To: UN Working Group on Business and Human Rights

From: Alan S. Gutterman, JD, PhD, DBA and CPG[[1]](#footnote-1)

Re: Call for Input Related to Investors, ESG and Human Rights

Date: September 23, 2023

The following is submitted in response to the Call for Input issued by the UN Working Group on Business and Human Rights in connection with the Working Group’s Report to be presented to the UN Human Rights Council in June 2024. In this submission, I will provide some general comments on impact investing and then address two of the questions posed in the Call for Input. More detailed information is available in the links provided as footnotes.

**What is Impact Investing**

Impact investing is aimed directly at creating a positive environmental or social impact by identifying and solving a particular environmental or social problem. Impact investing is an advanced stage of sustainable investing that began with the socially responsible investment movement that emerged in the 1970s and which was marked by the use of negative or exclusionary screening processes designed to avoid specific assets due to consideration of specific environmental, social and governance (“ESG”) criteria including moral values (e.g., tobacco or gambling), standards and norms (e.g., human rights), ethical convictions (e.g., animal testing), or legal requirements (e.g., controversial armaments such as cluster bombs or land mines, excluded in order to comply with international conventions). The next stage was based on “best-in-class” (positive) screening, which contrasts significantly with negative screening and calls for investment and lending decisions to be made based on demonstrated high ESG performance of sectors, companies or projects and adherence to minimum standards of business practice based on international norms relating to climate protection, human rights, working conditions and action plans against corruption.

As time went by, investors began to use positive screening in a more focused manner by concentrating their activities on specific high profile sustainability-related themes such as clean tech, infrastructure, affordable housing, energy-efficient real estate or sustainable forestry.[[2]](#footnote-2) BNP Paribas referred to the rise of social impact investing, sometimes referred to as social finance or solidary-based finance, which includes investments into projects that have a social focus and seek to address a particular social or environmental challenge such as housing problems caused by increased poverty, unemployment, environmental issues such as organic farming or clean energy and development of third world economies.[[3]](#footnote-3) Other drivers of maturation of the sustainable investment marketplace have included the development of new and emerging methodologies intended to systematically and explicitly include ESG risks and opportunities into traditional financial-based investment analysis and the growing role of “active ownership”, which focuses on engagement and dialogue with portfolio companies after an initial investment is made in order to influence ESG strategies and actions through exercise of ownership rights and being a visible activist for change.[[4]](#footnote-4)

Impact investing requires an intention to generate social and environmental impact alongside a financial return, which means that impact investors must have a means for identify and measuring “impact” and reporting on the results of their efforts to the ultimate owners of the assets that are being invested. One of the challenges with the evolution of impact investing has been developing reliable and consistent measures and ratings of performance (i.e., environmental and/or social impact) for individual projects and the overall progress of enterprises with respect to environmental, social and governance (“ESG”) criteria. Several ESG ratings schemes have emerged, and companies have been provided with opportunities to seek and obtain certification of their sustainability credentials by external assessors. As time has gone by there has been more interest in quantifying the relative environmental and social impacts of projects and companies to facilitate comparisons and there is also greater scrutiny of the ESG ratings schemes themselves. However, many have pointed to the difficulties of gauging social impact as opposed to environmental matters. For example, while reductions in pollution can be measured, the relative value of supporting and enabling ongoing education of young people in a developing country cannot be distilled down into a number and each investor will need to assess such a project by reference to his or her own ethical lens and personal value system.[[5]](#footnote-5)

**Doing the Deal**

***Corporate responsibility to respect human rights: 3. How should investors integrate human rights considerations throughout the investment process, including when constructing, underwriting, and/or investing in an ESG product or service?***

The success of an impact investor depends on its ability to access and participate in deals that allow them to deploy their capital with social enterprises that can deliver the financial and impact returns that the investor expects. Fund managers must be able to demonstrate to prospective investors that they will be able to build and maintain a robust pipeline of potential investment opportunities, which will require fund managers to develop a strong profile in the marketplace and a network of contacts among the various sources of deal flow. Fund managers must develop and maintain a diligence process as they sift through their pipelines to select potential deals, conduct the necessary due diligence, complete negotiations with the founders and other members of the executive team of the prospective portfolio companies on the economic and impact terms of the deal, finalize the legal agreements and commit the capital of their funds and monitor and supervise the progress of the enterprises up to the point where it is appropriate for the fund to exit the investment. Selection, due diligence, and negotiation all take time, usually nine to twelve months, and once the deal is completed the fund should expect to be actively engaged in monitoring for three to five years, perhaps more, depending on the portfolio company’s stage of development at the time that the initial investment is made. In many cases, the fund will make a “follow-on” investment in a subsequent round of funding. Clearly, the fund and its portfolio companies will have a long-term relationship and what happens while they are “doing the deal” will be important in laying the foundation for mutual success.[[6]](#footnote-6)

