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Subcommittee on International Monetary Policy and Trade
"Investments Tied to Genocide: Sudan Divestment and Beyond"
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Domini Social Investments is an SEC-registered investment adviser based in New York. We manage more than $960 million for individual and institutional mutual fund investors who wish to incorporate social and environmental criteria into their investment decisions.

It is an honor to have the opportunity to address this committee and to share our perspectives on investor and regulatory responses to the genocide in Darfur and corporate human rights performance generally.

We begin our consideration of these issues with an affirmative obligation as investors to respect human rights, and to seek to do no harm. The Sudan Accountability and Divestment Act (SADA), and the recent Government Accountability Office (GAO) study that assessed its efficacy,[1] each recognized that investors operate in a legal and regulatory environment that fails to explicitly acknowledge this obligation, and does not provide investors with the tools needed to fulfill it. In some cases, our legal system may even impose obstacles to investors seeking to address the human rights implications of their activities. We believe that investment decisions must be bounded by an obligation to respect international human rights norms. Investors are not simply passive actors in this system – they are playing a critical capital allocation role, and should be mindful of the implications of their investment decisions.

Domini seeks to meet this obligation by establishing and implementing a comprehensive set of social and environmental standards to guide all of our investment decisions. These policies are directed toward the ultimate goals of universal human dignity and environmental sustainability.[2]

Investors have two tasks to address with respect to corporate human rights behavior – the impact of this behavior on the financial performance of their portfolios, and the impact that their investment decisions may have on human rights. As an increasing number of fiduciaries recognize the financial risks imposed by corporate human rights violations, however, these two tasks may be merging into a unified understanding that human rights violations are bad for investment, and should therefore be scrupulously avoided. Corporate activity in conflict zones such as Sudan present a variety of financial risks, including:

- Operational risks caused by physical disruptions and community opposition[3]

[1] Government Accountability Office, "Sudan Divestment: U.S. Investors Sold Assets but Could Benefit from Increased Disclosure Regarding Companies' Ties to Sudan" (GAO-10-742, June 2010), available at *www.gao.gov/products/GAO-10-742*.
[2] Domini's Global Investment Standards are available at *domini.com/GlobInvStd/index.htm*.

[3] See, e.g., Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework (April 9, 2010), at paragraph 71, available at *http://www.reports-and-materials.org/Ruggie-report-2010.pdf*. In this report, Professor Ruggie reports that: "a study of 190 projects operated by the international oil majors indicates that the time for new projects to come on stream has nearly doubled in the past decade, causing significant cost inflation. Delays are attributed to projects' 'technical and political complexity.' An

- Reputational risks, when companies become associated with human rights violations
- Legal risks of complicity in human rights abuses
- Loss of license to operate (during conflicts, or post-conflict if the company is seen as a partner of the former regime)

Several of these risks, particularly reputational and legal risks and loss of license to operate, may follow the company long after it has ceased the activities in question.

In addition to these risks to the financial value of the company, investors should be mindful of broader systemic risks that are exacerbated by egregious human rights violations such as genocide. Regional instability and authoritarian rule present significant opportunity costs and long-term financial risks. Investors have a strong interest in supporting open, democratic governments around the world, and protection of human rights is inextricably linked to this interest. Addressing genocide is first and foremost a moral imperative, but it is also a perfectly appropriate concern for fiduciaries that see their role as exclusively focused on financial concerns.

Domini's Approach to Sudan

Domini manages a global family of mutual funds, covering North America, Europe and the Asia Pacific regions, and certain emerging markets. Our funds may only purchase securities that we deem to be in compliance with our Global Investment Standards, which cover a broad range of social, environmental and governance standards. Domini has an in-house team of analysts dedicated to evaluating the social, environmental and governance records of companies in our investable universe.

Our Global Investment Standards compel us to evaluate corporate activity against societal needs and international norms. We believe this helps our funds identify opportunities and avoid certain risks that will generally not be reflected on the balance sheet—at least not in the short term—and, if our standards are to have integrity, there must be a point at which we will sell our shares.

