

CMSI Consultation Response

Respondent Details

NAME

Aubrey Menard

COUNTRY

United States

PERMISSION

Yes, CMSI can disclose my feedback, name, and organisation.

STAKEHOLDER

Non-governmental organisation (NGO) / civil society organization (CSO)

ORGANISATION

Oxfam

COMMENTS & QUESTIONS BY DOCUMENT

Document:
Governance

11. How would the initial Board be established?

COMMENT:

Selection criteria

As outlined in the governance model, the Independent Chair will work with the IAG and SAG to select the four Mining Stakeholders, four Value Chain Stakeholders, and four Value Chain Company Directors. While its useful to see that the IAG includes some civil society and community representatives, it's also important to note that the four partners assembled the IAG, thus they should not be conflated with truly independent civil society representation. Once instated, these board members will choose their successors. In true multistakeholder groups, such as the EITI and IRMA, civil society—not the extractive industry—is responsible for determining who represents its interests and for electing its own board members. It is also worth noting that the four partners will be responsible for selecting the Independent Chair, albeit with input from the IAG and SAG. That role will be crucial given the Independent Chair's key role in Board member selection.

Further, the governance model sets no minimum performance requirement for company members of the board. As we've seen in EITI, when companies who are not complying with the standard are given a leadership role, they can use it to hold back the organization's progress. There is no mechanism for the removal of problematic board members.

Recommendation: Allow constituency groups to choose their own representatives. We recommend that companies should achieve at least a "Good" score against the CMSI in the previous reporting period to be considered for board membership. Given the important role that the Independent Chair will play in establishing the Board and the urgency of building trust in this process at the outset, civil society and community representatives on the SAG should have the opportunity to veto proposed Independent Chair candidates prior to the selection.

12. How would the Board be renewed over time?

COMMENT:

Board structure and coordination

In order for stakeholder groups to meaningfully represent their constituencies, there must be structures in place for them to engage with their contingencies and coordination and support structures to make sure that representatives are fully capacitated to engage with CMSI decision making.

Recommendation: Require stakeholder groups to develop their own constituency processes and provide support for them to implement those processes. Provide administrative support structures for board and committee members from small organizations so that they can reasonably engage on an equal footing with companies.

14. What happens next?

COMMENT:

The structure of the governance model does not allow for true multi-stakeholder governance in which each stakeholder group has full power in the decision-making process.

6. What will the composition of the Board look like?

COMMENT:

Division of board and committee seats

The division of board and committee seats skews towards industry influence. While seats are reserved for "mining stakeholders," and "value chain stakeholders" there is no reason to believe that these board members will truly represent the interests of project-affected communities and civil society. The language of who may be represented in each group is vague—for example, "other interests" for committee representation "could include investors, providers of finance, multilateral organizations, responsible mining or value chain initiatives, academics, think-tanks, international NGOs, etc." With such broad categories, there is no guarantee that rights holders or civil society will be represented adequately in these spaces. We worry that those chosen for these roles will be industry allies who have moved onto roles at think tanks, academia, etc., rather than genuine members of civil society.

Recommendation: Define stakeholder groups so that there is genuine space for civil society and project-affected community representation.

QUESTION 1

The governance principles that guided the development of the governance model are inclusive, effective, credible, impact-driven, pragmatic and efficient. From your perspective, does the proposed governance model meet expectations for consistency with these principles?

Response: 1: Significantly below

QUESTION 2

Does the proposed governance model ensure no single group is able to unduly influence decisions?

Response: unsure

Document:
Assurance

4. Consolidated Standard External Assurance Process

SECTION: Critical Notifications

COMMENT:

4.3.6 Critical Notifications

While we appreciate the clarity on mandatory reporting, it could be strengthened by making the time period for such explicit.

Recommendation: We recommend that instead of mandatory reporting occurring “at the earliest opportunity,” it is specifically required within 24 hours.

COMMENT:

The CMSI requires the mining facility, rather than auditors and the CMSI itself, to provide public notice that an audit is taking place. Notice of the audit and proactive communication with affected stakeholders will lead to more genuine audit results. Further, notice from CMSI and auditors will let stakeholders and rights-holders know that this is an independent process, where notification from solely the mining facility may make stakeholders and rights-holders distrustful.

Recommendation: Require that CMSI and auditors, in addition to the mining facility, provide public notice that an audit is taking place, in all relevant languages. CMSI, auditors, and the company should proactively contact relevant stakeholders via local forms of media and exchange of information to inform them that an audit is taking place.

COMMENT:

The CMSI prescribes that the mining site will provide auditors with a list of stakeholders and rights holders to interview and that the auditors should critically consider the list provided and notify the facility of any gaps. It does not give the auditors independent power to interview people outside the list provided by the facility.

Recommendation: In order for audits to be independent, the auditors must have explicit authority to interview any relevant stakeholders and rightsholders they see fit, regardless of whether they are included on the mining site’s list.

QUESTION 1

From your perspective, does the Assurance process meet your expectations of a robust, credible, replicable and transparent approach?

Response: 2: Below expectations

Document:
Standard

Introduction

COMMENT:

Any new standard for the mining sector should at least align with existing and widely accepted standards. The draft standard from the Consolidated Mining Standard Initiative (CMSI), however, fails to align with best practice standards agreed from multi-stakeholder debate over decades of standard development. The draft CMSI standard does not measure up to several standards widely accepted by the industry, such as the International Finance Corporation (IFC) Performance Standards, Initiative for Responsible Mining Assurance

(IRMA), Global Reporting Initiative (GRI) Mining Sector Standard, and Extractive Industries Transparency Initiative (EITI). It also falls short of international law, for example with regard to Indigenous Peoples right to Free, Prior, and Informed Consent. In addition, the CMSI draft lacks the detail present in other standards and through ambiguous language creates unclear expectations and carves out exemptions that sets back years of progress in the sector.

