OECD OCDE

Comments received from Web consultations

The OECD would like to thank all those who have contributed comments to the draft revised Principles of Corporate Governance

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INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (FIDH)

The International Federation for Human Rights (FIDH), an international human rights non-governmental organisation, representing 115 member organisations in over 100 countries, has long been involved in a process to ensure that corporations assume full responsibility – political, moral, legal – for their activities when impacting human rights. In recent years, the FIDH has engaged various programmes for a sustained dialogue with corporations over their social and human rights responsibilities, which all call for an enlarged vision of the responsibilities and therefore the governance of corporations.

International human rights law is clear: private entities such as corporations are bound by international human rights standards. It is also now widely acknowledged that, because of the large financial, economic and social impact of corporations, stakeholders other than the Board and shareholders must be involved in the process of governing a corporation, in particular employees as well as affected communities.

The FIDH is thus particularly interested in the OECD Principles of Corporate Governance, the implementation of which should represent a step in guaranteeing full corporate responsibility. Unfortunately, the FIDH does not deem the revised draft as it stands to offer sufficient guarantees to ensure such an aim, just as it does not sufficiently include procedures by which people affected by corporate activity might have their views taken into account. The FIDH also wishes to express its concern about the vague wording of many of the provisions of the revised Principles, which may allow for interpretations contradicting the spirit of the Principles.

Chapter III - "The role of stakeholders in corporate governance"

The FIDH is particularly concerned about chapter III of the Draft revised principles of Corporate governance, which does not even define the stakeholders, and moreover does not reflect an enlarged understanding of the governance of corporations, beyond merely addressing the articulation between shareholders and managers – although such and enlarged understanding has now become the rule for all international bodies regulating corporations. Other stakeholders than shareholders and managers must have a voice in the mechanisms that govern corporations.

Definition of stakeholders

The FIDH holds the view that chapter III should include a definition of stakeholders as given by the "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights", adopted by the Sub-Commission on human rights in august 2003 (E/CN.4/Sub.2/2003/12/Rev.2). The Norms state that

"The term "stakeholder" includes stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. The term "stakeholder" shall be interpreted functionally in the light of the objectives of these Norms and include indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation or business enterprise. In addition to parties

directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations or other business enterprises such as consumer groups, customers, Governments, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations, and others."

Enhanced participation of all stakeholders

The FIDH is seriously concerned about the vagueness of the wording of chapter III regarding the participation of stakeholders. In its current wording, chapter III falls far short of an objectively effective mechanism to ensure stakeholder participation.

The FIDH wishes to underline that the international human rights normative framework includes the right of those affected by key decisions to participate in the relevant decision making processes. The right to participate is reflected in numerous international human rights instruments such as the International Covenant on economic, social, and cultural rights and the UN Declaration on the right to development, as well as in the above-mentioned UN "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights".

In particular, the FIDH is concerned about the insufficiency and lack of precision of

- Principle III B **("**Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights"),

- Principle III C ("performance-enhancing mechanisms for employee participation should be permitted") and

- Principle III D ("Where stakeholders participate in the corporate governance process, they should have access to relevant information"),

In effect, these provisions allow a wide margin of discretion to the managers as to the information they agree to make public, and which does not guarantee access to judicial recourses for affected stakeholders.

The FIDH is also concerned about proposed Principle III E ("Stakeholders, including individual employees, should be able to freely communicate their concerns about illegal or unethical practices to the company board and their rights should not be compromised for doing this"). The FIDH regrets the lack of supervising and monitoring mechanism induced by such a provision. "Communicating freely" in no way guarantees that stakeholders' viewpoint will be taken into account in governing procedures. The FIDH holds the view that the OECD principles should encompass a mechanism such as provided for by the above-mentioned UN Norms: *"This monitoring [of the enterprise] shall be transparent and independent and take into account input from stakeholders (including non-governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other business enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms"*

Chapter IV "Disclosure and transparency"

The FIDH is surprised by the limited scope of Principle IV A on the material information to be disclosed by a company. In particular, it regards Principle IV.A.7 ("Disclosure should include, but not be limited to, information on: […] Material issues regarding the employees and other stakeholders") to be largely insufficient to ensure effective responsibility by the corporation. The FIDH calls to mind that there

is a growing recognition that the policy of disclosure of a corporation should include not only their policy regarding human rights, social and environment responsibilities, but also the actual impact of their activities on such domains. The annotation could usefully call for the commissioning by the board of directors of independent human rights, social and environmental impact assessment.

Chapter V "The responsibilities of the board".

The FIDH wishes to express its serious concern about Principle V C: “The board should apply high ethical standards. It should and take into account the interests of stakeholders"**.** The FIDH calls to mind that “ethical standards”, however “high”, do not constitute an internationally agreed norm, and finds it particularly regrettable that the revision of Principle V.C does not call for the duties of directors to respect explicitly the Human Rights Declaration and other human rights instruments, which form the only possible foundation of such “ethical standards”.

Besides, the FIDH is surprised to see “ethical standards” and the “interests of stakeholders” lumped in one §. Experience unfortunately teaches us that the two are frequently at odds, and are at best two distinct issues. To have them together under one principle, may confuse corporation about their duties and the broader principle of stakeholder participation.

We appreciate the opportunity to submit these remarks and suggestions and remain at your disposal to clarify any of the issues raised.

MVC ASSOCIATES INTERNATIONAL: WWW.MVCINTERNATIONAL.COM

Thank you for your invitation to comment on the new draft principles of Corporate Governance issued by the OECD.

Based on our just released research completed over 10 years regarding Level of Board / CEO accountability and capability, we would suggest adding some additional principles:

1. Disclosure

Companies should disclose their goals and activities in each of the 3 domains of Leadership Accountability and Governance

a) Operational Domain - focused on financial and other results from current business operations

b) Business Development Domain - focused on development of future products, services and possible new business models, as a basis for assessing level of innovation and risk in the enterprise on behalf of shareholders

c) Global Industry Domain - focused on the role of the enterprise in society and goals and objectives related to corporate citizenship, shareholder value and sustainable development

Companies should ensure that all disclosures are not boiler plate and accurately reflect how policies are actually carried out by the Board and management on behalf of shareholders.

2. Responsibilities of the Board

a) the board is accountable for defining the level of work complexity and accountability of the CEO role (there are five levels based on current research) as the core foundation for determining ethical, defensible and transparent:

i) CEO selection and succession planning

ii) CEO performance appraisal

iii) CEO / executive compensation and pay for performance

b) the board is accountable for aligning the capability of the Board with the level of work complexity and accountability of the CEO role (there are 5 levels of board capability) in managing shareholder risk

see matrix F2

c) the board is accountable to ensure that Pay for Performance aligns ethical and defensible executive compensation with the 3 Leadership Accountability & Governance Domains providing for a transparent integration of compensation and the appropriate level of true value creation (current and future) for customers, shareholders and global society

Matrix F2

Board / CEO Capability Matrix

	CEO – Operating Below Required Capability Level	**CEO +** Operating at or above Required Capability Level
Board + Operating at or Above the Required Capability Level	**CEO Driven Shareholder Risk**	**Shareholder Value Creation** *("the leadership challenge")*
Board - Operating Below the Required Capability Level	**Shareholder Value Destruction**	**Board Driven Shareholder Risk**

(DRAFT PAPER F3) Ivey Business Journal – Final DRAFT – Jan 12, 2003

Are Boards and CEOs Accountable for the Right Level of Work?