We believe that by setting social and environmental standards, investors can establish a means for dialogue about the appropriate role of corporations and investors in society. These standards also drive our research and engagement processes, which create an ongoing demand for corporate social and environmental data, and a continuous accountability mechanism.

In 2007, we adopted a formal policy on Sudan to supplement our pre-existing human rights investment standards. Our Sudan policy directs us to avoid investment in companies that do business in Sudan in cases where we have determined that the company's activities provide certain direct benefits to the government of Sudan, particularly in the areas of oil, mining, electricity infrastructure and military or where, in our view, the company is otherwise involved in human rights abuses in Sudan.[4] Domini has worked closely with the Sudan Divestment Task Force, and now serves on the advisory board[5] of the

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independent and confidential follow-up analysis of a subset of those projects indicates that non-technical risks accounted for nearly half of all risk factors faced by these companies, with stakeholder-related risks constituting the largest single category. It further estimated that one company may have experienced a US $6.5 billion "value erosion" over a two-year period from these sources, amounting to a double-digit fraction of its annual profits." (*footnotes omitted, emphasis added*)

[4] Domini's Sudan policy is available at: *domini.com/GlobInvStd/Darfur-Cri/InvestmentPolicy.doc_cvt.htm*
[5] This testimony is presented solely on behalf of Domini Social Investments, and may not represent the views of the Conflict Risk Network or its members.

Conflict Risk Network (CRN), the Task Force's successor organization. CRN's in-depth research on corporate activity in Sudan has been an invaluable resource for us.[6]

Corporations face human rights risks wherever they do business, in every country in the world. Most of the companies that Domini has determined violate our Sudan policy are excluded from our portfolios for a variety of other reasons as well, including a record of human rights violations in other parts of the world. In our experience, it is rare to find a company that meets our social and environmental standards but must be excluded solely based on its involvement in Sudan. Problematic involvement in Sudan, therefore, may serve as an indicator of a corporate culture that is not sufficiently respectful of its human rights obligations. Domini's preference is to apply consistent investment standards to all companies, in all regions of the world. Our Sudan policy is an exception to this rule, in recognition of the urgent need to address an ongoing genocide.

In Sudan, unlike the South African divestment movement, targeted divestment strategies implicate a very limited number of companies. This is a critical consideration for a fiduciary attempting to manage a well-diversified portfolio. Our policy, consistent with the policies advocated by the Conflict Risk Network, requires careful consideration of the role individual corporations are playing in Sudan. It does not target for exclusion every company operating in that country. It should also be noted that an investor's decision to avoid or divest a company's shares based on its Sudan operations does not necessarily equate to a message that the company must divest from Sudan.

Shareholder Engagement

Investment policies designed to address genocide are both warranted and achievable, and our decisions to sell holdings when they violate our standards can also influence corporate behavior. Each decision to buy, sell or vote shares sends a signal to the marketplace. Those investors that fail to adopt human rights policies to guide their investment decisions, however, should not feel free to stand on the sidelines—investors have other tools at their disposal.

My firm is engaged in direct dialogue with our fund holdings on a broad range of environmental and human rights issues and we have seen the results of these efforts. Concerned investors have achieved significant results with corporations, convincing companies to adopt more responsible climate change policies, to accept responsibility for working conditions in their global supply chains and to exit repressive regime countries, such as Burma or Apartheid-era South Africa, to name but a few issues.