Unless the CMSI makes significant improvements to both the governance model and standard, it will fail to serve as a legitimate accountability mechanism for the sector, and will lose the public's confidence. Among the recommendations below, we would like to highlight the following issue areas and related recommendations as red lines for Oxfam: governance, transparency, tax, gender, Indigenous Peoples, and customary land rights.

Performance Area 1: Corporate Requirements

SECTION: 1.3 Transparency of Mineral Revenues, Foundational Practice

COMMENT:

Country-by-Country Tax Reporting

The CMSI doesn't include anything about country-by-country tax reporting, an important disclosure for identifying aggressive tax practices and comparing fiscal, legal, and contractual terms across countries. ICMM companies are committed to country-by-country tax reporting (ICMM's Social and Economic Reporting). It is included in GRI's Standard (on tax, which is cross-referenced in their mining standard) and OECD's Action 13 BEPS. Many mining companies, such as Rio Tinto, Anglo American, Newmont, BHP, and South 32 already report this information.

Recommendation: We recommend that the CMSI includes country-by-country tax reporting as "Foundational Practice" in line with the ICMM Social and Economic Reporting Framework and Guidance. There is no need to tier this requirement.

COMMENT:

Beneficial Ownership

The CMSI has no requirements on beneficial ownership disclosure. The EITI requires that companies publish an anti-corruption policy setting out how the company manages corruption risk, including their use of beneficial ownership data and to engage in rigorous due diligence processes. It encourages companies to disclose their ownership structure, including the full chain of legal entities leading to the beneficial owner.

Recommendation: We recommend that the CMSI requires its companies 1) publish an anti-corruption policy setting out how the company manages corruption risk, including their use of beneficial ownership data and to engage in rigorous due diligence processes, and 2) disclose their ownership structure, including the full chain of legal entities leading to the beneficial owner. These recommendations should both be included at the Foundational Level.

SECTION: 1.3 Transparency of Mineral Revenues

COMMENT:

Project-Level Payments to Governments Disclosure

In not specifying that disclosures must be project level and allowing companies to comply with national regulations instead of the EITI Standard, the draft standard from the Consolidated Mining Initiative considerably lowers the bar for transparency of minerals revenues. It falls short of the ICMM's commitment on

payments-to-governments disclosures, which requires members to disclose “all material payments by country and by project at the appropriate levels of government,” regardless of the country’s status as an EITI-implementing country. It also falls short of the World Gold Council’s Responsible Gold Mining Principles, which state that companies “will publish [their] tax, royalty and other payments to governments annually by country and project.”

In classifying disclosures that don’t meet the minimum project-level threshold in the ICMM commitment or other standards, such as that of the Extractive Industries Transparency Initiative (EITI), the Initiative for Responsible Mining Assurance (IRMA), the Global Reporting Initiative (GRI) Mining Sector Standard, or the International Monetary Fund’s (IMF) Fiscal Transparency Code as “Foundational” or “Good” Practice, the CMSI gives cover to companies that aren’t meeting basic project-level payments-to-governments disclosure practices in all countries of operation.

Specifically, on payments to governments, the CMSI does not specify that companies should report its payments to governments at the project level in non-EITI-implementing countries (as the EITI requires for its own Supporting Companies) and instead allows them to report in line with national regulations, which are often less rigorous. Reporting these payments at the aggregate level provides limited insight into project revenues and allows companies to obfuscate important information. Project-level disclosure is the global norm—the EU, UK, Canada, Norway, and the EITI have all required it for many years. Giving companies that are not meeting this basic requirement kudos for “Good Practice” under the CMSI would represent a major step backwards.

(Project-level disclosure is included in the EITI Standard, GRI, and IMF as well as in the laws of the countries listed above.) Further, CMSI does not include important information about what payments data should be disclosed, as do IRMA, GRI, and EITI.

Recommendation: We recommend that the CMSI does not tier this requirement and instead requires all members to disclose their project-level payments to governments in all countries of operation. CMSI should also include additional detail on the payment data that should be disclosed, in line with that data types specified under EITI.

COMMENT:

Contract Disclosure

The CMSI’s requirements on contract disclosure are unclear and include loopholes. Both the EITI Standard and ICMM’s own commitment on contract disclosure require disclosure of contracts entered into after January 1, 2021, with the EITI Standard Requirement 2.4 going a step further and requiring retroactive disclosure of the underlying contract for any contract amended after that date. (GRI also include a contract disclosure requirement in 14.22.5.) The CMSI does not include contract disclosure under “Foundational Practice.” Its “Good Practice” standard requires simply that “new” contracts are disclosed, which creates a gap between present day (or the date of CMSI implementation) and the 2021 requirement. Its Leading Practice requirement potentially goes a significant step further by calling for the public disclosure of existing contracts, which would put it ahead of both the EITI and ICMM requirements. However, it caveats that these contracts should be disclosed “where applicable” and does not specify that all contracts should be disclosed.

Further, the CMSI includes an exemption to not disclose contracts if legally prohibited by the host government. Companies should instead be required to specify the legal text that they believe prohibits them from disclosing the contract to make sure that this has been correctly interpreted and to notify the government that it is not in line with the CMSI.