By Mark Van Clieaf, MVC Associates International, Tampa, Toronto

WILLIAM MICHAEL CUNNINGHAM AND CREATIVE INVESTMENT RESEARCH, INC.

We understand that the OECD Steering Group on Corporate Governance, "in the interest of broadening the opportunity to participate, is now asking for public comment on the draft text of the Principles of Corporate Governance. This is an opportunity for a broader segment of the public to comment and participate in the review process."

We appreciate this opportunity and support the revised Principles of Corporate Governance. In addition, we refer the OECD, and incorporate by reference, our comments on corporate governance rules proposed by the US Securities and Exchange Commission. The complete text of these comments is available on-line at:

Security Holder Director Nominations: ***Release No.:*** IC-26206 ***File No.:*** S7-19-03

Comments of William Michael Cunningham, Social Investment Adviser, William Michael Cunningham and Creative Investment Research, Inc.

http://www.sec.gov/rules/proposed/s71903/wmccir122203.pdf

Comments on S7-36-02: Disclosure of Proxy Voting Policies. Comments of William Michael Cunningham and Creative Investment Research, Inc.

http://www.sec.gov/rules/proposed/s73602/wmcunningham1.htm

Comments of Creative Investment Research on S7-10-03

http://www.sec.gov/rules/other/s71003/wmccreative050503.htm

Summary of Comments on Proposed Rule and Rule Amendment under the Investment Advisers Act of 1940 Addressing SEC-Registration of Internet Investment Advisers

http://www.sec.gov/rules/extra/s71002commsumm.htm

In Response to the Commission's Proposed Rules Relating to Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, Exchange Act Release No. 34-48301, Investment Company Act Release No. 26145, File No. S7-14-03

http://www.sec.gov/rules/proposed/s71403/creativeinv090803.htm

Also see:

http://www.sec.gov/rules/extra/s71403summary.htm

VISUAL FINANCE

Thank you very much for having the opportunity to comment the "draft revised text" of the "OECD Principles of Corporate Governance". It's a wonderful thing!

As one of a very few Bondholder Protectors around the World and developer of the "Bondholder Value" Concept I would like to see the Creditor even better protected in that way that more room is given to their needs. It's a great thing that the Bondholder now are mentioned directly in Part III, Section F. But from my point of view it is very important that the management cares not only in case of a restructuring (Argentina, Enron, WorldCom, Parmalat, SAirGroup). Because we have seen since the beginning of the securitization a certain "atomization" of the individual rights, it's important that exactly because of that fact, the Bond Issuers care for the Bondholders. On my website www.visualfinance.ch you will find a definition of the "Bondholder Value Concept". The aim is a better protection and higher visibility for the Bondholders around the world. One big problem is that the Bondholders (until now) are not organised as for example the Shareholders, Employees or sometimes Banks. Because that fact they should specially be treated (as the other stakeholder too).

Both the Shareholder and the Bondholder are financial investors. But when I go through the Principles of Corporate Governance (in Switzerland too), they are nearly neglected. When you count the pages (the room) the Shareholders get, I thing Bondholders and other Stakeholder would deserve more.

Please go and see for the definition of Bondholder Value and think about the Role of the Bondholders. Nearly no Book is written about this Stakeholder Group. They of course deserve more.

Please let me know if you need more information. I would be very glad, if you would give more weight on Bondholder & Creditor Rights.

ALTERNATIVE RISK PARTNERS

*"This document is intended as a basis for dialogue with corporate officers and board members to augment their fiduciary awareness and corporate due diligence responsibil*ity."

"13 Jewels", innovative (3-Dimensional) loss control criteria for directors and officers protection. Provides *surety* for governance *integrity* and Sarbanes-Oxley *assurance* whereas Wall Street is willing to pay a substantial premium. The following provides limited insight of preventativ*e* depth for today's corporate liability exposure.

***"13 Jewels"*, is a comprehensive *Corporate Culture for* "*Shared-Risk Responsibility"*. Derived from a procedure utilized within a nuclear environment for *zero tolerance*. Preventative liability measure of this nature is now commercially available.**

"13 Jewels", culture provides *liability surety* that *augments financial rating* agency practice such as Standard and Poor's, Fitch, and Moody's during evaluation which supports the *assurance for pension and mutual fund* portfolio fiduciary responsibility.

Selected jewels are technical for *tracibility* and conformance to *authenticity*. This persuasively *negates litigation* in concert with *transparency* and *unbiased* decision process that ensures *transformation* challenge for *accurate predicative predictability*.

The *"13 Jewels"* is designed to *strengthen your current risk practice*, *limit* your *liability* exposure and *fortify your* "best practice" to achieve *quarterly performance*.

Alternative Risk Partners

Personal (D&O) Protection

"13 Jewels"

Directors' & Officers'

Personal
Preemptive Protection

S a r b a n e s - O x l e y
Assurance, Surety & Integrity

"13 Jewels"

1. Independent
2. Uxxxxxxxxx
3. Zero Tolerance

4. Dxxxxxxx
5. Transparency
6. Multi-Use / Shared

7. TR Authenticity
   Traceibility
   Rxxxxxxxx
   Reproducibility
8. Predictability
9. Txxxxxxxxx

10. Specialty Insurance
11. Agency Rating
12. Pension & Mutual Funds

13. Accepted **Axxxxxxxx**

"13 Jewels"

Facilitates the congressional mandate for fiduciary awareness and corporate due diligence.

"13 Jewels"

Predictive culture derived from a nuclear facility for analytical assurance and quality control.

Christopher Hardy
281 227 8898

THE IUF

The IUF represents 346 trade union organizations from 121 countries with a representative membership in excess of 10 million members worldwide. We would like to make the following comments on the current "Draft Revised Principles of Corporate Governance". Specifically our comments focus on Chapter III "The role of stakeholders in corporate governance"

We hope our comments will be taken fully into account in the deliberations prior to finalizing the revised OECD "Principles of Corporate Governance"

Chapter III "The role of stakeholders in corporate governance"

Draft should add a generalized right to stakeholder representation. The current text of chapter III does not focus on specific outcomes of corporate governance. The draft's call to respect the rights of stakeholders ***"as established by law"*** is a requirement of good public governance (in the header of the chapter, and Principles A & B). However it fails to fully inform corporations as regards the rights and the responsibilities of the stakeholders. It is essential that the revision include a generalized right to stakeholder representation. We support TUAC's view that the title of the chapter would be better if it were *"The rights and responsibilities of stakeholders"*. Concretely the header of the chapter should be revised to adopt the June 2003 proposal of the OECD Secretariat, that is "The corporate governance framework should recognize the established rights of stakeholders".

