

November 21, 2014

Via electronic mail

Initiative for Responsible Mining Assurance
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Re: Comments on the Initiative for Responsible Mining Assurance Draft Standard for Responsible Mining

Dear IRMA Steering Committee:

Accountability Counsel is pleased to submit the following comments on the Initiative for Responsible Mining Assurance (“IRMA”) Standard for Responsible Mining Draft v1.0 (“Draft Standard”). We commend IRMA for recognizing the need for an international standard for mining operations and undertaking this important initiative. We hope that these comments provide useful suggestions for improvements to the Draft Standard.

We are an organization dedicated to supporting community access to remedy through non-judicial grievance mechanisms. As such, our comments focus on Chapter 5.3 of the Draft Standard, regarding the need for projects to establish and maintain project-level grievance mechanisms and to provide access to other remedies for project-related harms. The UN Guiding Principles on Business and Human Rights (“Guiding Principles”) define project-level grievance mechanisms as an important part of ensuring that affected communities have access to remedy for project-related grievances and harms.¹ Nonetheless, there are a multitude of challenges and limitations to designing and using these mechanisms in a way that resolves grievances fairly and effectively. We welcome this opportunity to share lessons we have learned through our work with non-judicial mechanisms and with communities around the world to support the development of a strong international standard for mining industry projects.

¹ Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, ¶ 29, UN HUMAN RIGHTS COUNCIL A/HRC/17/31 (2011) [hereinafter “Guiding Principles”].

I. The Draft Standard Must Ensure that Project-Level Grievance Mechanisms Adhere to the Effectiveness Criteria of the UN Guiding Principles on Business and Human Rights

The Guiding Principles establish that business enterprises have an obligation to establish effective project-level grievance mechanisms to provide a forum for addressing grievances from project-affected people.² They also provide a list of elements, or “effectiveness criteria,” needed to design and implement mechanisms that are effective at resolving disputes fairly and effectively.³ These elements aim to address the particular challenges of relying on non-judicial grievance mechanisms to address community concerns.

The Draft Standard requires that project-level grievance mechanisms meet the Guiding Principles’ effectiveness criteria, but does not provide further elaboration or insight into the specific policies and components that grievance mechanisms must possess in order to meet these general policy objectives and provide real remedy for people affected by mining operations. Many of the requirements for project-level grievance mechanisms listed in Chapter 5.3 of the Draft Standard relate to one or more of the Guiding Principles’ criteria, but a majority lack the specificity needed to present a meaningful and measurable standard for companies to follow.

We recognize that the Draft Standard seeks to present requirements that can be applied to a diverse range of projects and local community contexts, and can be used to address different types of grievances. While this requires a flexible and adaptable standard, there is nonetheless room for additional specificity in the current draft. The requirements as listed are too vague to be easily measured by an independent auditor. Moreover, because of this vague language, a grievance mechanism may appear to satisfy the Draft Standard requirements, yet nonetheless lack the qualities necessary to resolve community grievances in a fair and effective manner.

The sections below contain specific recommendations related to each criterion of the Guiding Principles, to ensure that requirements effectively accomplish the goals of each stated principle.

1. Legitimacy

Project-level grievance mechanisms are only an effective means of resolving disputes if they engender the trust of affected people and intended users.⁴ To achieve this, grievance mechanisms must be able to function independently of influence from the company’s operational departments, whose actions are often the source of grievances. For example, all or part of a mechanism may be housed outside of the company, such as

² Guiding Principles at ¶ 29.

³ See Guiding Principles at ¶ 31.

⁴ See Guiding Principles at ¶ 31(a).

in a local or community government agency, in order to promote independence.⁵ Grievance mechanisms must also be provided with sufficient authority to handle grievances and make redress decisions independently.

The Draft Standard includes some limited provisions to promote legitimacy in project-level grievance mechanisms, including a provision advising companies to “consider the option” of using an independent third-party mediator or similar tools to determine an appropriate remedy. However, it does not address the governance structure of grievance mechanisms, where they will be institutionally housed or how they will be financed. We therefore recommend adding a requirement that mechanisms must be housed, staffed, financed, and granted authority in a manner that promotes their ability to make decisions independently. Such a requirement will help ensure that mechanisms have the legitimacy necessary to be effective.