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[6] About CRN: Conflict Risk Network (CRN), *http://crn.genocideintervention.net/* is a network of institutional investors, financial service providers and related stakeholders calling on corporate actors to fulfill their responsibility to respect human rights and to take steps that support peace and stability in areas affected by genocide and mass atrocities. Its goal is to increase such behavior by corporate actors, and thereby reduce conflict risk. CRN is a project of the newly merged Save Darfur Coalition / Genocide Intervention Network (SDC/GINET). The two organizations merged on November 1, 2010 to create a more powerful voice dedicated to preventing and stopping large-scale, deliberate atrocities against civilians. The organization remains committed to its work to end the crisis in Darfur and bring peace to all of Sudan as well as to end violence in other areas of mass atrocities such as Congo and Burma. The merger creates the world's largest anti-genocide organization, with a membership base of hundreds of thousands of committed activists globally, an unparalleled nationwide student movement, more than 190 faith-based, advocacy and human rights partner organizations, and a network of institutional investors collectively representing trillions in assets under management.

The Conflict Risk Network reports engagement successes with a number of companies operating in Sudan, including La Mancha Resources, Schlumberger, Weatherford and others. Domini has participated in dialogues with banks[7] about their approach to the Darfur crisis, telecommunication firms[8], and others, including companies we have excluded from our portfolios. These efforts are ongoing and are a critical aspect of the investor response to Darfur.

Few tough negotiations—in any field—go very far without both carrots and sticks. We therefore believe that the most effective approach to changing corporate behavior must combine both divestment and engagement.

The Global Growth of Responsible Investment

In 2005, the law firm of Freshfields Bruckhaus Deringer issued a survey of the law of fiduciary duty in the United States, Europe, Japan, Canada and Australia, and concluded that the consideration of environmental, social and governance factors in the investment process is clearly permissible in every jurisdiction.[9]

Freshfields, however, went a step further. They concluded that the law arguably *requires* fiduciaries to take environmental, social and governance factors into account when they may impact the long-term value of the portfolio. They also noted that the law of fiduciary duty accords fiduciaries wide discretion in making this determination. In our view, fiduciary duty compels investors to act, and to act now, particularly to address the most egregious violations of human rights—genocide and other crimes against humanity.

The initial Freshfields study helped to accelerate a global trend towards greater consideration of social and environmental factors by investors, and greater disclosure. For example:

- The UN-backed Principles for Responsible Investment (PRI) now counts among its endorsers investors representing more than $20 trillion. PRI signatories endorse the following statement "As institutional investors, we have a duty to act in the best long-term interests of our beneficiaries. In this fiduciary role, we believe that environmental, social, and corporate governance (ESG) issues can affect the performance of investment portfolios (to varying degrees across companies, sectors, regions, asset classes and through time)." PRI signatories also commit to "seek appropriate disclosure on ESG issues by the entities in which we invest."[10]

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[7] See, e.g, the Sudan policy statement issued by Citigroup at *www.citigroup.com/citi/citizen/approach/humanrights/sudan.htm*.
[8] See Conflict Risk Network, "Major U.S. Institutional Investors Urge Telecommunications and Oil Companies in Sudan to Help Ensure Human Rights During Anticipated Contentious Referendum Process (Nov. 4, 2010), available at *http://www.savedarfur.org/page/-/PDFs/11-04-2010_CRN_Press_Release.pdf*; and a Fact Sheet describing the engagement at *http://crn.genocideintervention.net/files/company_profiles/CRN%20Engagement%20Fact%20Sheet_11.4.10.pdf*

[9] "*A legal framework for the integration of environmental, social and governance issues into institutional investment*", produced for the Asset Management Working Group of the UNEP Financial Initiative by Freshfields Bruckhaus Deringer (October 2005). Freshfields produced a sequel to its initial report in 2009, available at *http://www.unepfi.org/fileadmin/documents/fiduciaryII.pdf.*

[10] *www.unpri.org*

- Regulators and stock exchanges in numerous other jurisdictions, including Brazil, France, Malaysia, South Africa, Sweden and Denmark, have mandated or encouraged corporate social and environmental performance disclosure.[11] Between September 2009 and February 2010 the European Commission hosted a series of multi-stakeholder workshops on the disclosure of corporate environmental and social information to inform policy development.[12] In 2008, the Chinese government announced that many state-owned entities would need to begin reporting on corporate social responsibility initiatives. Most recently, the UK government announced it intends to reinstate the "Operating and Financial Review" in an effort to ensure that environmental and social information is included in corporate reporting.