Principle III.A would be better drafted as follows: *"The corporate governance framework should include stakeholder representation"*.

These changes would ensure that the chapter gains a minimal level of relevance for OECD countries – at least rising to the relatively modest standards of the European model of social dialogue – and for the developing world. There is currently no consideration in relation to continental European worker participation or to non-OECD countries. The credibility of the chapter and its relevance and application to many OECD countries within continental Europe, and also developing and transition countries is therefore placed in jeopardy. This chapter fails to recognize and is even in part in contradiction to established European practice on social dialogue (for example the European Works Council directive, the directive on generalized information and consultation rights for employees, the European Company Statute, and lately the proposed take-over directive that specifically includes a model for employee consultation (article 14)). The IUF therefore supports TUAC's efforts to urge EU members and the European Commission representatives in the Steering Group to ensure that there is consistency in relation to various EU commitments on stakeholder participation in corporate governance.

There appears to be some conceptual misunderstanding about stakeholder participation and performance enhancing mechanisms. The text does not distinguish between performance enhancing mechanisms and representation of stakeholders. Specifically, for example, employees share ownership schemes (ESOPs), and employee representation (e.g., agreed arrangements with trade unions, works councils, board level employee representation etc) are separate issues within the corporate governance framework and should specifically be recognized as such. Employee representation may on occasion relate to corporate performance but is not and should not be confined to that objective. Employee representation also targets employees' participation at the board level (an independent employee's voice in all major corporate decisions), over such issues as safety and health and importantly representative participation in discussions and negotiations around restructuring processes, none of which are encompassed as "performance-related matters" in company-specific terms. The other employee related Principles: B, D, and E address the issues in part and inadequately. None of them satisfactorily address the principle of employee representation in or access to the corporate governance framework.

FNV

Corporate Governance refers to a sound control of responsibilities of both Managerial and Supervisory Board, vis-à-vis those who have an interest in the risks and in the development of the company either by providing capital or labour.

A difference should clearly be made between the different categories of stakeholders. Employees and shareholders are in a different position than other stakeholders as they can be considered to be participants in the risks and developments of the enterprise.

Chapter 3 dealing with the role of stakeholders should be substantially reinforced, particularly with regard to the position of employees in the corporate governance framework.

It is not satisfactory that this chapter 3 treats employees only as an ordinary group of stakeholders whose legal and negotiated rights have to be respected. Workers should be considered as participants in the company just like shareholders in the sense that they are sharing the risks of the company. They should therefore play a role in the management and accountability systems of the company.

The FNV strongly calls for an explicit and standard setting recognition of employees as a group of stakeholders who, through their representatives, are entitled to a particular place in the Corporate Governance Framework and who should be able to express themselves in Corporate Governance Process of the company. Chapter 3 must provide the Corporate Governance Framework with some mechanisms of employees representation.

A clear distinction has to be made between employees representation and performance enhancing mechanisms. A provision on workers representation in the CGF is crucial because it contributes to a sound and proper management of the company and not in the first place because it contributes to a better performance of employees.

Not only should workers representatives be provided with relevant information, but they should also be given sufficient time to fulfil their tasks in the Corporate Governance Process. The concept of relevant

information should be specified so as to express that it will provide them with a reliable picture of the company, with particular attention paid to activities likely to have significant consequences for workers.

Particular attention has to be paid, should it be in Chapter 3 or 5, to the safeguarding of independence of employee share ownership plans or of company pension funds vis-à-vis the management and the board of the company.

FNV opposes the proposal made in Chapter 1 Part B according to which shareholders should have the right to participate in any decision related to the establishment of a group of companies. If the approbation of the shareholders meeting is required for every single decision, this would be a serious obstacle to good management of the company. For special operations, the proposed addition is superfluous as those are already covered by the category "extraordinary transactions".

The FNV opposes the first paragraph of the comments on Chapter 1 Principle C Part 3 stating to "elect THE members of the board is a basic shareholder right. In practice this should include both the power to nominate candidates and the possibility to vote on individual nominees". This would not be compatible with some national legislation according to which employees representatives are directly or indirectly involved in the nomination of board members. A reference to these national laws is highly desirable in this paragraph.

FNV opposes the comment on Chapter 2 Principle A Part 3 according to which depositary receipts holders are virtually equalized with shareholders. This is incompatible with current Dutch legislation.

STEFAN ALBER, FINANCIAL ADVISOR

I believe your Principles should address more fully some key factors which mitigate the effectiveness of Boards in reaching high quality oversight decisions. There are issues of clarity of the Board mandate, capture of Board members by management compromising independence, part-time nature of Board work, lack of a separate Board budget to allow consultation of experts not beholden to management, evaluation of Board effectiveness, standards in setting executive compensation. And finally, there is the issue of fraud.

On the mandate issue, new Board policy statements maybe required to clearly state its primacy and that oversight is its prime function. In many cases, there is still the perception that Boards are there to provide business advice primarily.

On the capture of Board members, the focus should be on independence of mind. This can only be achieved by appointing persons of strong beliefs, business knowledge und underpinned by no fear of reprisal and appropriate incentives.

All too often the nominating process is being corrupted by management.

On the part-time nature, Boards should be endowed with their own budgets and executive staff to overcome the widespread notion that Board members lack adequate business insight.

On Board effectiveness evaluations, are we sure that self-evaluation is really working? Are there cases of significant improvements on account of self evaluations? Why not simply call for independent evaluations?

On executive compensation, the issue is how to drastically reduce the outlandishly large compensation packages. But, what are reasonable standards?

What multiple of an average salary should be applied?

On fraud, it would be helpful to address this issue separately given the recent huge scandals both in the USA and Europe. Should both external and internal auditors be better equipped to detect fraud? Should Boards have separate investigative powers?

Hope these comments are helpful.

WENDY LANE, CHAIRMAN, LANE HOLDINGS, INC. NEEDHAM, MA, USA

Your proposed Principles are excellent! You certainly have learned well from the mistakes we in the U.S. have made in focusing on rules rather than on principles. You are also wise to emphasize the principles' focus on economic and entrepreneurial advancement as best means to serve shareholders and stakeholders.

There is one important addition I would suggest. Both our rules and your Principles emphasize shareholder rights and the responsibilities of corporate boards. There should be a section reinforcing the responsibilities of managements as they parallel those of boards. You might say that those responsibilities are obvious, but one could make the same case for board responsibilities. It was the abdication of managers' responsibilities to their companies' shareholders and stakeholders that created the spectacular breaches of trust in the U.S. If the managers had been more cognizant of their responsibilities to make decisions, including compensation decisions, that would serve *all* shareholders best, not just themselves, such breaches would not have happened. It would be wise to *explicitly* remind managers that they represent the best interests of the company, its shareholders, and its stakeholders. Like the board, they are agents and fiduciaries.