2. Accessibility

In order to serve as a reliable forum for providing access to remedy, a project-level grievance mechanism must make itself well known to potential users and provide adequate assistance to help users overcome any barriers to access, including “language, literacy, costs, physical location and fears of reprisal.”⁶ Towards this end, the Draft Standard requires operating companies to “ensure that affected communities and stakeholders have access to a project-level grievance mechanism” and includes requirements that the company inform communities of the existence of the mechanism and its functions.⁷ However, additional provisions are needed to ensure that affected people are truly able to access the grievance mechanism.

i. The Draft Standard Should Require Mechanisms To Provide Information and Documents in Local Languages

The Draft Standard contains no mention of how companies should address the language barriers that frequently exist between companies and local communities. As recognized by the Guiding Principles, language barriers can present a significant obstacle to accessing remedy through project-level grievance mechanisms.⁸ We recommend requiring grievance mechanisms to provide informational materials and services in all primary languages spoken by project-affected people. All documents generated by the mechanism in a particular case, including any contracts or agreements, should be translated to the primary language(s) spoken by the users of the mechanism.

Grievance mechanism outreach activities should also be conducted in the local language(s). Any documents explaining the purpose of the mechanism, its functioning,

⁵ See Advisory Note: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects, 46, CAO (2008), available at <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>.

⁶ Guiding Principles at ¶31(b) and commentary.

⁷ Draft Standard at §§ 5.3.1.1 and 5.3.6.1.

⁸ Guiding Principles at ¶31(b) and commentary.

and the rights of project-affected people, should be made available in all primary languages spoken by project-affected people. Wherever project-affected people are illiterate, the mechanism should be required to conduct verbal outreach efforts in the local language(s) regarding the purpose and functioning of the mechanism and how affected people can access its services.

i. The Draft Standard Should Include More Robust Requirements Regarding Confidentiality and the Protection of Mechanism Users

The Guiding Principles state that ensuring the accessibility of a grievance mechanism includes providing adequate assistance for those who may face particular barriers to access, including fear of reprisal for filing a grievance.⁹ The Draft Standard requires that mechanisms offer protection for those filing grievances and also specifies that reporting about grievances must be done in a way that “protects the confidentiality and safety of those filing grievances.”¹⁰ This general requirement, while positive, may be insufficient to ensure that affected people are able to access mechanisms free of any fear of reprisal.

To help ensure that those fearing reprisals feel safe using project-level grievance mechanisms, the Draft Standard should include more thorough requirements regarding confidentiality and the protection of mechanism users. We recommend that project-level grievance mechanisms be required to respect all requests for confidentiality. In situations in which the grievance mechanism cannot move forward with a complaint and maintain the requested confidentiality, it should be required to notify the filers and determine how to proceed in consultation with the filers. Grievance mechanisms should also be required to inform affected people in all outreach materials and at the start of a grievance process that they may request confidentiality.

Further, the Draft Standard should go beyond mere confidentiality provisions to ensure that mechanism users are protected from reprisal or fear of reprisal for filing a grievance. We recommend that project-level grievance mechanisms be required to establish procedures for addressing instances of reprisal, including, for example, appealing to national or international institutions.

3. Predictability

Grievance mechanisms are most effective when they provide a clear and known procedure that is applicable to all grievances and clear and reasonable timeframes for each phase of the process.¹¹ We commend the Draft Standard for requiring the operating company to inform communities and stakeholders of the existence of the mechanism, its design and procedures, and how to access it.¹² These requirements help ensure that

⁹ Guiding Principles at ¶31(b) and commentary.

¹⁰ Draft Standard at §5.3.6.4.

¹¹ See Guiding Principles at ¶31(c).

¹² Draft Standard at §5.3.6.1.

project-level grievance mechanisms will be predictable. However, the Draft Standard does not address an additional crucial part of ensuring predictability: the provision of explicit timeframes for each phase of the grievance process. We therefore recommend that the Draft Standard be amended to require companies to assign time frames for each phase of the process during the design of the mechanism, to communicate those timeframes clearly to affected communities and stakeholders, and to respect those timeframes in the implementation of the mechanism.

4. Equitability

One of the constant dangers in relying on project-level grievance mechanisms as a source of remedy for project-affected people is the inherent risk that such mechanisms will display bias in favor of the operating company. The company typically plays a leading role in designing, developing and financing the mechanism, and may ultimately control the mechanism through a direct reporting line. In addition, affected communities are often not well informed of their rights and their options for recourse and are severely disadvantaged in their access to resources and information compared to those they may be bringing grievances against. For all of these reasons, it is imperative that affected communities have access to sufficient information and advice to use the mechanism on fair and informed terms.