The CMSI significantly alters the definition of contract disclosure in its glossary by limiting disclosures to merely fiscal terms. The EITI Standard requires disclosure of the full text of all contracts and licenses with no redactions, as well as annexes, addenda, and riders which include documents such as site maps, accounting procedures, details of the project cycle, takeover procedures, management procedures, guarantees and feasibility studies. This alteration also falls short of the ICMM’s commitment on contract disclosure.

Recommendation:

We appreciate that the CMSI links to the EITI's Guidance Note on contract disclosure in the glossary and interpretive guidance and recommend that the document is referenced in the text of the requirement. For example, the text could say, "Publicly disclose new mineral development contracts (as defined in the EITI Guidance Note on contract disclosure) with host governments."

The CMSI should require contract disclosure of all contracts entered into after January 1, 2021 as "Foundational Practice." It should require contract disclosure of all contracts entered into after January 1, 2021 and the retroactive disclosure of the underlying contract for any contract amended after January 1, 2021 as "Good Practice." It should require public disclosure of all contracts as "Leading Practice."

The CMSI should remove the loophole allowing companies to not disclose contracts where it's legally prohibited or, alternatively, instead require companies to detail the legal provision that prohibits them from disclosing and to inform the host government that they are not in line with CMSI.

Additionally, the CMSI should require its companies create a list that details which contracts and licenses are publicly available and which are not. The overview should include a reference or link to the location where the contract or license is published. If the contract or license is not published, the legal or practical barriers should be documented and explained. (This is required by the EITI Standard.) This is included in the EITI's Guidance Note on contract disclosure, which is included in the CMSI's glossary, but we recommend that the CMSI is explicit about creating this list.

Finally, we recommend the CMSI fixes its definition of contract disclosure to define contracts in line with the EITI's contract disclosure definition.

COMMENT:

Responsible Tax

The CMSI fails to incorporate the WGC's commitment on responsible tax and transfer pricing included in its Responsible Gold Mining Principles. It also lags behind global standards on responsible tax, such as the B Team's Responsible Tax Principles, OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, and the OECD's Guiding Principles for Durable Extractive Contracts.

Further, the EITI Standard (4.1) requires that companies publicly disclose their audited financial statements, or the main items (i.e. balance sheet, profit/loss statement, cash flows and effective tax rates) where financial statements are not available at country level. Companies are encouraged to disclose tax deductions and incentives in the period under review.

Recommendation: We recommend that the CMSI builds a new requirement on responsible tax practices based off the B-Team Responsible Tax Practices, which cover compliance, business structure, relationships with tax authorities, seeking and accepting tax incentives, supporting effective tax systems, and transparency. We also recommend that the CMSI adopts the EITI's tax disclosure requirements.

SECTION: 1.4 Risk Assessment, Leading Practice

COMMENT:

Risk Assessment

This section lists engaging external stakeholders in the risk assessment process as "Leading" Practice. This practice should be Foundational. In order to ensure that risk effectively capture key risks, external stakeholders must be involved. For example, human rights impact assessments (HRIA) must engage people directly affected by projects, such as local workers and project-affected community members. This engagement must be both inclusive and gender sensitive. (See here for more guidance on capturing human rights risks in HRIA).

Recommendation: Engaging stakeholders in risk assessment must be considered Foundational Practice.

Performance Area 12: Stakeholder Engagement

SECTION: 12.1 Stakeholder Identification and Engagement, Foundational Practice

COMMENT:

In order to be effective and meaningful, stakeholder engagement should always be established in collaboration with stakeholders and rightsholders, with particular attention to diverse and gender-balanced representation from the community, and should be ongoing from prior to the environmental impact assessment process through mine closure. These requirements should be Foundational. Otherwise, companies run the risk of developing engagement processes which fail to communicate effectively and meet the needs of target communities.

For consultation processes with project-affected communities regarding project activities with potentially adverse impacts on their lands and natural resources, customary land holders and Indigenous peoples should have the opportunity to give or withhold their FPIC (see comments for Performance Area 4 regarding application of FPIC to customary land holders).

This section would benefit from much more detailed requirements related to the implementation of meaningful engagement processes. For example, IFC Performance Standard 1 describes specific requirements for inclusive consultation processes, and mandates a more rigorous processes of "informed consultation and participation" for projects that have potentially significant impacts on communities. IFC requires that consultation be a two-way process that should "begin early in the process of identification of environmental and social risks and impacts and continue on an ongoing basis as risks and impacts arise" and that it should be "based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is in a culturally appropriate local language(s) and format and is understandable to Affected Communities." Among other requirements, it calls for a process free of external manipulation and coercion that must be documented by the client. This process must be tailored to the language preference of affected communities and their own decision-making process, and to the needs of disadvantaged or vulnerable groups. It allows for communities to provide evidence if they have already implemented such a process.

Oxfam has developed guidance on meaningful rights holder engagement that the standard may wish to reference for companies. It includes requirements for effective information provision which would provide additional clarity to the standard. For example, companies should ensure that participants are informed about the purpose of their participation, engagement must be a two-way process (both informing and listening), and sufficient time should be allocated to stakeholders to engage effectively -according to their cultural norms and practices. Companies should create a safe space for communities to engage and discuss sensitive topics, as they need to be able to interact with people they trust without fear of retaliation. It's useful to work with local people and partner organizations that know the community well and can advise on how to organize consultations.

Recommendation: At the Foundational Practice level, stakeholder engagement should always be established in collaboration with stakeholders and rightsholders, with particular attention to diverse and gender-balanced representation from the community, and should be ongoing from prior to the environmental impact assessment process through mine closure.