By way of providing you some perspective on myself and my ability to assess governance: I have sat on five public company boards in the U.S. and have chaired both Compensation and Audit Committees as well as sitting on Governance/Nominating and Ethics Committees. Currently, I serve on the board of Laboratory Corporation of America (the second largest independent clinical lab in the world) and recently served on the board of Tyco International, where I was the only former board member to establish governance policies and practices for the new board. Through assisting to rectify the problems related to management breaches of conduct, I have gained deep and practical experience in governance and have spoken on various aspects of the topic at institutions such as Harvard Business School, the Wharton School, and Stanford Law School. I also have reviewed governance criteria for one of the major rating agencies, the securities commission of New Zealand, and corporations. I have international experience from 12 years of investment banking at Goldman Sachs and Donaldson, Lufkin & Jenrette, including clients such as ICI, Rhone-Poulenc, Roche Holdings, and others.

I hope you find my comments useful.

DGB

The DGB, the German trade union umbrella organisation, was engaged from the very beginning in the debate about Corporate Governance internationally and at home. German trade unions participated to the Governmental Commission on Corporate Governance (Baums-C.) in 2000-2001 and have one seat in the German Corporate Governance Code Commission (Cromme-C.) which is a standing commission.

The **participation of employees**, as we have it in Germany[1], **is a fundamental part of good Corporate Governance** and without a good Corporate Governance all the established rights of the

[1] And from October 2004 on we will have that mechanism on the European level in the European Company, the SE.

stakeholders have less value. This is the basic reason for our support for the position of TUAC[2] in the current process of revision of the OECD-Principles and our following comments.

There were good reasons after the Enron-scandal to begin a debate about a revision of the Principles of 1999 and one can now find on a daily basis new "reasons" in the economic press news for strengthened and more precise Principles. The Principles are relevant not only for the developing countries – as it was originally the aim in 1999, in the wake of the Asian financial crisis - they are too for those so-called sophisticated capital markets within the OECD. The stakes are high, the priority of the agenda should be on the quality of the review, it should not be second to the speed of the process to come to a quick end with a text which would not fulfil the essential criteria.

Our focus is on the Stakeholder-Chapter (III.)

Although we welcome the new Principle **III.E** which is bringing the idea of "whistleblowing" on its way, we are very concerned about the overall treatment of that chapter within the review process. We regret that the draft revised chapter is not making a great step forward in the question of stakeholder representation.

We support the TUAC-position that the title of the chapter should be: **"The rights and the responsibilities of stakeholders".** This would better reflect the content of the chapter and current best practises and developments in within corporations. As they stand, the header of the chapter and Principle III.A are absolutely dissatisfying. Principle III.A calls for companies to recognise or respect existing laws, in practice that is to ask companies not to break the law when dealing with stakeholders and workers in particular. That is not a "best practice" of corporate governance, it is a basic requirement of public governance. There are - notably in Europe- - established rights of stakeholders which are not written in law, but based on contract and/or collective agreements.

The current text does not inform on the best practices associated to the fulfilment of these rights. Neither does it take into account the European model of social dialogue and the emerging cross border rights of workers as developed by successive EU directives (including on European Works Councils and in the European Company) and lately the new take-over directive that requires employee consultation as well as several national participation schemes in European countries.

Principle III.A should read: **recognise the established rights of stakeholders** and **should include stakeholder representation.**

Furthermore, employee representation, especially collective agreements with trade unions and employees participation at board level[3], is a separate issue to "performance enhancing mechanisms", and should be distinguished accordingly. The text should refer to Board level employee representation as an effective means to bring an independent voice in all major corporate decisions.

There is in the Corporate Governance issue often a debate about the independence of board members (see also chapter V. of the Principles). But to emphasize it already here: Even the SEC has understood in the process of implementing the Sarbanes-Oxley-Act that for example German non-management employees serving as members of the supervisory board had to be exempted from the independence requirements. On the other hand, employee-members are often the first to warn before bad intentions of the management.

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[2] Trade Union Advisory Committee to the OECD

[3] Be it in the Two-tier-model as for example in Germany or Austria or the One-tier-model as for example in Denmark or Sweden. Both eligible in the future SE.

Comments to the other chapters

1. Preamble

Whilst in the Preamble (point 15.) it is expressly mentioned that there is no single model of good Corporate Governance, and the Principles do not advocate any particular board structure, in the following text the Two-tier-system is not well reflected; this should be changed.

2. Chapter I.

We do not think that the phrase "key ownership functions" in the title is clear, concise and understandable. The revision of chapter I (and in particular new Principles I.F.1&2) calls for "rights - but also - for responsibilities of the shareholders. The title should be changed accordingly and refer explicitly to responsibilities.

For some parts, the text is not consistent with the two-tier-system, especially Principles I.C. 2 and 3 . On the other hand new Principle I F is welcome. Principle I.G. should be amended to ensure that any "acting in concert" be disclosed to the market.

3. Chapter IV.

We welcome the aim of Principle IV.A.4, but yet again there is no distinction in that text between managers and supervisory board-members as established in the Two-tier-model and to the use of independency at this place, we again have to emphasize that employee-members of the board are independent by the definition of participation.

4. Chapter V.

In the header and in Principle V.A, the definition of the accountability of the board as "to the company and the shareholders" is unacceptable from our point of view. That text expresses a certain idea of the relation between the company and the shareholders. Instead it should read: "to the company as a whole". The accountability of the board includes all stakeholders, including the shareholders.

Principle V.D.5. is another example where the Two-tier-model is ignored. the election of the shareholder members of the supervisory board should be effective and transparent, however in some countries, the appointment of the management board is a responsibility of the supervisory board , not of shareholders.

We are also concerned by the weakness of Principle V.E. which revision obviously does not reflect the many lessons learnt from the series of scandals in recent years. Even in One-Tier-System organisation of the board, one should ensure separation of supervisory and management functions of the company (the separation of the Chief Executive and the Chairman should be declared in the Annotations as good practise). Finally we suggest the following change in Principle V.E.1:

"The board should be independent from management, dominant shareholders and others in a position to influence the company **or to undermine its accountability to all the stakeholders** ".

This would better reflect the notion that independence of the board is not an objective itself, but it is rather an effective means to ensure the accountability of the board to the company as a whole.

THE ASSOCIATION OF BRITISH INSURERS

In accordance with the OECD's invitation, we have pleasure in attaching comments from the Association of British Insurers on the OECD's new draft guidelines on corporate governance. They are offered from the perspective of our members as large institutional investors controlling funds of some Euros 1,500bn equivalent.

In particular we would emphasise our belief that a carefully crafted set of OECD guidelines would set a useful benchmark for the European Union's own efforts towards convergence, thereby obviating the need for detailed prescription at the European level.