We commend the Draft Standards for requiring the operating company to inform communities of their rights to use external mechanisms to address their grievances. However, to ensure that mechanism users receive non-biased information and advice, and to increase the likelihood that they will trust the information and advice provided, community members must also be allowed access to independent legal counsel or other advisors. Access outside legal counsel or other advisors is fundamental to promoting a fair and equitable process for users of the mechanism. We recommend that the Draft Standard explicitly require grievance mechanisms to allow affected people to consult with counsel or advisors of their choosing, and to have counsel or advisors present, at any time during the grievance process. Companies should also be required to inform affected communities that they have a right to consult with outside parties, including legal counsel, before and at any time during the grievance process.

5. Transparency

Transparency can be key to building and maintaining community and stakeholder confidence in a project-level grievance mechanism. This includes keeping parties to a grievance process informed about its progress and reporting to the broader public regarding the activities of the mechanism. In this vein, we commend the Draft Standard for requiring operating companies to report to affected communities and stakeholders regarding the grievances received and the responses provided.¹³ However, this requirement would benefit from additional specificity to ensure that reporting is done in a manner that maximizes transparency and enables all potential users to make informed decisions regarding whether to use the mechanism. We recommend that the Draft

¹³ Draft Standard at §5.3.6.4.

Standard be amended to require that grievance mechanisms maintain a publicly available case register, including an online version on the company's website, stating all grievances received and responses provided, in addition to any other culturally appropriate means of disseminating this information. As noted in the Draft Standard, grievances for which confidentiality was requested should be appropriately redacted as necessary to protect the confidentiality of the filer. In such cases, the mechanism should indicate publicly that it has restricted disclosure of information in response to such a request.

Additionally, in order to build and maintain public confidence in project-level grievance mechanisms, it is important that mechanisms avoid establishing blanket confidentiality provisions that seek to bind all users. Although respecting requests for confidentiality can be crucial to protecting mechanism users from any reprisal or fear of reprisal, when confidentiality requirements are implemented as a standard protocol, they block the public from monitoring the effectiveness of the mechanism without being justified by any strong security interest. We therefore urge the Draft Standard to explicitly prohibit project-level grievance mechanisms from instituting blanket confidentiality requirements as a prerequisite for participating in the grievance process.

6. Source of Continuous Learning

Beyond their role in resolving individual grievances, effective project-level grievance mechanisms can serve a valuable role by providing feedback and lessons learned to companies.¹⁴ A well-functioning grievance mechanism can serve as an early warning system regarding larger, systemic problems and indicate necessary changes to company operations or management systems.¹⁵ While the Draft Standard includes requirements related to monitoring and evaluation of the performance of grievance mechanisms, the current draft provides no guidance on the importance of extracting lessons from grievance mechanisms to inform ongoing and future project operations. This is a missed opportunity to encourage operating companies to see project-level grievance mechanisms as a source of learning and a way to generate lessons to improve their operations. We recommend that a provision be added explicitly encouraging companies to implement procedures to receive operational feedback and extract lessons from project-level grievance mechanisms in order to improve overall project activities.

7. Rights compatibility

Project-level grievance mechanisms can only be considered effective where the outcomes and remedies they provide accord with internationally recognized human rights.¹⁶ Although the Draft Standard mentions that grievance mechanisms should be rights compatible, it does not provide any detail about how mechanisms can achieve this fundamental objective. We recommend explicitly requiring that the outcomes arrived at through a project-level grievance mechanism process be in line with international human

¹⁴ Guiding Principles at ¶31(g).

¹⁵ CAO Advisory Note at II.

¹⁶ See Guiding Principles at ¶31(f).

rights. All monitoring and review efforts should also include monitoring of the rights compatibility of grievance mechanism outcomes.

8. Based on Engagement and Dialogue

Companies must engage and consult with affected communities in both the design and performance of project-level grievance mechanisms to ensure that mechanisms meet the needs of potential users, that communities will use them, and that there is a “shared interest in ensuring [their] success.”¹⁷

i. The Draft Standard Needs Additional Provisions To Ensure Community Participation in the Design of Project-Level Grievance Mechanisms

The Draft Standard states that the company “shall collaborate with affected communities and stakeholders to design an appropriate and acceptable project-level grievance mechanism.”¹⁸ This principle is important, but the stated requirement is not strong enough to ensure that affected communities have a meaningful role in the design and development of grievance mechanisms. The participation of affected communities is imperative to the development of a culturally appropriate mechanism that meets their needs and expectations and is capable of effectively addressing their concerns.¹⁹ We strongly recommend revising the Draft Standard to require meaningful participation by affected communities and stakeholders throughout the grievance mechanism design process.²⁰

Further, the means of verification for this requirement in the Draft Standard involves consultation with affected communities and stakeholders “regarding the process for designing mechanisms and procedures.”²¹ However, consulting with affected communities regarding the design process alone may not be sufficient to determine whether input by communities and stakeholders was genuinely taken into account and incorporated into the design of the mechanism. We therefore recommend that as an additional means of verification, the independent IRMA auditor consult with affected communities and stakeholders regarding the procedures, functions and types of remedy that they requested during the grievance mechanism design process.