The CMSI standard should provide more detailed requirements for effective community engagement and consultation, in line with standards like the IFC Performance Standards, IRMA, and guidance from the United Nations and civil society organizations like Oxfam. The standard should make explicit that consultation processes with communities facing potential adverse impacts from mining projects must adhere to the principles of FPIC, including enabling Indigenous Peoples and customary land holders to give or withhold their consent for project activities that affect their lands and natural resources.

Within the Glossary definition of Meaningful Engagement, suggest adding the following additional text: Companies should ensure that engagement processes involve diverse and gender-balanced representation from the community, paying particular attention to the equitable participation of Indigenous women and gender-diverse individuals.

Performance Area 13: Community Impacts and Benefits

SECTION: 13.1 Identify and Address Community Impacts, Foundational Practice

COMMENT:

Affected stakeholders and rightsholders should always be engaged in the identification of potential adverse impacts, preparation of mitigation plans, and ongoing monitoring of these impacts. This should be Foundational Practice. Companies must ensure that they engage with a diverse cross-section of the community, including women and marginalized groups. As for Performance Area 12, this section should provide more detail on CMSI's expectations for companies with regard to consultation processes and agreement making with communities, with more rigorous requirements proportional to the level of expected adverse impacts (as with the IFC Performance Standards). The CMSI should also require independent monitoring for when adverse impacts are anticipated, in line with IFC Performance Standard 1: "For projects with significant impacts, the client will retain external experts to verify its monitoring information."

SECTION: 13.2 Community Development and Benefits

COMMENT:

Local Procurement

ICMM's Social and Economic Reporting Framework and Guidance requires that companies disclose the percentage of procurement spent on suppliers local to operations, disaggregated by gender and ethnicity, which is absent from the CMSI. The Risk Readiness Assessment (RRA) Criteria Guide used by the Copper Mark also includes requirements for "establishing a procurement policy that includes the definition of local procurement, objectives and areas of application," and "establishing a baseline and tracking progress on local procurement (e.g. in terms of procurement spending on local suppliers)."

Recommendation: Include at the Good Practice level reporting statistics on local procurement spending so that is in alignment with the ICMM's reporting guidance and the RRA, and include use of either the ICMM's guidance on local procurement reporting or the Mining Local Procurement Reporting Mechanism (LPRM), at the Leading Practice level. This should also state that this data should be disaggregated by gender to match the recommendation in the ICMM's guidance.

Performance Area 14: Indigenous Peoples

SECTION: 14.1 Managing Engagement, Impacts and Opportunities with Indigenous Peoples

COMMENT:

The draft standard does not conform with international law and norms that protect human rights and the rights of Indigenous Peoples, especially their right to their lands, territories and resources, to self-determination, and to Free, Prior, and Informed Consent (FPIC), as affirmed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and through various international treaty norms. FPIC must be recognized as a minimum requirement for respecting and protecting Indigenous Peoples' rights at the Foundational Practice level. The notion that essential elements for the respect of fundamental rights, such as the right to self-determination of Indigenous Peoples, can be tiered into varying levels of performance is an inherent flaw of the CMSI draft standard. Importantly, the standard must also explicitly recognize Indigenous Peoples' right to give or withhold their FPIC for the different stages and cycles of projects -from exploration to mining operations and closure activities -that affect them.

The current language on FPIC under Good Practice in the CMSI standard refers to agreements with Indigenous Peoples as if they are a foregone conclusion. It states that "in accordance with the principles of FPIC"

companies should “obtain agreement with affected Indigenous Peoples demonstrating consent to anticipated impacts to their land or other rights.” While it is positive that that this statement recognizes the importance of demonstrating consent, it is framed in a way that assumes a decision to move forward with the project, rather than acknowledging the possibility that communities may choose to withhold their consent. It should be edited to make explicit that communities have the right to give or withhold their consent.

The CMSI standard is vague on what companies should do when agreement is not obtained. It states: “Recognising that there could be circumstances where full agreement is not obtained with all affected Indigenous Peoples despite concerted efforts, develop, implement and publicly disclose appropriate steps the facility will take to manage anticipated impacts to Indigenous Peoples land or other rights holders in line with the UNGPs”. This language should be deleted from the standard as it implies that projects may move forward even in the absence of Indigenous Peoples’ consent, inconsistent with international law. The standard should state clearly that projects should not move forward unless Indigenous Peoples FPIC is secured.

There should be explicit language that no relocation or eviction of affected Indigenous Peoples shall take place without their FPIC. Further, there should be language affirming that Indigenous Peoples have the right to fair and equitable compensation and comprehensive rehabilitation of mined-out areas.

In addition, in order to be an effective tool to guide corporate behavior, this standard would need to provide much clearer and more comprehensive guidance on FPIC implementation and how it should be audited. For example, multi-stakeholder initiatives like the Initiative for Responsible Mining Assurance (IRMA) and the Roundtable on Sustainable Palm Oil (RSPO) have developed company standards on FPIC which are much more detailed and explicit about expectations for companies than the CMSI’s draft standard. IRMA’s FPIC chapter provides specific requirements for companies on FPIC scoping, determining the FPIC process, and implementing FPIC. IRMA’s FPIC guidance is also explicit about the ability of communities to withhold consent: “if indigenous peoples’ representatives clearly communicate, at any point during engagement with the operating company, that they do not wish to proceed with FPIC-related discussions, the company shall recognize that it does not have consent, and shall cease to pursue any proposed activities affecting the rights or interests of the indigenous peoples. The company may approach indigenous peoples to renew discussions only if agreed to by the indigenous peoples’ representatives.”