2. Members of the Association of British Insurers are actively involved in institutional investment, both because of the need to invest life and other premiums and because of their role in managing third party funds. Assets under management exceed £1,000bn, including extensive equity investments in the UK and overseas markets.

3. Insurers have long been actively involved in seeking to raise standards of UK corporate governance in the firm belief that this will help secure long term returns for customers. The world-wide nature of investment also means members are keen to see high standards throughout the global financial markets.

4. We therefore welcome the opportunity to comment on the new OECD draft principles. A strong consensus around a set of internationally agreed principles will not only provide a useful benchmark to which emerging markets should aspire. It will also serve as reminder of standards that investors can expect to find in developed markets.

5. In particular we welcome the elaboration of principles that can be used as a reference for the EU in developing its own approach to corporate governance. Reference to OECD principles in the implementation of the Corporate Law Action Plan would obviate the need for the EU to develop its own prescriptive rules on convergence.

6. The critical task, however, is to strike the right balance between generalised principle and excessively detailed prescription. Although investment is becoming more international, precise governance standards must reflect national and market cultures which continue to differ widely from one centre to another. Whereas the existing principles suffer in part from blandness, we have been concerned at stages in the debate on the new principles that the new version would be too detailed in its prescription.

7. By and large, however, we believe that the latest text sets an appropriate balance. We would, however, draw attention to the following points of detail.

   – Section I, Principle C 3. We concur with the broad principle as drafted, but we have reservations about the explanatory note on page 17 of the draft guidelines, which states that shareholders should be able to participate in the nomination of directors. We believe strongly that boards should have a properly constituted nomination process, and that shareholders should have a right to vote on the election of candidates, but we do not believe it is appropriate to encourage a model where shareholders nominate directors directly, as we feel this could undermine the effectiveness and decision-making capacity of unitary boards.

In this context aspects of the current debate in the US have given us some concern. We do not believe the model being developed there will have useful application elsewhere, and we would be concerned at wording in the OECD guidelines which sought to promote it as an ideal.

- Section I, Principle D. We agree that capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed. We believe this principle would benefit from the addition of the words "and discouraged."

Unequal voting rights have been used in many cases to shield management against takeover and limit a free market in corporate control. By supporting weak management in office, this can damage economic prospects and undermine the confidence of minority shareholders in their ability to exercise their rights. Companies should aspire to a regime where rights of control are distributed in proportion to the amount of equity investment at risk.

- Section I, Principle F1. While we are strongly in favour of transparent arrangements between fund managers and beneficiaries, we believe it is premature to establish a firm principle that institutions should disclose to the market details of voting decisions on an annual basis. The complex nature of many voting decisions creates a risk that pro forma disclosure will mislead. It may also make institutions vulnerable to pressure from lobby groups with whom they have no contractual relationship.

The ABI has given this issue careful consideration over the past year and it is covered in our statement of voting principles, which is attached as an Annex below. Our main conclusion from this debate was that institutions should monitor the demand from their retail customers for information and respond accordingly. Though a number of our members are now making public disclosures, most say that demand for this from retail clients is minimal. On the other hand we would expect pension fund trustees to take an active interest in the voting record of fund managers and for fund managers to report back to them on a regular basis.

- Section II, Principle A3. We support strongly the suggestion in the explanatory note on page 24 that depositary receipt holders should be able to issue binding voting instructions, with respect to the shares held by a depositary or trust office on their behalf. Unless this principle is respected there is a danger that the voting right will be appropriated by executives and used to support their resolutions.

- Section IV, Principle A6. Disclosure related to material risk factors should include reference to social as well as environmental factors as these can affect a company's performance (explanatory note on page 31). In this regard we would cite issues relating to the pricing of drugs in developing countries and the labour standards applied by the company or its suppliers.

We agree strongly with the suggestion in the note that disclosure should not be made in detail greater than is needed to inform investors of the material and foreseeable risks of the enterprise. Investors are not helped by the provision of a wealth of extraneous information, which makes it harder for them to discern what the real risks are and satisfy themselves that they are being properly managed.

- Section IV, Principle A8. We fully support timely disclosure of voting totals. In order to give a clear picture to investors, these need to be broken down into votes for, votes against and votes withheld or abstentions where arrangements provide for these. Investors should not have to make calculations of their own in order to estimate any one of these totals.

Companies should recognise that it is in their own interest to be fully transparent with the regard to the outcome of polls. Otherwise they risk forfeiting the confidence of investors and the broader market.

– Section V, Principle G1. We believe that it is insufficient to call on boards to "consider assigning" independent directors to tasks where there is a potential conflict of interest such as the management of remuneration and ensuring the integrity of financial and non-financial reporting. These tasks require the attention of independent directors if the conflicts are to be managed. We would therefore urge the OECD to call on boards "to assign."

Annex

VOTING AT COMPANY GENERAL MEETINGS – AN ABI STATEMENT OF POLICY

Introduction and background

Institutional investors wield significant influence over companies through their voting rights at general meetings. ABI members, who control some 20 per cent of shares listed in the UK, believe it is important that this right be exercised responsibly. This is an essential part of their duty to the millions of savers who place their money with life insurance companies or in pension funds managed by them.

In the light of recent developments, including agreement on the new Higgs Code of corporate governance, the Company Law debate over the role of institutions, the launch of the European Corporate Governance Action Plan and questions over the reliability of the system of registering votes, it is appropriate to set out the views of the Association on best practice in voting.

These views have been endorsed by the ABI Board and Investment Committee. They rest on the over-arching principle that institutions should make active but considered use of their voting power with the aim of securing value over the longer term for those whose money they are investing. This means they should aim to use their votes wherever practicable.

The voting decision and companies

Members are guided in their voting decisions by their support for the Combined Code on corporate governance and by the ABI's own guidelines[4], including those on share capital management, remuneration and social responsibility.

Fulfilment of voting responsibilities will involve considering the particular circumstances of the investee company and careful assessment of any explanations for departure from best governance practice set out in the Combined Code. Dialogue with companies is an important part of the process

In keeping with the Institutional Shareholders' Committee (ISC) statement on shareholder responsibilities published in October 2002[5], the ABI recommends that its members should raise concerns directly with investee companies in the hope of resolving them privately before any critical vote.

[4] Full guideline details are available on our website www.abi.org.uk and on that of our Institutional Voting Information Service www.ivis.co.uk

[5] See also website references above.

Where companies have declined to address legitimate concerns of investors, the latter should be prepared to vote against the board on relevant resolutions. In these cases they should inform companies of the reasons for their decision.

Investors should seek to make a clear decision to vote in favour of or against each resolution, in preference to the use of an abstention. However, if a decision to abstain is taken, it should represent a warning signal of the extent of shareholder concern, and this message should be conveyed to the company.

Institutions should use their best efforts to ensure that votes cast are properly recorded and collaborate with others as necessary to ensure that the voting process goes smoothly.

The voting decision and beneficiaries

Institutions should aim for a high level of transparency on voting policy, consistent with the overall aim of generating value for beneficiaries.