**Age-Responsive Human Rights Due Diligence**

***Corporate responsibility to respect human rights: 12. How should investors take … intersectional-responsive approaches?***

The UN Guiding Principles on Business and Human Rights (“Guiding Principles”) were drafted and adopted to serve as universally applicable standards to support businesses in developing action plans for identifying, preventing, mitigating, and remediating adverse human rights impacts associated with their internal operations and their business relationships, a process that is commonly referred to as “human rights due diligence”.[[7]](#footnote-7) The Guiding Principles provide a blueprint for businesses to respect human rights and conduct human rights due diligence to determine the actions that should be taken to discharge their obligations and report on the results of those actions to their stakeholders. They provide high-level guidance that is intended to be used across a range of industries and then customized to the specific activities and risk profile of a particular business. Certainly, the Guiding Principles compliment and extend businesses’ existing risk management strategies by reducing human rights-related legal, operational and reputational risk, but they also provide businesses with a roadmap for becoming more socially responsible members of the global community.

The Guiding Principles introduce and explain two distinct, yet tightly connected, concepts that play out simultaneously during the formulation and implementation of the actions of businesses with respect to the human rights impacts of their operations and their business relationships on all their stakeholders including older persons. Specifically, businesses cannot expect to effectively carry out all the steps described below with respect to age-responsive human rights due diligence until they have laid the necessary foundation by embedding respect for human rights of older persons into the formal structures and organizational culture of the organization and committing to the pursuit and achievement of appropriate goals for operating as an age-friendly business. “Embedding” in this context would require a formal and public commitment from the board of directors and senior executives to respect for the human rights of older persons; allocation of roles, responsibilities and resources in order to carry out the due diligence process; development of specific commitments, which must take into account the risks and opportunities identified and prioritized during the due diligence process; integration of age-responsive due diligence into businesses’ overall human rights due diligence framework and integration of due diligence into core business processes and decision making and key policies and procedures.[[8]](#footnote-8) Other activities, such as measurement and tracking and reporting and communications are also important steps in the embedding process.

While the Guiding Principles is a powerful tool, it must be applied in a manner that recognizes that persons who are impacted by the activities of a business may be affected differently due to their gender, age, color, caste, class, ethnicity, religion, language, literacy, access to economic resources, marital status, sexual orientation, gender identity, disability, residence in a rural location or migration, indigenous or minority status.[[9]](#footnote-9) For example, the UN Working Group on Business and Human Rights noted that “[i]t is widely documented that women and girls experience adverse impacts of business activities differently and often disproportionately … [and] … also face additional barriers in seeking access to effective remedies” and developed and disseminated a guidance publication for States and businesses on how to implement the Guiding Principles in a manner that is gender responsive.[[10]](#footnote-10)

The Gender-Responsive Due Diligence Platform (“GRDDP”) has described gender-responsive due diligence as a process that “applies a gender lens to each step of the [human rights] due diligence process to minimize the adverse business impacts on women and contribute to gender equality”.[[11]](#footnote-11) The gender-responsive due diligence process described by the GRDDP is not based on the Guiding Principles, but rather on the steps outlined in the OECD Due Diligence Guidance for Responsible Business Conduct (“OECD Guidance”) which are substantially similar to those laid out in the Guiding Principles: embed responsible business conduct into policies and management systems; identify and assess actual and potential adverse impacts associated with the enterprise’s operations, products or services; cease, prevent and mitigate adverse impacts; track implementation and results; communicate how impacts are addressed and provide for or cooperate in remediation when appropriate.[[12]](#footnote-12)