RSPO Principles and Criteria also have much clearer and comprehensive requirements on FPIC. RSPO requires that companies demonstrate that “use of the land for oil palm does not diminish the legal, customary or user rights of other users without their FPIC” and that companies produce evidence to demonstrate that FPIC has been secured, including, for example, documents showing legal land ownership authorized by customary landowners and evidencing agreement-making processes, including a consultation plan developed in good faith with diverse members of the community, and “maps of an appropriate scale showing the extent of recognised legal, customary or user rights...through participatory mapping involving affected parties (including neighbouring communities where applicable, and relevant authorities).”

RSPO also specifies that documents evidencing negotiated agreements and the FPIC process must:

- a) Evidence that a plan has been developed through consultation and discussion in good faith with all affected groups in the communities, with particular assurance that vulnerable, minorities’ and gender groups are consulted, and that information has been provided to all affected groups, including information on the steps that are taken to involve them in decision making
- b) Evidence that the unit of certification has respected communities’ decisions to give or withhold their consent to the operation at the time that these decisions were taken
- c) Evidence that the legal, economic, environmental and social implications of permitting operations on their land have been understood and accepted by affected communities, including the implications for the legal status of their land at the expiry of the unit of certification’s title, concession or lease on the land.

Importantly, the RSPO standard also requires companies to produce evidence that “that affected local peoples understand they have the right to say “no” to operations planned on their lands before and during initial discussions, during the stage of information gathering and associated consultations, during negotiations, and up until an agreement with the unit of certification is signed and ratified by these local peoples. Negotiated agreements are non-coercive and entered into voluntarily and carried out prior to new operations.” Among other requirements, RSPO requires companies to ensure that evidence that relevant information be available in appropriate forms and language and that evidence is available to show that communities are represented

through institutions or representatives of their own choosing. Companies must also evidence that “implementation of agreements negotiated through FPIC is annually reviewed in consultation with affected parties” and ensure that communities have the “option of resourced access to independent advice through a documented, long-term and two-way process of consultation and negotiation.” These are just a few of the more detailed requirements that the CMSI standard should include in order to ensure a shared understanding across stakeholders of expectations required in order to meet the standard.

The CMSI requirements around FPIC also fall short of the requirements of the IFC’s Performance Standard 7 on Indigenous Peoples, which applies to all projects funded by IFC and requires companies to document: “(i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations” in circumstances which trigger FPIC, including projects which impact Indigenous peoples’ lands and natural resources (such as mining projects), entail relocation, or impact critical cultural heritage. To align with IFC’s standard, the CMSI language must be strengthened to make clear that FPIC, obtained through a mutually accepted process, must be ensured for any of these circumstances. IFC’s standard does not provide for exceptions to application of the standard when companies are unable to reach agreements.

The standard can also draw on useful guidance on FPIC from the United Nations Global Compact (UNGC) and Food and Agriculture Organization. The UNGC’s Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) makes clear that companies, and not just States, have a responsibility to ensure FPIC: “All businesses should take the following fundamental actions, some of which may be required in conjunction with local and State governments to meet their responsibility to respect indigenous peoples’ rights.” Specifically, UNGC recommends that companies: “Commit to obtain (and maintain) the free, prior and informed consent of indigenous peoples for projects that affect their rights, in line with the spirit of the UN Declaration.” The standard should make explicit that companies have the responsibility to ensure FPIC, and that they should not move forward with projects where FPIC has not been secured.

As recommended for the Human Rights performance area, companies should be required to conduct human rights due diligence at the Foundational and not at the Good Practice level, in line with the UNGPs. The policy should also be explicit at the Foundational level about the need for engagement processes to effectively incorporate marginalized or vulnerable populations and segments of the population. Companies should ensure that engagement processes involve diverse and gender-balanced representation from the community, paying particular attention to the equitable participation of Indigenous women, gender-diverse individuals, and other groups facing structural marginalization. Where women and gender-diverse individuals experience particular barriers to participation, the standard should require that companies address these barriers to enable their engagement.

Given the significant risks of contact posed to Indigenous communities living in voluntary isolation, the CMSI should make clear that mining companies should refrain from operating in these areas. This would be in line with recommendations from the Inter-American Commission on Human Rights (IACHR) calling on states to “refrain from granting licenses or authorizations for activities related to the extraction of natural resources, such as mining, oil and gas activities... in areas with a presence of indigenous peoples in voluntary isolation and initial contact, or where they transit, including buffer zones.”

Finally, the definition of “Indigenous Peoples” in the glossary should be expanded to make note of how identification of Indigenous Peoples has evolved in the African context in particular, where it does not generally reference pre-colonial societies or aboriginality. Rather, the African Commission on Human and Peoples’ Rights (ACHPR) has identified the following characteristics that embody the concept of indigenous peoples: self-identification; a special attachment to and use of traditional land; and a state of subjugation or marginalization resulting from ways of life or modes of production different from the national hegemonic and dominant model. The standard’s definition of Indigenous Peoples should mention this regional distinction and cite to the ACHPR.