Insurance companies should have a clear policy on voting which is approved at board level, publicly available and easily accessible to retail customers and investee companies, preferably via their website[6].

The boards of life companies should monitor implementation of this policy through regular reports from fund managers conducting investment business on their behalf whether in-house or externally.

Such reports should include details of how votes were cast in individual cases. For example, they may highlight instances where the institution abstained or voted against the board and the action taken to convey concerns to the company concerned.

In keeping with the ISC statement, insurance companies conducting business for institutional third parties such as pension funds should have similar report-back arrangements with trustees or those in a similar position of accountability. They should follow the wishes of trustees or beneficial owners in executing votes and where this leads to an adverse voting decision, they should explain the circumstances to the investee company.

The ABI does not believe that there should be a legal requirement to disclose specific voting records to the general public. Some members do so now on a voluntary basis. All are, however, encouraged to monitor demand for such disclosure from retail customers and respond accordingly, taking account of the need to ensure that the context in which decisions were taken is properly explained and understood.

[6]Such a statement might cover, inter alia, the institution's approach to engagement with companies, voting, attendance at annual meetings, board composition, directors' remuneration, audit committee accountability, social responsibility and takeovers.

ADRIAN CADBURY

Many thanks for sending me the draft revised text of the OECD Principles of Corporate Governance. I think the revised text is admirable and I would fully support its publication as it stands.

On going through it, I had two thoughts which are perhaps worth passing on.

Page 31. IV 7. You might consider whether disclosure of company policies in relation to the training and development of employees at all levels, of health and safety records and of the length of service of employees (retention record) should be included. Arguably they are covered under the second paragraph which refers to human resource development in general. They would however provide useful practical evidence of a company's ability to make the best use of its human resources.

Page 40. V E3. The second paragraph under this heading refers to board training and evaluation. It might be worth considering strengthening this paragraph. It is now accepted practice for all professions to require their members to undertake a programme of continuous professional development and that should also become accepted practice for board members. Equally, it is hard to see how boards can improve their performance without some formal system of self-assessment. It might also be helpful to refer to the need for a formal process of induction for new board members, whether executive or non-executive.

These are however only minor points of emphasis for consideration, rather than calling for any amendment to the text as it stands which I think marks a real achievement by those who have worked on it.

I do appreciate having the chance to comment and I congratulate you and the OECD on the leadership which you have given to companies worldwide in the matter of corporate governance.

THE ICGN

The International Corporate Governance Network (ICGN) is pleased to make the following comments concerning the draft revised OECD Principles of Corporate Governance.

The ICGN is the premier investor-driven worldwide organization for corporate governance. A large number of its members are officers of investors, both institutional and private, and their advisors, with assets of approximately US$10 trillion. Members also include leading experts and commentators on governance from OECD member states and emerging markets. The ICGN seeks to represent a global consensus on the role of corporate governance in capital markets and, in particular, on what is required of corporates and investors in respect of governance. In addition, the ICGN produces reports on current issues and comments on developments. Recent documents may be accessed on its website (www.icgn.org). As you know, the ICGN has been part of the OECD's consultative process in developing the original and, now, the revised, corporate governance principles.

With reservations noted below, the ICGN welcomes the OECD's revisions. It believes that the new principles will contribute importantly to the development and improvement of corporate governance practices around the world and, by doing so, to healthier economies. In many respects, the new OECD language reflects material congruence with the ICGN's own Statements, including on voting practices, corporate governance, executive and board remuneration and shareholder responsibilities.

In particular, the ICGN applauds the following highlighted improvements over the 1999 version:

- *Investor rights.* The new draft recognizes explicit rights of shareowners to nominate corporate board directors, vote on equity-based incentive remuneration and propose resolutions at general meetings [I.C (2) and (3)]. Further, the Principles rightly clarify that outside auditors should be accountable to shareholders and they make clear that investors should have basic rights to question outside auditors with a view to increasing levels of director and investor confidence in the integrity of financial statements [IV D and I.C (2)]. The Principles underscore that investors should have the ability consult with each other on issues of corporate governance [I.G]. And they affirm that minority shareowners should enjoy protections from abuse by controlling shareowners [II.A.(2)].

- *Board practices.* The new draft contains helpful calls on companies to take steps to instill "high ethical standards" [V. C.]. It also emphasizes for the first time that boards should have a "formal and transparent" board election process [V. D. (5).]

- *Voting.* The new draft adds the OECD's voice to that of the ICGN and others for measures that permit unrestricted cross-border share voting [II.A. (4)].

- *Disclosure.* The Principles pave advances in accountability by calling for broader information on the background of board candidates and on related party transactions [IV. A. (4) and (5)].

- *Fund and intermediary duties.* The new draft introduces the principle that investing institutions should disclose voting policies. Language in this respect parallels the ICGN's Statement of Institutional Shareholder Responsibilities, adopted unanimously at the 2003 annual meeting in Amsterdam, though the ICGN goes further in asking funds periodically to disclose how they execute ownership monitoring and how they test the effectiveness of it. Further, the latest OECD draft asks intermediaries such as analysts, brokers, rating firms and voting agents both to disclose conflicts and describe how they are handled.

- *Stakeholders and non-financial disclosure.* The new draft sets an important disclosure benchmark in asking corporations to provide employees and other stakeholders with "relevant and sufficient" information "on a timely and regular basis" [III. D]. Principles also add helpful language urging boards to ensure the integrity of non-financial reports, which often include subjects of material interest to stakeholders and the market in general [V.G. (1)].

The ICGN does, however, wish to suggest constructive ideas to enhance the effectiveness and relevance of the Principles both in raising confidence in markets and helping them generate growth.

- *Potential insider conflicts.* The new draft spells out that members of the board and key executives ought to disclose to the board whether they directly or indirectly have a material interest in transactions affecting the corporation [II. C.]. This is in part an advance over the 1999 text in that, through the language on indirect interest in the Principles and Annotations, it embraces the notion that the interests of controlling shareowners should be made known to the board. But in other respects the latest text is limiting. First, the 1999 provision was broader, applying the

disclosure recommendation not just to specific transactions, but also to "matters affecting the corporation." This language ought to be restored, since there are often cases where controlling shareowners have strategic interests in the company—not just in particular transactions—that may diverge from minority investor interests. Second, the original draft circulated in September 2003 urged that such interests be generally disclosed, not just disclosed to the board. It is vital for shareowners to be aware of potential conflicts when making judgments on board members or strategic company decisions. This earlier language also ought to be restored. The ICGN further recommends that IV. A. (5) ought to be expanded to include a call on companies regularly to explain to shareowners the process by which related party transactions are generally decided.