- In August, the world's major accounting bodies, the International Organization of Securities Commissioners (IOSCO) and a number of major non-governmental organizations and corporations joined in the formation of the International Integrated Reporting Committee (IIRC), to "create a globally accepted framework for accounting for sustainability: a framework which brings together financial, environmental, social and governance information in a clear, concise, consistent and comparable format."[13]

- Approximately 1,000 companies worldwide utilize the Global Reporting Initiative's sustainability reporting format.[14] Worldwide, the Corporate Register anticipates that approximately 4,000 corporate sustainability reports will be published in 2010 (a small proportion of the world's 82,000 transnational corporations). Ninety three of the S&P 100 publish some sustainability data on their websites and, according to a 2008 KPMG study, 80% of the worlds' 250 largest companies publish stand-alone corporate responsibility reports.

As discussed below, U.S. investors depend primarily upon voluntary disclosure to assess corporate social and environmental performance.

The Ruggie Framework

It is important to place this discussion of SADA and Sudan divestment in its broader context. In June 2008, the United Nation's Human Rights Council unanimously endorsed a framework for understanding the human rights obligations of corporations. The "Protect, Respect and Remedy" framework, developed

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[11] For a comprehensive survey of global developments, see "Carrots and Sticks—Promoting Transparency and Accountability: An update on trends in voluntary and mandatory approaches to sustainability reporting" (May, 2010), at *http://www.globalreporting.org/NR/rdonlyres/08D0C5D6-3B19-4BA2-9F12-540F66F73C5E/4198/Carrrots2010final.pdf*. The report was prepared by the Global Reporting Initiative, KPMG, UNEP FI, and the Unit for Corporate Governance in Africa.

[12] *http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/reporting-disclosure/index_en.htm*

[13] See *www.integratedreporting.org*. The IIRC, formed by The Prince's Accounting for Sustainability Project (A4S) and the Global Reporting Initiative (GRI), includes among its membership senior representation from IOSCO, the International Federation of Accountants, FASB, the International Accounting Standards Board, KPMG, PriceWaterhouseCoopers, Ernst & Young, Deloitte Touche Tohmatsu, the Tokyo Stock Exchange Group, the International Corporate Governance Network and several major corporations and NGOs.

[14] *www.globalreporting.org*

by Professor John Ruggie, the Special Representative of the UN Secretary-General on business and human rights (hereinafter, "the Ruggie Framework" and "the SRSG," respectively), should provide useful guidance for Congress in considering how to improve SADA and more effectively address the genocide in Darfur and corporate human rights performance more generally. The framework is based on:

> "the **State duty to protect** against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; the **corporate responsibility to respect** human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access for victims to **effective remedy**, judicial and non-judicial." (*emphasis added*)[15]

In resolution 8/7 (June 2008), the UN Human Rights Council extended the SRSG's mandate in order for him to "operationalize and promote" it. Earlier this month, the SRSG has posted for public comment a set of "Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework."[16] The SRSG expects to present his final report in April, for a vote by the Council in June.

The SRSG notes that "The worst corporate-related human rights abuses, including acts that amount to international crimes, take place in areas affected by conflict, or where governments otherwise lack the capacity or will to govern in the public interest. But companies can impact adversely just about all internationally recognized human rights, and in virtually all types of operational contexts." [17] As a genocide, the situation in Darfur rises to particularly important prominence. However, corporations face human rights issues wherever they operate around the world, and investors need better information to assess how they are managing these issues in order to help avert future humanitarian crises.[18]