Recommendation: Corporate commitments to FPIC must be a Foundational Practice and the standard must be explicit that if agreement is not obtained then the project should not move forward. The standard should also state clearly that no relocation or eviction of affected Indigenous Peoples shall take place without their FPIC, and that Indigenous Peoples have the right to fair and equitable compensation and comprehensive re-

habilitation of mined-out areas. The standard should be fully rewritten in order to provide much more detail on expectations for companies both with regard to FPIC implementation in practice as well as documentation of the process to ensure auditability (IRMA and RSPO standards both provide helpful precedent). Stronger gender language should be incorporated into the standard, and the standard should require that companies avoid mining activities in areas with a presence of Indigenous Peoples in voluntary isolation and initial contact. Finally, the definition of Indigenous Peoples in the glossary should be expanded to reference ACHPR's definition of Indigenous Peoples in Africa.

Performance Area 17: Grievance Management

SECTION: 17.1 Grievance Mechanism for Stakeholders and Rights, Holders

COMMENT:

This is another section where tiering of criteria is unhelpful. In line with this performance area's goal of enabling communities to have access to a grievance mechanism that conforms to the UN Guiding Principles on Business and Human Rights (UNGPs) effectiveness criteria, Foundational Practice (and not just Good Practice) requirements should align with all eight of the UNGP's criteria.

For example, in order to ensure that a grievance mechanism meets UNGPs legitimacy criteria, it must have clear, transparent, and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process. The standard should require companies to ensure that the grievance mechanism be operated by a third-party trusted by the community, providing some distance from the company itself, and this should be required at Foundational Level. The CMSI calls on companies to implement internal third-party reviews of effectiveness of the grievance mechanism as Leading Practice. While this is an important step, it should be considered "Good" rather than "Leading" Practice, and the review should be conducted by an external rather than an internal third-party reviewer.

At the Foundational Level, companies must engage with communities, and in particular stakeholders who have experienced adverse human rights impacts, both in the design of the mechanism and on the processing of their resolutions. Companies must also ensure that claims are resolved in a timely manner and that individuals receive remedy. A grievance mechanism which does not allow for community engagement nor provide remedy to individuals who have experienced harm risks being ineffective (if communities do not use it) or worse could aggravate frustrations and tension at the local level. The standard should require that the companies at least review and address the following considerations with regard to potential barriers to access the mechanism: language, literacy, awareness, finance, distance, gender, and fear of reprisal. Companies should ensure that communities have multiple ways to file these claims (for example, mail, online, in person, 24-hour phone hotline, etc.)

To address fear of reprisal, Oxfam appreciates the standard's Foundational Level calls on companies to protect the identities of complainants. The standard should also require that companies publicly commit to ensure that individuals who use grievance mechanisms will not face discrimination, reprisals, harassment, threats, or intimidation from the company, its contractors, or business partners. This commitment should be in addition to a broader corporate commitment to protect the rights and legitimacy of human rights defenders, as noted in our recommendations on Human Rights. Grievance mechanisms must be accessible to human rights defenders.

To promote transparency, companies should publicly disclose the number and types of complaints filed, as well as key elements of their outcomes, at the Foundational Level. Companies should make this information available on their websites and also provide regular updates to communities.

The present draft CMSI does not include company requirements to address the UNGPs "equitable" criteria (as stated in the draft standard's glossary, to ensure that communities have "reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms"). Companies should provide independent funding to enable communities to hire advisory and technical support for use of the mechanism if necessary. Companies must ensure that mechanisms are designed to

include the participation of both women and men, and in some cases may need to be adapted to register for particular gender-based harms.

Oxfam supported the development of a toolkit for companies on grievance mechanisms which can be accessed here: <https://www.oxfamapps.org.uk/grievance-mechanism-toolkit/> and guidance on grievance resolution for the Australian mining industry here: <https://www.oxfam.org.au/wp-content/uploads/2011/11/OAus-GrievanceMechanisms-0410.pdf>.

Recommendation: The standard should ensure that even Foundational Level requirements align fully with all of the UNGPs effectiveness criteria, in particular ensuring that mechanisms are:

Legitimate (third-party management of the mechanism and external third-party reviews of the effectiveness of the grievance mechanism),

Based on engagement and dialogue (communities must be involved in the design of the mechanism and claimants engaged throughout the process),

Accessible (at least address the following considerations with regard to potential barriers to access the mechanism: language, literacy, awareness, finance, distance, gender, and fear of reprisal),

Rights compatible (communities must receive remedy as a result of the process, and companies must publicly commit to ensuring that individuals who use grievance mechanisms will not face discrimination, reprisals, harassment, threats, or intimidation from the company or its contractors or business partners),

Transparent and Predictable (companies must publicly disclose the number and types of complaints filed, as well as key elements of their outcomes on their websites and also provide regular updates to communities)

Equitable (must be gender-responsive and survivor-centered, and provide community with access to independent advisory or technical support if necessary).

Performance Area 4: New Projects, Expansions and Resettlement

SECTION: 4.1 Risk and Impact Assessments of New Projects and Expansions, Foundational Practice

COMMENT:

4.1 Risk and Impact Assessments of New Projects and Expansions

Impact Assessment

We are happy to see that conducting an impact assessment that assesses the gender differentiated impacts of projects is considered “Foundational Practice.” However, engaging affected stakeholders and rights-holders in the baseline data collection and the risk and impact assessments should also be considered Foundational rather than Good Practice. Failure to adequately capture women’s voices in impact assessment processes can result in missed opportunities to reduce adverse impacts and in additional costs to companies. In some contexts, women face particular barriers to participation in consultation processes (for example, as a result of differential childcare responsibilities, literacy levels, and fluency in the dominant language of the host country; cultural norms relating to public participation; etc.). Companies should assess these barriers and take measures to facilitate women’s engagement.