- *Fund conflicts*. While the latest draft rightly asks investing institutions to disclose to beneficiaries "how they manage material conflicts of interests that may affect the exercise of key ownership rights regarding their investments," it omits language in the September 2003 version that asks institutions also to disclose such material conflicts of interest [I. F. (2)]. The deletion represents a break from the ICGN's Statement on Institutional Shareholder Responsibilities, which declares that institutional shareholders "as a matter of best practice" should at least annually disclose to beneficiaries "a list of conflicts of interest that may impede an independent approach towards the companies in which they have invested" [III. 1. (h)]. The latest OECD Principles entirely agree with this stance in respect of intermediaries such as analysts, brokers, rating firms and voting agents. These bodies are asked both to disclose conflicts and describe how they are handled. Language placing similar duties on funds should be restored. The ICGN believes that fund beneficiaries need to be aware of such potential conflicts if they are to exercise judgment on the effectiveness of measures to manage them.

- *Remuneration*. The September 2003 draft made an important advance when it asked that board and key executive remuneration be aligned "with the longer term interests of shareholders and the company." The latest draft asks only that compensation be aligned with "the longer term interests of the company" [V. D. (4)]. The 2002 ICGN Statement on Best Practices for Executive and Director Remuneration asserts that compensation should be aligned with the interests of investors so as to ensure that management is working consistently for shareholder value. The ICGN therefore prefers language in the original revision draft.

The ICGN once again appreciates the opportunity to comment on the OECD Principles revision, and extends its congratulations to the fine and hard work undertaken by staff, the Steering Committee, representatives of member and non-member states and other market contributors. ICGN representatives would be pleased to discuss the foregoing comments with appropriate officials of the OECD.

ASSOCIATION OF SUPERANNUATION FUNDS OF AUSTRALIA LTD. (ASFA)

This letter is in response to the Invitation to Comment on the Draft Revision of the OECD Principles of Corporate Governance. The Association of Superannuation Funds of Australia Ltd. (ASFA), a peak institutional investor body in Australia, welcomes this opportunity to provide comment.

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation (pension) funds, their trustees and their members. Our members, which include single- employer, multi-employer, public sector, and retail superannuation

providers, comprise more than 5.7 million member accounts in Australia and over 80% of superannuation savings.

Superannuation fund trustees, as the primary fiduciary, have a duty, under both statute and common law, to make investment decisions in the best interests of the members and other beneficiaries of the fund. Superannuation funds currently hold an estimated $A246 billion (46% of their total assets) in Australian equities. This represents approximately one-third of Australia's domestic capital market. Australian superannuation funds also have significant overseas equity holdings.

As a significant shareholder, Australian superannuation funds have a keen interest in the performance of listed companies and the efficient operation of capital markets, both in Australia and elsewhere. Poor governance of companies can lead to poor financial performance, as well as fraud and failure. Good corporate governance, conversely, can have a positive impact on the earnings of superannuation funds and consequently the incomes Australians can expect in retirement.

ASFA has long taken an interest in issues related to governance. ASFA has been an active member on the Australian Stock Exchange Corporate Governance Council, which issued landmark best practice corporate governance guidance for Australian listed companies last year. ASFA has also issued guidance to superannuation fund trustees on becoming "active share owners". (OECD: This guidance can be found at http://www.superannuation.asn.au/policy/bp17.pdf)

Comments on Draft OECD Principles

"Institutional Investors Should Not be Required to Vote"

ASFA encourages Australian superannuation fund trustees to become "active shareowners", which we define as including not only proxy voting but engagement and discussion with companies.

We recognise the importance of voting by shareowners. Guideline B6 of our Active Share Ownership Guideline notes "Superannuation fund trustees should vote on all company resolutions within the scope of the Active Share Ownership Policy where they hold shares, wherever practicable to do so." Further, we note:

"Voting is important, as it is one of the mechanisms by which shareholders can directly impact on company decisions. Trustees should not remain "passive" shareholders, as their voting rights are a valuable asset of the fund. Trustees should seek to exercise their voting rights on important matters, even if they actively choose to abstain on a particular motion."

Though encouraging voting, we broadly agree with comments made recently by the Secretary-General of the OECD Donald Johnston, reflected within the Draft Principles, that compulsory "would not necessarily lead to informed use of ownership rights".[7]

Recommendation – ASFA supports the position within the OECD Principles of voluntary voting by institutional investors.

"Institutional Investors Should Disclose Voting Policies"

[7] Donald J. Johnston (2001) "A call for a culture of value, not just rules – from the corner office to the boardroom", *Policy options*, November 2001. p. 26.

We support improved disclosure by institutional investors. A central recommendation in our Best Practice guidelines is for trustees to develop and disclose written policies on how they will behave as shareowners. ASFA believes that such policies should be disclosed to members of superannuation funds.

Recommendation – ASFA supports the position within the OECD Principles on disclosure of voting policy by institutional investors.

"**Institutional Investors Should Disclose Voting Record to Market on Annual Basis"**

ASFA sees merit in funds disclosing their voting record on "significant issues" – for instance, where there is a critical issue that affects the value of the investment or where the fund has voted against a board recommendation.

Such disclosures, however, will impose costs, a point recognised by the SEC in its discussion about the new rules for mutual funds. In our discussions with US mutual fund managers, the cost of compliance with the SEC requirements is seen as significant and the entire undertaking complex and time-consuming. The cost and benefits of the recent US reforms in practice have yet to be fully evaluated.

Recommendation – ASFA supports disclosure of voting on "significant issues" by institutional investors. ASFA believes the experience of OECD member countries in the area of compulsory voting disclosure should be examined prior to requiring disclosure of voting record within the OECD Principles.

More information about ASFA and the Australian superannuation system can be found at our website www.superannuation.asn.au.

ANONYMOUS

We recommend omitting the sentence "The voting record of such investors should also be disclosed to the market on an annual basis" under I. F. 1.

(Reasons)

1. The Japanese Investment Trust Law requires investment trust management companies to exercise the voting rights of shares held by investment trusts, and the inspections by Financial Services Agency (a regulatory authority) ensures the compliance with the Law.

Furthermore, our Association requested its member companies to prepare the internal rules for exercising voting rights. Each member company already prepared the internal rules and exercises the voting rights in accordance with them.

The purpose of the provisions of I. F. is to encourage shareholders to exercise the voting rights. This purpose could be achieved through disclosing various policies without the disclosure of voting record. In fact, voting rights have been exercised in Japan as mentioned above.

2. U.S. SEC adopted the rule under the Investment Company Act to require U.S. mutual funds to disclose the voting record. When SEC asked the public comment on the rule, a lot of commentators opposed it. (However, in spite of these oppositions, SEC adopted the rule almost same with the original proposal.)

We heard that SEC adopted this rule last year, but the first disclosure of voting record in accordance with the rule will actually begin from now on. Therefore, its effects and impacts were not yet evaluated nor verified.

Investment fund systems are different from country to country. The specific way that is not yet evaluated and verified should not be applied uniformly to all institutional investors including investment funds in other countries. Instead, we believe that each country should consider its own way in light of its own investment fund system.