My chapter on Age-Responsive Human Rights Due Diligence[[13]](#footnote-13) adapts the gender perspective approach taken by the UN Working Group on Business and Human Rights and the gender guidance provided in the publication mentioned above and in other resources such as the GRDDP to suggest ideas that businesses can apply to ensure that their human rights due diligence is “age-responsive” and explicitly deploys an “age-sensitive lens” in order to consider the unique impacts of their activities on older persons in the various ways that they are stakeholders of the business (e.g., workers, customers, members of the communities in which the business operates, etc.).[[14]](#footnote-14) While, as described in Guiding Principle 14, “[t]he responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure”, the scale and complexity of the response by any particular business will depend on each of those factors as well as the severity of its specific adverse human rights impacts. Regardless of the size of the business and the scope of its activities, respect for the human rights of older persons should be a priority for all policies, processes and strategies across all of the departments within the enterprise and not just treated as a diversity and inclusion issue to be overseen by the human resources function.

Guiding Principles 15 and 17 require that businesses have in place a human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights of older persons and that the process should be ongoing and include assessing actual and potential human rights impacts, integrating, and acting upon the findings, tracking responses, and communicating how impacts are addressed. The due diligence process includes a wide range of generic questions and activities; however, it is important that the process consider the specific situation of vulnerable groups with which the business has contact including women, older persons and persons with disabilities. Failure to do so can lead to businesses missing differentiated and disproportionate adverse impacts that their operations and business relationships might have on older people. For example, like women of all ages, older persons are particularly vulnerable to harassment and ageist stereotyping in the workplace and are more likely to be discriminated against in recruitment, training, and career opportunities. Not only does this have an adverse impact on the mental health and economic security of older workers, but it also reduces productivity and innovation among businesses since studies indicate that more diverse businesses enjoy better performance.

An age-responsive human rights due diligence process is also a powerful tool for embedding respect for the human rights of older persons into the business’ organizational culture and provides an opportunity for engagement with older persons in the workforce and the communities in which the business operates. Just as advocates for gender equity call on businesses to always regard sexual harassment and gender-based violence as risks of severe human rights impacts, businesses should prioritize zero tolerance for ageism and age-based discrimination. Such an approach is not only required as a matter of basic respect for human rights, but it also makes sense from a business perspective since the evidence is clear that people aged 50 and older make significant contributions to the economy that benefit everyone in society. For example, AARP conducted a series of data analyses on various types of contributions that Americans 50 and over, numbering about 117 million as of 2018, made to economic and unpaid activities and found them to be worth over $9 trillion in 2018 ($8.3 trillion in economic activities and an estimated $745 billion in unpaid benefits, altogether representing about 40% of the US Gross Domestic Product and projected to continue growing through 2050. AARP noted that contributions from older persons ranged from working, paying taxes, and supporting the job market to giving time and money to charitable causes and included invaluable support to family and friends as caregivers.[[15]](#footnote-15)