The SRSG comments that "States have been slow to address the more systemic challenge of fostering human rights-respecting corporate cultures and conduct" and notes that "the most prevalent cause of legal and policy incoherence is that the units of Governments that directly shape business practices—in such areas as corporate law and securities regulation, investment promotion and protection, and commercial policy—typically operate in isolation from, are uninformed by, and at times undermine the effectiveness of their Government's own human rights obligations and agencies."[19]

The SRSG makes several recommendations that are particularly important to keep in mind. SADA can be viewed as an attempt to address the policy incoherence discussed by Professor Ruggie, by helping to align government contracting and investor decision-making with the larger policy goal of ending the genocide

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[15] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework (Posted for public review and comment until January 31, 2011), at paragraph 11. Available at http://www.srsgconsultation.org/index.php/. The Guidance document can be downloaded in pdf format at http://www.srsgconsultation.org/GPsDiscussionDraftFinal.pdf (hereinafter cited as "Guiding Principles")

[16] *Id.*

[17] *Id.* at paragraph 2.

[18] Congress, for example, through the Dodd-Frank Wall Street Reform and Consumer Protection Act, acknowledged the importance of disclosure requirements relating to the sourcing of conflict minerals from the Democratic Republic of the Congo, and the human rights implications of revenues transparency as well.

[19] *Guiding Principles* at paragraph 6.

in Darfur. Securities regulation is not generally placed in the context of the State's duty to protect against human rights abuses, but it can be an effective tool for mitigating these abuses.

Just as the Guidance sets the context for the State's obligations to legislate and regulate in this area, his guidance for corporations can provide a useful framework for setting disclosure requirements, based on the need for a company to adopt policies consistent with international human rights norms and develop appropriate due diligence and remedial procedures.

The Need for Comprehensive Corporate Human Rights Performance Disclosure

In the United States, there are currently no explicit rules requiring corporate issuers to disclose their social or environmental policies, procedures or performance in their securities filings, including those relating to human rights. Although there are no explicit rules regarding "social" risks, such as human rights violations or community opposition to new capital-intensive projects, general requirements to disclose material risk information apply equally to all sustainability issues, as long as management determines that these issues present "material" risks to the issuer.

The GAO report provides a useful review of SADA and investor views regarding Sudan divestment, and we were pleased to provide our perspective to the GAO during its preparation. The GAO makes the following recommendation:

> "In order to enhance the investing public's access to information it needs to make well-informed decisions when determining whether and how to divest Sudan related-assets, we recommend that the SEC consider issuing a rule requiring companies that trade on U.S. exchanges to disclose their business operations related to Sudan, as well as possibly other state sponsors of terrorism."[20]

We endorse the GAO's disclosure recommendation as a necessary, but insufficient measure to provide investors with the information needed to make more informed investment decisions and to ultimately hold companies accountable for their impact on human rights, in Darfur and elsewhere, and would like to focus the remainder of this testimony on the need for expanded human rights disclosure requirements.

The GAO's stated goal—providing information to help investors implement a program of Sudan divestment—focuses on a tactic, not a long-term strategic goal. If our goal is to affect an outcome on the ground—to end the genocide in Darfur and contribute to stabilization of the region—we believe the recommendation should be recalibrated.

As noted above, Domini utilizes a *targeted* model of divestment. Some companies operating in Sudan should remain in Sudan. Some should remain in Sudan and improve their practices. Some companies should exit Sudan. Investors and other stakeholders need appropriate disclosure to help distinguish between these different categories of companies, and to highlight key areas for corporate executives to manage and measure. In addition, investors need additional qualitative information to enable more effective engagements with corporate management.

A requirement for companies to disclose "their business operations related to Sudan" is therefore necessary, but not sufficient. For Domini, a company's connection to Sudan is merely the first step in our analysis, and is insufficient to gauge how a company is meeting its obligations outlined by the Ruggie

[20] *GAO Report* at 8.

Framework. We would therefore encourage Congress to consider requiring the SEC to take a broader view of the matter, and require issuers to disclose human rights policies, procedures and performance, with additional specific disclosure requirements for companies operating in conflict regions or other designated state sponsors of terrorism, including Sudan.