¹⁷ Guiding Principles at ¶ 31(h) and commentary.

¹⁸ Draft Standard at §5.3.2.1.

¹⁹ Some experts believe that imposing a company-designed system could be even worse than having an ad hoc system. CAO Advisory Note at 2.

²⁰ For example, the CAO recommends that an effective grievance mechanism design team should “include a balanced group of representatives from the community, representing the range of constituencies and demographics that will be using the grievance mechanism.” CAO Advisory Note at 22. Appointing a design team that involves balanced representation from community members is one way to achieve meaningful participation by affected communities in the design process.

²¹ Draft Standards at §5.3.2, Means of Verification.

ii. Provisions on Stakeholder Engagement in Monitoring and Evaluation Require Further Specification

The Guiding Principles advise that companies should engage with affected stakeholder groups about not only the design of the mechanism, but also its performance.²² The Draft Standard requires stakeholder engagement in monitoring a mechanism's functioning, but the current requirement is both unclear and seemingly inadequate to ensure meaningful participation by affected communities and stakeholders in monitoring and evaluation activities.²³ The current requirement applies the same standard for stakeholder engagement in grievance mechanism monitoring as for environmental and social impact monitoring. This requires that stakeholders have an opportunity to participate in the *design* of a monitoring system and that they be allowed to comment on the design and implementation of the monitoring system.²⁴ It is unclear whether this would require collecting feedback from stakeholders on the grievance mechanism itself.

Because grievance mechanisms are intended for the use of affected community members, it is imperative that any monitoring and evaluation of those mechanisms incorporates the direct feedback of those user groups. We recommend that in addition to requiring stakeholder engagement through reference to social and environmental impact monitoring requirements, Chapter 5.3 clearly state a separate requirement that, as part of monitoring and evaluation efforts, affected communities shall be provided clearly-communicated, regular, periodic opportunities to submit feedback on the mechanism's performance.

II. Project-Level Grievance Mechanisms Require Regular Monitoring to Ensure Adherence to the Draft Standard

The IRMA website indicates that the Steering Committee has not yet finalized the IRMA certification process, but that it will likely include audits by an independent third-party certification body and that certificates will be issued for a certain period of time, after which a mine may apply for renewed certification.²⁵ As the certification procedures are further developed, we urge the Steering Committee to consider the great need for certification procedures that require periodic follow-up visits by auditors, to ensure continued adherence to the requirements of the Draft Standard. Monitoring visits are particularly important in the context of project-level grievance mechanisms, as experience has shown that even grievance mechanisms with strong procedures can easily fail if those procedures are not properly implemented.

²² Guiding Principles at ¶ 31(h) and commentary.

²³ Draft Standard at §5.3.5.2.

²⁴ Draft Standard at §§ 5.2.6. and 5.2.6.2.

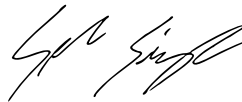
²⁵ See FAQ: IRMA Certification, How will certification work?, <http://www.responsiblemining.net/the-irma-process/faqs/#HOWCERT>. We commend the Draft Standard for requiring compliance with all provisions of Chapter 5.3 as a prerequisite for certification. The provision of access to remedy is imperative to developing a workable standard for mining operations. Without this, the remaining framework would be ineffective at promoting socially and environmentally responsible mining projects.

We recommend that the certification process include provisions for regularly collecting and reviewing information on grievance mechanism functioning. Monitoring activities should pay particular attention to common risks, such as mechanisms failing to make independent, un-biased decisions, or a lack of fairness and equitability in grievance proceedings involving affected people with no other options for redress. To promote the collection of accurate information and candid responses, monitoring activities should be conducted independently from the operating company and include unannounced visits to the project site, ideally more than once per year. Conversations should be held with affected people without company representatives present.²⁶

III. Conclusion

We appreciate this opportunity to comment on the Draft Standard and look forward to future opportunities for public participation in the development of this important initiative. Please do not hesitate to contact us with any questions regarding our comments.

Sincerely,



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²⁶ Monitoring visits that are not conducted in an independent manner can be counter-productive and contribute to false impressions of project sites. For example, based on Accountability Counsel's experience working with communities in tea plantations in Assam, India, the absence of strong provisions for independent information gathering can result in auditors collecting false and misleading information about working and living conditions and failing to uncover serious human rights violations during site visits.