Further, public disclosure of the ESIA should be considered Foundational Practice. Management plans to address adverse (any adverse, not just significant adverse impacts) and cumulative impacts should also be included as Foundational.

Recommendation: Recharacterize the practices of engagement of affected stakeholders and rights-holders, the public disclosure of ESIA, and the development of management plans to address adverse impacts as Foundational practices. The standard should specify that ESIA’s should be inclusive and take an intersectional approach. Companies should assess whether there are barriers to women’s participation in consultations around ESIA, and should adapt planning and scheduling to accommodate their participation. You may wish to include Oxfam’s guide to Gender Impact Assessment in interpretive guidance for this section.

SECTION: 4.2 Land Acquisition and Resettlement, Foundational Practice

COMMENT:

4.2 Land acquisition and resettlement

A Resettlement Action Plan (RAP) and livelihood restoration plan in consultation with local stakeholders and in line with IFC Performance Standard 5 should be a Foundational requirement. Under no circumstances should communities be relocated without consultation, adequate planning, and agreements reached through a mutually accepted process. Resettlement on the lands of Indigenous Peoples or communities with customary tenure should not be conducted without a process of Free, Prior, and Informed Consent (FPIC) that results in community consent for the relocation. FPIC is a right for Indigenous Peoples under international law (see comments on Performance Area 14 for more on this).

In Africa, several regional policies apply FPIC more broadly when natural resource projects have the potential to impact local communities regardless of whether affected communities identify themselves as Indigenous Peoples. For example, the Economic Community of West African States, African Commission of Human and Peoples Rights, Pan-African Parliament, and Africa Mining Vision have all called on States to respect the FPIC of local communities that face potential impacts from mining, hydrocarbon development, or natural resource projects more broadly. In light of African human rights law, customary law, and existing statutes and jurisprudence in Africa, FPIC should be considered a right for customary land rights holders.

Also, companies should always facilitate a process of legal titling for resettled communities -this should be Foundational rather than Leading Practice. Communities should never be moved to lands where they have precarious tenure, and should always be ensured fair and equitable compensation, including the opportunity for land-for-land compensation, in instances where resettlement occurs.

Recommendation: Require companies to develop RAPs and livelihood and restoration livelihood plans, in consultation with local stakeholders, as Foundational practice. Companies must commit to a mutually accepted agreement-making process that allows communities to consent (or not) to the terms of their resettlement before such resettlement is implemented. Company policies should state explicitly that Indigenous peoples and customary land holders not be resettled unless they have given their FPIC. Companies must ensure that resettled communities have legal title to their new lands and are ensured fair and equitable compensation, including the opportunity for land-for-land compensation.

Performance Area 5: Human Rights

SECTION: 5.1 Human Rights, Foundational Practice

COMMENT:

5.1 Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs) principle 15 states clearly that businesses must have in place a policy commitment to meet their responsibility to respect human rights; a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute. The UNGPs specify that human rights due diligence should “involve meaningful consultation with potentially affected groups and other relevant stakeholders.” Just as companies conduct ESAs as a basic impact assessment measure, they must evaluate potential human rights impacts, and do that in a way that effectively engages rights holders. These are all foundational elements in order for a company to meet its responsibility to respect human rights and should be Foundational Practice. Dividing/tiering commitments to the UNGPs further fragments the landscape rather than improving it.

Human rights defenders have come increasingly under pressure in recent years, with new research highlighting mining as the most dangerous sector for defenders. With more mining expected in coming years related

to energy transition needs, it is crucial that mining companies put strong policies in place to reverse this worrisome trend and protect human rights defenders. There is a growing body of standards, frameworks, tools, and guidance on corporate policies that commit to not tolerate or contribute to attacks against defenders. Oxfam developed a resource entitled “Threats to Defenders: Six ways companies can respond”, and the Zero Tolerance Initiative has compiled several other resources for companies, including important new guidance from the Voluntary Principles Initiative on Security and Human Rights and examples of comprehensive individual business policies from companies like Unilever. The International Finance Corporation and Inter-American Development Bank Invest have also issued positions on anti-retaliation and a Good Practice note for private sector on the risks of retaliation against project stakeholders. The present version of the CMSI misses an opportunity to incorporate key recommendations from these tools in its requirements.

As a key first step, companies must adopt and disclose a public policy commitment to protecting human rights defenders. ICMM’s new guidance on human rights defenders says as much clearly: “The first step to respecting the human rights of defenders is to make a clear public commitment to respect the rights of HRDs against any threats, whether they originate from a company’s own personnel or contractors (e.g., private security contractors) or from the State itself. The commitment should apply across all geographies relevant to company operations.” This should be made a requirement for companies at the Foundational Practice level.

Recommendations: The Foundational requirements should be strengthened to ensure consistency with the UNGPs:

5.1.1 - Human rights commitment and relevant policy should be disclosed publicly. If the policy is not disclosed, external stakeholders will have no way to evaluate whether it is consistent with UNGPs nor to hold the company accountable for implementation.

5.1.2 - All companies should conduct Human Rights Due Diligence and these processes should involve meaningful consultation with rights holders.

5.1.4 - The standard should specify that human rights trainings should also address the protection of human rights defenders, including training on the companies’ human rights defenders policy and implementing guidance, and on the rapid response plan should the company, a contractor, or a supplier learn of a potential risk to a human rights defender engaging on the project.

On human rights defenders in particular, Foundational requirements should be strengthened to ensure that:

Companies recognize and commit to protecting the rights and legitimacy of human rights defenders by adopting and disclosing a policy in support of human rights defenders. The company’s policy statement must commit it to neither tolerate nor contribute to threats, intimidation, or attacks (both physical and legal) against human rights defenders.