Reliance on the Materiality Standard

The GAO reports that the SEC will consider the GAO's recommendation, but is "committed to the practice of relying on companies to ensure that their disclosures contain all material information about their operations in these countries."[21]

The SEC has provided the following definition of materiality: **"**Information is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision, or, put another way, if the information would alter the total mix of available information."[22]

In our view, the materiality standard has failed to provide investors with necessary information about corporate human rights performance in any area of the world, including Sudan, for the following reasons:

- Although materiality is an "objective" standard, and "companies are not free to make their own judgments as to whether these matters are 'material,'"[23] in practice we do depend on the company to determine and disclose material risks. It is very difficult to second-guess these determinations, and the GAO report does an excellent job in highlighting the results of the SEC's efforts in this area.[24]

- The SEC's materiality standard is focused on financial risks *to the issuer*, not to stakeholders affected by corporate activities. "Externalities", including human rights abuses, are not generally considered "material" by companies unless they believe they may present a risk to the issuer, and corporate counsel generally considers these risks to be too tenuous or difficult to predict to rise to the level of required disclosure.

- Materiality is a broad, ambiguous standard that can lead to confusion. Issuers are often uncertain whether an emerging risk factor should be disclosed and, if it is material, *how* it should be disclosed.

Domini's researchers assess corporate social and environmental performance every day. In our experience, securities filings provide relatively little information in these areas. In fact, it is rare to find any human rights data in securities filings at all.

To "foster business respect for human rights," the SRSG states that States should encourage, and where appropriate, require "business enterprises to provide adequate communication on their human rights

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[21] *GAO Report* at 33.
[22] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469; FR-82 (Feb. 8, 2010), available at http://www.sec.gov/rules/interp/2010/33-9106.pdf, citing TSC Industries v. Northway, Inc., 426 U.S. 438 (1976).
[23] *GAO Report* at 76-77, Appendix IV, Comments from the Securities and Exchange Commission.
[24] *GAO Report* at 32-33.

performance."[25] He notes that "there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable businesses to respect human rights…." He recommends that "financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" from the investors' point of view and indicate when they should be disclosed."[26] In our view, a broadly defined "materiality" standard that applies to each and every conceivable risk a company may face falls short of the SRSG's recommendation that the State "encourage" or "require" and provide clarity around corporate human rights obligations and reporting.

The SEC's Division of Corporate Finance expressed the view to the GAO that "companies have a strong incentive to make appropriate judgments about materiality because they may face significant federal securities law liability for disclosure that includes material misstatements or material omissions that make the information provided misleading."[27]

The GAO's assessment of the SEC's monitoring of companies tied to Sudan, however, "appears limited."[28] The GAO reports that the SEC's efforts to elicit disclosure from these companies have, at best, met with mixed success and only one referral to the SEC's Division of Enforcement.[29] Despite the concerted efforts of SEC staff, we are left to conclude that there is currently no meaningful sanction for companies that fail to disclose material human rights information, and we assume this is apparent to issuers as well.

Management's incentives—particularly in the face of a global divestment campaign—are to disclose *as little as possible*, in direct opposition to what investors need. This can be particularly dangerous when a company is blind to the risks it faces, or is engaged in particularly destructive behavior. The companies that are the most likely to experience—or contribute to—avoidable catastrophic disasters are therefore the least likely to provide advance warnings. A "reasonable" investor needs something more than management's perception of risk. A reasonable investor needs information to allow her to second-guess management, and to arrive at a more complete view of the company. This is particularly true when seeking to address a particular crisis, such as the genocide in Darfur. When this crisis is filtered through the 'judgment' and financial risk assessment metrics of a large company, very little—if any—usable data emerges and the market's ability to mitigate these risks is dramatically undermined.

