK NCP to Specific Instances in Which There are Parallel Proceedings*, (2009), available at <http://www.bis.gov.uk/files/file53069.pdf>; EBRD PCM, *supra* note 11 at para. 16.

<sup>23</sup> See e.g., EBRD PCM, *supra* note 11 at para. 48.

<sup>24</sup> In our experience with other accountability mechanisms, the act of meeting with requestors in person can be the single most important step in the process. Obtaining recognition that they have a legitimate grievance is often one of the main reasons for seeking redress.

<sup>25</sup> The concept of a roster of experts is used by the World Bank Group’s Compliance Advisor/Ombudsman, the EBRD’s Project Complaint Mechanism, and the Inter-American Development Bank’s Independent Consultation and Investigation Mechanism, among others.

the methods, processes and time frame for the mediation. The parties and the mediator should complete the mediation process in no more than eight months. The time could be extended for set periods if the U.S. NCP verifies that both the requestor and the MNE agree that productive dialogue is continuing. All extensions of time shall be noted on the U.S. NCP website.

At the conclusion of the eight-month mediation period, the mediator should deliver a Mediation Report to the U.S. NCP, with copies to the parties and the Review Board. The Mediation Report should describe the facts of the dispute, the process used in the mediation, the position of the parties, and the agreement reached or a description of how and why the mediation concluded if no agreement was reached.

### Fact-finding

Upon receipt of the Mediation Report, or upon completion of the Initial Assessment Report if there has been no mediation, the U.S. NCP should review the facts in the Mediation Report (if any), and independently verify allegations related to the MNE's violations of the OECD Guidelines. Fact-finding could include site visits, interviews, document review, or any other relevant methods.

### Issuance of a Final Statement

With the exception of any approved extensions of time for continuing dialogue, the U.S. NCP should issue a Final Statement no later than one year after the receipt of the complaint.<sup>26</sup> The Final Statement must include:

- A summary of the mediation process, if any (including whether agreement was reached or not);
- A finding of whether there is non-compliance with the OECD Guidelines, including the investigation method used, facts found, and reasoning behind conclusions; and
- Recommendations for how compliance with the OECD Guidelines should be achieved.

The U.S. NCP should submit the Final Statement to the parties and the Review Board.

### Review of a Final Statement

The U.S. NCP should allow both parties the opportunity to respond to the Final Statement within 30 days and request a review by the Review Board if needed. The Final Statement, along with any requests for review, should then be posted on the U.S. NCP website at the end of the 30-day period.

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<sup>26</sup> The requirement for issuance of a Final Statement is found in the Implementation Procedures of the OECD Guidelines at page 34, para. 3, available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

To the extent there are no requests for review after 30 days, no findings of violations of the Guidelines, and no recommendations, the U.S. NCP's posting of the Final Statement should designate the case as closed. If there are violations and/or recommendations to be implemented, the case should be left open so that monitoring begins.

If a review is requested within the 30-day period, the Review Board shall meet to discuss whether to: (1) ask the U.S. NCP for additional information supporting findings of fact or recommendations, (2) request that recommendations be elaborated upon or further justified, or (3) take no action. The Review Board must submit the Review Report to the U.S. NCP within 30 days of the request for review. The Review Report should be immediately posted on the U.S. NCP website.

The U.S. NCP should respond to the Review Report in writing within 30 days. The response should be immediately posted on the U.S. NCP website. If after the U.S. NCP's response to the Review Report there are no findings of violations of the Guidelines, and no recommendations, the U.S. NCP should designate the case as closed. If there are violations and/or recommendations to be implemented, the case should be left open so that monitoring begins.

***If at any point in the process the parties believe that the U.S. NCP has failed to follow its own rules of procedure, the Review Board should permit the parties to request review. The Review Board should respond accordingly within a reasonable time period, and within no more than 30 days.*** The Review Board should be able to engage independent experts for advice as needed.