1. For further information on the submitter, see my website at [www.alangutterman.com](http://www.alangutterman.com), which includes links to many of my works relevant to business and human rights. [↑](#footnote-ref-1)
2. A. Krauss, P. Kruger and J. Meyer, Sustainable Finance in Switzerland: Where Do We Stand? (Zurich: Sustainable Finance Institute, September 2016), 18-19; Environmental, Social and Governance Issues in Investing: A Guide for Investment Professionals (CFA Institute, 2015); and [Changing Dynamics of Sustainable Finance: The regulatory push in the direction of sustainable growth, Sia Partners (February 25, 2020)](https://www.sia-partners.com/en/news-and-publications/from-our-experts/changing-dynamics-sustainable-finance-regulatory-push)). [↑](#footnote-ref-2)
3. <https://group.bnpparibas/en/news/sustainable-finance-about>. For further information on social impact investing, see the website of Finansol (<https://www.finansol.org/en/index.php>), a French organization that certifies certain social finance products and monitors trends in social finance. [↑](#footnote-ref-3)
4. A. Krauss, P. Kruger and J. Meyer, Sustainable Finance in Switzerland: Where Do We Stand? (Zurich: Sustainable Finance Institute, September 2016), 18-19. For further discussion, see Gutterman, Alan, What is Impact Investing (October 10, 2020). Available at SSRN: <https://ssrn.com/abstract=3823837> or [http://dx.doi.org/10.2139/ssrn.3823837](https://dx.doi.org/10.2139/ssrn.3823837) [↑](#footnote-ref-4)
5. [The Economist explains: What is sustainable finance?, *The Economist* (April 17, 2018)](https://www.economist.com/the-economist-explains/2018/04/17/what-is-sustainable-finance). For further discussion, see Gutterman, Alan, Impact Measurement and Reporting (December 1, 2020). Available at SSRN: <https://ssrn.com/abstract=3834003> or [http://dx.doi.org/10.2139/ssrn.3834003](https://dx.doi.org/10.2139/ssrn.3834003) [↑](#footnote-ref-5)
6. For further discussion, see Gutterman, Alan, Impact Investing: Doing the Deal (December 1, 2020). Available at SSRN: <https://ssrn.com/abstract=3834001> or [http://dx.doi.org/10.2139/ssrn.3834001](https://dx.doi.org/10.2139/ssrn.3834001) [↑](#footnote-ref-6)
7. For full discussion of the human rights due diligence process, see “Human Rights Due Diligence” in [A. Gutterman, Businesses and Human Rights of Older Persons (Oakland CA: Older Persons’ Rights Project, 2022)](http://ssrn.com/abstract=4024373). [↑](#footnote-ref-7)
8. For further discussion of embedding human rights, see “Embedding Respect for Human Rights” in [A. Gutterman, Businesses and Human Rights of Older Persons (Oakland CA: Older Persons’ Rights Project, 2022)](http://ssrn.com/abstract=4024373). [↑](#footnote-ref-8)
9. [Gender Dimensions of the Guiding Principles on Business and Human Rights (New York: United Nations Development Programme and the United Nations Working Group on Business and Human Rights, 2019)](https://www.undp.org/publications/gender-dimensions-guiding-principles-business-and-human-rights), 22. [↑](#footnote-ref-9)
10. Id. The booklet contains the wording of each guiding principle within [Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework” (United Nations publication, Sales No. 13.XIV.5)](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf), and the text of [“Gender guidance for the Guiding Principles on Business and Human Rights” within the United Nations official document (A/HRC/41/43), Gender dimensions of the Guiding Principles on Business and Human Rights: Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises](https://www.ohchr.org/en/documents/thematic-reports/ahrc4143-report-gender-lens-guiding-principles-business-and-human-rights). [↑](#footnote-ref-10)
11. [Gender-Responsive Due Diligence Platform](https://www.genderduediligence.org/) (“Women are often disproportionately affected by adverse business practices, which warrants a due diligence process that responds to their specific needs. GRDD is based on the recognition that human rights violations are not gender neutral and should not be treated as such. … While in a regular HRDD process gender might be added as a standalone theme, GRDD incorporates gender throughout all of the steps and activities of the due diligence process.”). [↑](#footnote-ref-11)
12. [OECD Due Diligence Guidance for Responsible Business Conduct (Paris: OECD, 2018)](https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf#:~:text=The%20objective%20of%20the%20OECD%20Due%20Diligence%20Guidance,of%20its%20due%20diligence%20recommendations%20and%20associated%20provisions.) (including the Annex of Questions Related to the Overview of Due Diligence for Responsible Business Conduct, which provide selective illustrations of the recommendations included in the Guidance). For additional discussion of the human rights due diligence process described in the OECD Guidance, see “Human Rights Due Diligence” in [A. Gutterman, Businesses and Human Rights of Older Persons (Oakland CA: Older Persons’ Rights Project, 2022)](http://ssrn.com/abstract=4024373). [↑](#footnote-ref-12)
13. Gutterman, Alan, Age-Responsive Human Rights Due Diligence (May 16, 2022). Available at SSRN: <https://ssrn.com/abstract=4111643> or [http://dx.doi.org/10.2139/ssrn.4111643](https://dx.doi.org/10.2139/ssrn.4111643) [↑](#footnote-ref-13)
14. Useful information and resources on gender-responsive due diligence, including case studies, can also be found on the [Gender-Responsive Due Diligence Platform](https://www.genderduediligence.org/). [↑](#footnote-ref-14)
15. [The Longevity Economy® Outlook: How people age 50 and older are fueling economic growth, stimulating jobs, and creating opportunities for all (aarp.org)](https://www.aarp.org/research/topics/economics/info-2019/longevity-economy-outlook.html). [↑](#footnote-ref-15)