The SEC has the authority to determine categories of information that are *per se* material, rather than rely on management's judgment of materiality. The GAO reports that the SEC's Division of Corporate Finance "expressed concern that adopting a disclosure requirement that is excessively broad and beyond what GAO recommends could possibly lead to a volume of information that would overwhelm the investor and possibly obscure other material information."[30] This is a valid concern, but it is equally clear to us that the status quo is not acceptable. The SRSG recommends that States ensure that "current policies, regulation and enforcement measures are effective in addressing the risk of business involvement in situations which could amount to the commission of international crimes."[31] As noted by the GAO,

[25] *Guiding Principles* at 8 (Guiding Principle 5(c))
[26] *Id*.
[27] *GAO Report* at 30-31.
[28] *Id*. at 32.
[29] *Id.* at 33.
[30] *Id*. at 8.
[31] *Guiding Principles* at 10.

however, “companies have generally resisted [the SEC’s instructions to disclose] and, at times, have refused to disclose information about their ties to Sudan.”[32]

Investors need clear, comparable and relevant data to allow them to effectively implement targeted divestment and engagement strategies. We believe it is possible, and desirable, to require companies to disclose a tailored set of key indicators that would allow investors to make more effective decisions in this area. We recommend that Congress consider requiring the SEC to adopt a mandatory disclosure framework that ensures that:

- Investors have reliable, consistent, comparable and relevant information to allow them to make prudent investment decisions and to monitor corporate human rights activity; and
- To further implement the State’s duty to protect against human rights abuses, in keeping with the Ruggie Framework.

This requirement could be implemented through the SEC, or through the stock exchanges in the form of new listing standards, and should be consistent with the Ruggie Framework.

There will always be companies that refuse to comply with the law, and intentionally hide material information. Without a clear and explicit disclosure requirement, however, it is difficult for investors to interpret why a company chose to say nothing about its human rights performance. Explicit requirements to disclose human rights policies, due diligence procedures, risks identified and performance reports, however, would provide investors with a basis for evaluating corporate human rights performance, and could serve to significantly raise the bar globally.

Additional Recommendations

We would welcome broader Congressional hearings to consider all of the various tools that could be brought to bear to end this urgent humanitarian crisis, as well as to more effectively evaluate corporate human rights performance globally in order to guard against future crises. Below, Domini respectfully offers a handful of recommendations.

Federal Government

1. As discussed above, the Securities & Exchange Commission should require issuers to disclose key aspects of their human rights policies, procedures and performance, with a particular focus on genocide and other crimes against humanity. Investors and the public need consistent, reliable and comparable data on corporate human rights performance in order to effectively address these risks. In this context, the Global Reporting Initiative, the Conflict Risk Network and the Ruggie Framework should be particularly useful.[33]

2. The GAO notes that SADA has been interpreted to permit the U.S. government to contract with subsidiaries or affiliates of companies that would otherwise be subject to sanction. We believe it is critical for this loophole to be closed. The current interpretation of this section of SADA

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[32] *GAO Report* at 78.

[33] See, also, the Social Investment Forum’s petition to the SEC for mandatory sustainability reporting, available at http://www.socialinvest.org/news/releases/pressrelease.cfm?id=143 (Domini is a member of the Social Investment Forum, and the author was part of the committee that drafted this proposal).

undermines the principle that corporations bear human rights obligations throughout the enterprise, and significantly undermines the effectiveness of the provision.

The SRSG notes that "a corporate group may consider itself to be a single business enterprise, in which case the responsibility to respect human rights attaches to the group as a whole and encompasses both the corporate parent and its subsidiaries and affiliates. Alternatively, entities in a corporate group may consider themselves distinct business enterprises, in which case the responsibility to respect attaches to them individually and extends to their relationships with other entities – both within the group and beyond – that are connected to their activities." Congress should consider closing this loophole entirely, or adopting a more nuanced case-by-case approach to evaluating these corporate relationships.

