



The Open Media and Information Companies Initiative

## 1. INTRODUCTION

[Open MIC](#) (Open Media and Information Companies Initiative) works to foster greater corporate accountability at media and technology companies, principally through shareholder engagement. We identify, develop, and support campaigns that promote values of openness, equity, privacy, and diversity – values that provide long-term benefits for individuals, companies, the economy, and the health of democratic society. Open MIC works with investors who have both shareholder value and social impact in mind – investors who are concerned that the growth of the technology industry often comes at the expense of social, political, economic, and environmental well-being.

A more effective implementation of the United Nations Guiding Principles on Business and Human Rights (UNGPs) by the technology sector is essential to our objectives. At Open MIC, we provide investors with the education, tools, and networks needed to hold technology companies accountable for the impact of their policies and practices on people’s lives and to build a more open and accountable technology and media landscape. Clearer guidance on the human rights obligations of technology companies facilitates investor engagement on human rights issues and, in turn, enhances investor compliance with the UNGPs.

Though they have long espoused values of innovation, ease, and openness, the most profitable players in the technology sector have in fact frequently facilitated social divergence on a global scale, resulting in massive unintended harms and discriminatory outcomes. In this submission, we elaborate on two issues relevant to recent responsible investor engagements with technology companies and offer recommendations on areas of further exploration for Office of the High Commissioner for Human Rights (OHCHR) guidance to assist investors in exercising leverage to incentivize greater respect for human rights in the technology sector.

## 2. PROMOTING ACCOUNTABILITY AND REMEDY IN THE TECHNOLOGY SECTOR: CHALLENGES FOR INVESTORS

- a. **To hold technology companies accountable for human rights risks inherent to product design, responsible investors require early and comprehensive disclosure on those risks, including possible irremediable impacts.**

In earlier guidance, the B-Tech Project states that human rights due diligence “should take place early and often throughout product design, development and use: It is intended to be preventative and should therefore be conducted early, including in the idea, design and development phase.”<sup>1</sup> It further states:

[T]he expectation is that a company conducts robust human rights due diligence to identify, prevent or mitigate risks of harmful impact. If a company has met this standard and harm nevertheless occurs, the company will likely not be considered under the UNGPs to have caused or contributed to it. If the standard has not been met, the company may be considered as having caused or contributed to the harm and would be expected to remediate.<sup>2</sup>



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In guidance for investors, the OHCHR has recommended that institutional investors assess the actual and potential human rights impacts of investee companies prior to investing and on an ongoing basis, which involves assessing the “real-world impacts of the company on people including the real-world outcomes of their due diligence efforts.”<sup>3</sup>

Open MIC is concerned that without sufficient disclosure, investors and other stakeholders cannot be confident that adequate human rights due diligence is conducted at the product design phase. For instance, a *Wall Street Journal* investigation based on internal documents provided by a former employee and whistleblower at Facebook (now Meta Platforms Inc.), concluded: “Facebook... knows, in acute detail, that its platforms are riddled with flaws that cause harms, *often in ways only the company fully understands* [emphasis added].”<sup>4</sup> If investors are to fulfill their own commitments to the UNGPs, they require early and comprehensive disclosure on the human rights risks inherent to technology products in development.

Open MIC is also concerned that there may be few, if any, meaningful remedies where human rights risk inherent to a product that has already been developed and marketed materializes into actual adverse impacts. Andrew Bosworth, a Meta executive who will become chief technology officer in 2022, wrote in an employee memo that moderating what people say and how they act in the metaverse “at any meaningful scale is practically impossible.”<sup>5</sup> To give effect to the remedy pillar of the UNGPs, early-stage human rights due diligence ought to, at the very least, identify possible adverse human rights impacts that have the potential to be irremediable. Companies should disclose to investors the extent to which they may be linked to irremediable human rights risks in addition to the means by which the companies will seek to prevent these risks from materializing.

**b. Concealment clauses in worker contracts are inconsistent with the right to remedy and impede responsible investors from holding technology companies accountable for adverse human rights impacts.**

Concealment clauses are defined as any employment or post-employment agreement, such as arbitration, non-disclosure or non-disparagement agreements that would limit the ability of employees or contractors to discuss unlawful acts in the workplace, including discrimination, harassment, and other adverse impacts to labor rights. They may also extend to actions and events with implications for other human rights issues.

Open MIC is concerned that the use of concealment clauses can prevent information about adverse human rights impacts being made public, which could hinder the ability of affected workers to exercise their right to remedy, and, in turn, the same ability of other rights-holders who rely on whistleblowers to bring adverse impacts to light:

“If tech workers hadn’t risked breaking NDAs at their companies, the public might have never learned about [fraud at the blood testing company Theranos](#), the [emotional and physical health risks](#) faced by those who review Facebook posts containing violence and sex, and details of Russian online propaganda to create voter chaos in the United States.”<sup>6</sup>



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Workers at technology companies should not have to risk legal repercussions in order to seek remedy for adverse human rights impacts or to raise awareness about an issue of broad social concern. Unless individuals can speak up, investors will be kept in the dark about misconduct and mismanagement of human rights risk at the companies in which they have a financial stake.<sup>7</sup> In turn, they will be less equipped to fulfill their own commitments under the UNGPs.

### **3. RECOMMENDATIONS TO THE OHCHR:**

To assist investors in holding technology companies accountable for human rights risks inherent to product design and for ongoing human rights impacts, Open MIC recommends that the OHCHR:

1. Issue policy guidance for technology companies on the minimum standards for human rights due diligence at the product design stage.
2. Issue policy guidance for technology companies on the extent of their obligation to disclose to investors the human rights risks inherent to the design of their products.
3. Clarify the compatibility of concealment clauses with the right to remedy in international human rights law and under the UNGPs.
4. Issue policy guidance for governments to address the risks that concealment clauses may pose to the right to remedy in practice.

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[1] <https://www.ohchr.org/Documents/Issues/Business/B-Tech/key-characteristics-business-respect.pdf>

[2] <https://www.ohchr.org/Documents/Issues/Business/B-Tech/key-characteristics-business-respect.pdf>

[3] <https://www.ohchr.org/Documents/Issues/Business/UNGPs10/Stocktaking-investor-implementation.pdf>

[4] <https://www.wsj.com/livecoverage/facebook-hearing-live-updates/card/FhG2FmLWDDHk3plbAiNj>

[5] <https://www.nytimes.com/2021/12/30/technology/metaverse-harassment-assaults.html?action=click&module=RelatedLinks&pgtype=Article>

[6] <https://www.nytimes.com/2021/07/27/technology/nondisclosure-agreements-tech-companies.html>

[7] <https://www.nytimes.com/2021/04/13/opinion/nda-work-discrimination.html>