Ensure that business relationships (suppliers, contractors, etc.) commit to zero tolerance of retaliation against defenders.

Engage with communities and local civil society in inclusive and culturally and gender-responsive ways to identify and address risks for defenders and facilitate access to information relevant to the protection of defenders.

Commit to work with defenders to create safe and enabling environments for civic engagement and human rights at local, national, or international levels.

Companies refrain from supporting strategic lawsuits against public participation (SLAPPs) or other legal strategies that diminish established legal protections for human rights defenders.

At the Good Practice level, companies should publish their operational guidance related to the protection of human rights defenders and should also use their leverage and speak out in defense of human rights defenders and against legal reforms that are aimed at restricting civil society space and civic freedoms.

Performance Area 7: Rights of Workers

SECTION: 7.1 Workers' Rights Risk, Mitigation and Operational Performance, Foundational Practice

COMMENT:

Pay Equity

ICMM's Social and Economic Reporting Framework and Guidance includes an obligation for companies to report on pay equity, disaggregated by gender, that is absent from the CSMI. Other standards, such as GRI 405 and the EITI Standard also include disclosures on pay equity.

Recommendation: Include ICMM's guidance as Foundational Practice. Specifically, "Companies to report on the ratio of the basic salary and remuneration for each employee category by significant locations of operation for priority areas of equality: women to men, minor to major ethnic groups, and other relevant equality areas (as appropriate based on their local operating context and what is legally permissible)."

COMMENT:

Training

ICMM's Social and Economic Reporting Framework and Guidance requires that companies provide data on training provided to their employees, disaggregated by gender, that is absent from the CSMI.

Recommendation: Include ICMM's guidance on training as Foundational Practice in the CSMI. Specifically, "Companies to provide an overview of the training provided to their direct employees including: a. Average hours of training per person that the organization's employees have undertaken during the reporting period, by gender and employee category (total number of hours of training provided to employees divided by the number of employees). b. Average training expenditure per full time employee (total cost of training provided to employees divided by the number of employees). c. Percentage of employees that received training (split per employee category and where relevant equality categories). This indicator should also be disaggregated per gender and, if appropriate, ethnicity to the extent practicable based on the local operating context and what is legally permissible."

SECTION: 7.1 Workers' Rights Risk, Mitigation and Operational Performance

COMMENT:

Education and Skills

ICMM's Social and Economic Reporting Framework and Guidance requires that companies disclose the range of education and skills programs deployed outside of workforce, spanning number and types of programs, spend, and beneficiaries (disaggregated by gender and ethnicity), which is absent from the CSMI.

Recommendation: Include ICMM's guidance on education and skills reporting in the CSMI. Specifically, "Companies to provide details on the range of education and skills programs that they deploy outside of their workforce, including: –Number of education and skills programs supported with a proposed initial classification to cover support for early childhood development (ECD), bursaries and scholarships provided across all education levels, provision of primary/secondary/ tertiary education support (including after school programs or online support) and adult learning programs –Total investment on education and skills program(s) (outside of workforce) split by program area –Total number of beneficiaries of education and skills programs (disaggregated per gender and ethnicity)."

COMMENT:

Capacity and Institution Support

ICMM's Social and Economic Reporting Framework and Guidance requires that companies disclose an overview of the range of capacity and institutional programs deployed, spanning number and types of programs, spend, and beneficiaries disaggregated by gender and ethnicity, which is absent from the CSMI.

Recommendation: Include ICMM’s guidance on capacity and institutional support reporting in the CSMI. Specifically, “Companies to provide details on the range of capacity and institution programs that they support, including: a. Number of capacity and institution programs supported with a proposed initial classification to cover training programs specifically focused on local government or community leadership development, funding for civic organizations and, where relevant, other programs such as staff secondments or leadership development programs external to the workforce. (Programs reported under this core indicator should be distinct to the programs reported in relation to education and skills to avoid duplication of reporting.) b. Total investment on capacity and institution programs split by program area. c. Total number of beneficiaries of capacity and institution programs (disaggregated per gender and ethnicity to the extent practicable based on their local operating context and what is legally permissible).”

QUESTION 1

Does the scope, content, and narrative style of the consolidated standard meet your individual expectations and the collective industry expectation for responsible production practices?

Response: 1: Significantly below

QUESTION 2

Do the requirements meet your expectations for being sufficiently clear to support consistent and practical implementation and to achieve necessary performance improvement?

Response: 1: Significantly below

QUESTION 3

From your perspective, does the three-level performance structure (Foundational, Good, Leading) of the Consolidated Standard meet your expectations for providing an effective on ramp and clear articulation of good practice and effective path to continuous improvement?

Response: 1: Significantly below

Document:
Claims

QUESTION 1

We would value perspectives on a few additional questions related to threshold of performance associated with achievement claims. Please click here/ see page 11 of Reporting and Claims Policy.

Response: No Response

1. We prefer example 1, which would require facilities to achieve the good practice level at an 80 Additional Consultation Questions 1. We advise against a more gradual on-ramp process if you want the Standard to be meaningful. It needs to be possible for companies to not meet the performance claim. 2. We are concerned about the Performance Claim falling below commitments already made by ICMM, MAC, WGC, and Coppermark in their respective governing documents. We propose that all performance areas covered in these documents must be met in order to meet the performance claim, as well as adherence to international law and the IFC Performance Standards. 3. Yes– companies should be incentivized to better performance through a higher-level claim.