### **C. Monitoring, Reporting and Enforcement**

If the Final Statement identifies continuing non-compliance with the OECD Guidelines, the U.S. NCP should refer the Final Statement to appropriate entities, including agencies with enforcement power, such as the Department of Justice (for issues pertaining to violations of law), and also the Export-Import Bank of the U.S. and the Overseas Private Investment Corporation (to factor into their due diligence if the MNE at issue seeks their support).

For cases that remain open after issuance of Final Statements, the U.S. NCP should issue bi-annual Monitoring Reports on MNE's compliance with the NCP's recommendations regarding compliance with the Guidelines. Monitoring Reports should be based on any progress reports submitted by the MNE and the requestor, as well as independent factual verification through appropriate means.<sup>27</sup> Monitoring Reports should be published on the U.S. NCP website

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<sup>27</sup> *Accord* United Kingdom National Contact Point Brochure, available at <http://www.bis.gov.uk/files/file53566.pdf> ("Where the Final Statement includes recommendations, it will specify a date by which both parties are asked to update the UK NCP on the multinational enterprise's progress towards meeting these recommendations. The UK NCP will then publish a further statement reflecting the parties' responses."); EBRD PCM, *supra* note 11 at para. 44 ("The PCM Officer will issue Compliance Review Monitoring Reports at least biannually or until the PCM Officer determines that the implementation issues are concluded. In the preparation of each report, the PCM Officer will consult with the Relevant Parties as appropriate.").

and given to the parties and the Review Board. Bi-annual Monitoring Reports should be issued and published until the U.S. NCP determines that all compliance issues with the OECD Guidelines are resolved and/or recommendations have been implemented, at which point, the case should be designated as closed.

#### **D. Promotion and Outreach**

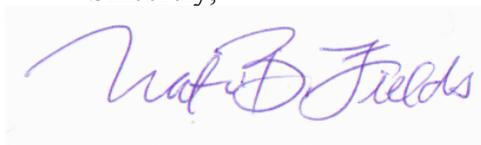
The U.S. NCP should ensure that information about the OECD Guidelines and about the U.S. NCP's role in addressing issues arising under the Guidelines is publicly available. The U.S. NCP should provide greater detail in the informational brochure currently on its website, and should make this brochure available at outreach events around the world. The brochure should also be distributed through NGO and union networks in the developing world and through U.S. business networks. The U.S. NCP should also maintain an up-to-date website with all relevant information about current and past cases. It is essential that the U.S. NCP should maintain open communications lines and provide clear information in languages and formats that maximize access to all parties.

In an effort to take a proactive role, the U.S. NCP should consider partnering with IFI accountability mechanisms when they conduct joint workshops around the world. The U.S. NCP should set specific goals regarding outreach (for example, attendance at 2 major international multi-stakeholder events per year and 4 major domestic events). Separately, the U.S. NCP should hold regular consultations, at least annually, with stakeholder groups including worker organizations and NGOs. Stakeholders should be given the opportunity to comment on the U.S. NCP process and on its promotional activities.

We believe that these changes to the U.S. NCP will facilitate better outcomes for all parties involved and will help the U.S. NCP operate in accordance with the "core criteria of visibility, accessibility, transparency and accountability" which the OECD Guidelines require of all NCPs.<sup>28</sup>

We appreciate the opportunity to comment on the review of the U.S. National Contact Point and we look forward continuing engagement with the State Department on this important endeavor.

Sincerely,

A handwritten signature in blue ink that reads "Natalie Bridgeman Fields". The signature is written in a cursive style and is contained within a light blue rectangular box.

Natalie Bridgeman Fields, Esq.  
Executive Director  
Accountability Counsel  
[natalie@accountabilitycounsel.org](mailto:natalie@accountabilitycounsel.org)

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<sup>28</sup> OECD, OECD Guidelines for Multinational Enterprises 33, 56-57 (2008), *available at* <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.