3. Despite the two Freshfields studies, there is still a broad perception that fiduciary duty presents an obstacle to consideration of human rights standards in investment decision-making, and the GAO notes several individual state laws that have been interpreted to place portfolio returns above considerations of even the most egregious violations. SADA's safe-harbor provision, and "sense of Congress" relating to ERISA helped to address these concerns, but only in the narrow context of Sudan divestment. Congress should consider ways to align standards of fiduciary duty with the Ruggie Framework to ensure that responsible fiduciaries never feel legally compelled to ignore issues such as genocide or other egregious violations of human rights.

   To this end, the Department of Labor should issue interpretative guidance to assure ERISA fiduciaries that decisions to divest individual holdings, or to engage with these holdings in order to avoid the fund's complicity in genocide or other egregious human rights violations, are consistent with the intent of the Act.

Stock Exchanges and Index Managers

Human rights criteria at the exchange or index level could have significant ripple effects throughout the markets and, more importantly, on the ground in Darfur.

1. If a company is complicit in genocide, it should not be permitted to list on a national exchange. The stock exchanges are the gateways to the capital markets. These gates should be closed to the small group of firms that choose to actively profit from, or knowingly finance, genocide or other gross human rights violations. Such standards would be consistent with the SRSG's comment that States should reduce or withdraw "access to public support and services for a business enterprise that is involved in gross human rights abuse and fails to cooperate in addressing the situation." [34] Although the NYSE and the NASDAQ adopted various corporate governance standards in the wake of Enron and the associated accounting and governance scandals, currently neither exchange includes any social or environmental listing standards. Sustainability standards—even those that merely required the disclosure of certain human rights performance data—would be a very powerful incentive for corporations. Such standards would also help to safeguard the competitiveness of the U.S. markets in light of rapid regulatory developments in foreign markets to promote corporate social responsibility.

[34] *Guiding Principles* at 10.

2. Portfolio managers are evaluated against public benchmarks. When they seek to avoid investing in certain companies that are included in their portfolio's public benchmark, they may face challenges in meeting their investment objectives. It is often a company's inclusion in a particular benchmark that creates the obstacle to divestment. A number of indexes currently incorporate social and environmental factors, including the MSCI KLD 400 Social Index, the Dow Jones Sustainability Index and the FTSE4Good Index Series. These standards, however, have not been incorporated into the mainstream indexes that are most widely used as benchmarks, such as the S&P 500.

Mutual Funds

1. Mutual funds should adopt formal investment policies that address genocide and other crimes against humanity, and should be required to publicly disclose how they address human rights concerns. Funds that believe that the adoption of a human rights policy would impose material risks to performance will need to review these policies with their fund's board of trustees, and may need to amend their prospectus. The Domini Funds' prospectus clearly discloses the potential risks imposed by the application of social and environmental standards. There is no legal obstacle to adopting such policies.

2. Mutual funds should amend their proxy voting policies to support shareholder proposals addressing the crisis in Darfur, and human rights generally. Most of the largest mutual fund families in the country currently routinely vote against or abstain on all shareholder proposals addressing human rights issues. Not only are these funds ignoring human rights issues in the investment process, they are affirmatively telling corporate management to ignore them as well through their proxy votes.

Other Financial Institutions

1. Investment banks should consider the broad range of influence they have over their portfolio holdings, as well as their clients, and should raise the very serious human rights risks that are imposed on the bank and its clients by corporate complicity in genocide and other crimes against humanity. Specifically, banks should adopt formal human rights policies to guide their activities, and publicly disclose how these policies are implemented. These policies should include the full range of a bank's activities, including mutual fund advisory services, project finance, debt underwriting, consulting, etc.

2. Wall Street analysts should incorporate corporate involvement in egregious human rights violations into their analyses. Their reports, for example, should assess the risk to shareholder value imposed by potential corporate complicity in genocide, and should provide investors with quality data to allow clients to fully assess these activities.