3. In case of investment funds, investors including individual investors with small investment amounts should bear all costs arising from the disclosure of voting record. The costs and benefits of disclosing voting record should be thoroughly considered in determining whether it is appropriate that investors of investment funds bear such costs in order to encourage exercising the voting rights by shareholders. We believe that it is too early to get to any conclusion without sufficient evidence of merits for investors.

4. Another concern is that the disclosure of voting record will be used for political agendas and will subject investment trust management companies to pressures from outside groups. We believe that it is necessary to examine the possibility of these negative factors and, if any, to consider the measures to protect from them before including the disclosure of voting record in the I. F. 1.

We hope our comment will helpful for you in preparing the final text.

BERNHARD HUBER

The OECD Principles are not binding in the current draft. I would like to see a commitment statement that the Principles ought to be binding - if not now then at least in the near future. Principles that are not binding show no impact as the current low rate of application of the guidelines proves. The national contact points across Europe had hardly any cases to deal with.

ANONYMOUS RESPONDENT

First of all congratulations on your initiative to review your 1999 Principles. Clearly the global corporate governance environment has evolved during those five years but there is still plenty of reason for you to extend guidance to national governments and companies all over the world.

I'd like to raise an issue that relates both to corporate governance and transfer pricing and I'd like to ask you to consider how this issue might be addressed better for the benefit of minority shareholders. More specifically, I'd like you to reduce the grey area of conditions, in which related party transactions are considered to be "fair" (Principle A.2).

In the past I've been an independent supervisory board member in the subsidiary of a large multinational company, which purchased about 70% of the output of the subsidiary and also supplied a very significant amount of raw materials and intangibles too. Although the subsidiary was legally a public joint stock company listed on a regulated market, with minority shareholders owning about 30% of its shares, it was effectively organised as a local branch of the multinational. Operationally this was obviously very efficient, but, in my opinion, it didn't protect the interests of the minority shareholders. E.g. transfer prices were determined by head office, rather than negotiated. Expatriate managers of the subsidiary weren't rewarded depending on its stock price but rather received the largest part of their salaries directly from the multinational.

The multinational claimed and a Big Four accounting firm confirmed that their transfer pricing policy was in compliance with OECD guidelines. A closer look however showed that the subsidiary received below average prices for most of its goods sold, although the discrepancy was never so large as to make it statistically significant in the opinion of the accounting firm (fourth quartile). On the other hand for most of its purchases the subsidiary paid above average prices, although again not statistically significantly. Some items were paid for twice, e.g. the subsidiary paid an export commission for having access to the multinational's international sales network but additionally the goods were sold at preferential conditions. The subsidiary participated in the costs of research and development on a pro-rata basis but when research resulted in valuable intangibles, the subsidiary had to pay license fees for deploying those intangibles.

The bottom line result was that the subsidiary achieved a long-term average operating margin of approx. 11%, which was 3 percentage points higher than in the case of the multinational, which in the opinion of the Big Four accounting firm was "consistent with the hypothesis that business was being conducted on an arms' length basis". However according to my estimations, mainly due to much (64%) lower labour costs in our country and taking into account all arguments against the subsidiary, the difference should have been at least 10 percentage points higher.

So effectively this multinational has been stretching the grey area. One way of combatting this problem would be to require significant related party transactions to be approved by a majority of independent board members. "Monitoring and managing" (see Principle V.D.6) is certainly not sufficient given the easiness with which multinationals convince Big Four accounting firms of their views and the difficulties that independent board members and dispersed minority shareholders have with convincing inefficient regulators and courts of their views.

Obviously I'm not an unbiased source of information about the case study discussed above, however a series of court decisions in favour of the minorities confirm beyond any doubt that there was a significant problem. Note by the way that it was solved finally after three years of legal battles through the multinational buying out the minorities.

The issue is particularly important for emerging markets with concentrated ownership and weak court systems. E.g. in our country 60% of the constituents of the main blue chip index have strategic shareholders conducting significant business with their subsidiaries. Getting anything out of a court action is notoriously difficult for a minority shareholder on our market.

HERMES

I am writing to express Hermes'[8] views on the OECD Principles of Corporate Governance.

Hermes appreciates the OECD Secretariat's efforts and commitment in relation to the review of the OECD's Principles of Corporate Governance. We congratulate the Secretariat on its «Survey of Corporate Governance Developments in OECD Countries» and support its views and approach on a number of issues, including:

- Requesting institutional investors acting in a fiduciary capacity to disclose how they manage conflicts of interests that may affect the exercise of key ownership rights (Principle I.F.2 and Annotations). In our view the ICGN statement on Institutional Shareholder Responsibilities provides useful guidelines in this regard[9]

- Providing holders of depository receipts with the same ultimate rights and practical opportunities to participate in corporate governance as are accorded to holders of the underlying shares (Annotation to Principle II.A.3)

- Encouraging disclosure on remuneration policy, and at individual level (Annotations to Principle IV.A.4)

- Emphasising the importance of truly independent directors (Principle V.E).

We also provide the following comments and suggestions for additional improvement:

A) Capital structure: We acknowledge that, as stated in the Annotations to Principe II.A.1, «The optimal capital structure of the firm is best decided by the management and the board, subject to the approval of the shareholders.» Some companies issue preference shares, priority shares, multiple voting shares, non-voting shares/certificates, or set voting or ownership caps. The Principles currently state also that «All of these structures may be effective in distributing risk and reward in ways that are thought to be in the best interest of the company and to cost-efficient financing». However, the Principles do not presently recognise that in changing market conditions, the board should regularly assess the relative merits of such structures in light of the changing needs of the company.

Therefore we deem that the Annotations to Principle II.A.1 should add that companies shall monitor regularly (at least every two years) the impact that their capital structure has on the cost of capital. External, qualified and independent experts should be appointed for this purpose, with the mandate to produce a report assessing the relative merits and demerits of any departure from the one share - one vote rule. Such experts' reports should be made public and subject to shareholders' vote, boards

[8] Hermes Investment Management is owned by, and is the principal fund manager for, the BT (British Telecom) Pension Scheme, the UK's largest. Hermes also manages portfolios for Royal Mail Pension Plan and approximately 200 clients including many major pension schemes. In total, Hermes manages £ 41 billion, and it is a leader on issues of corporate governance.

[9] Available on http://www.icgn.org/documents/ShareComm-Guidelines.pdf (September 2003).

should use them to help in determining companies' capital structure, and minority shareholders should be granted the right to start a legal action against boards that neglect the best interest of the company and cost-efficient financing.

Such concepts should also be reflected in Principle I.D too. It could be amended as follows. «Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed*, and an independent report shall be produced regularly to monitor their impact on cost-efficient financing. It shall be subject to shareholders' vote as described in the Annotations to Principe II.A.1*».

Likewise, Principle V.D.1 should be amended as follows. «[The board should fulfil certain key functions, including:] Reviewing and guiding corporate strategy, major plans of action, risk policy, *capital structure*, annual budgets […]».

B) Voting obstacles: We deem that the OECD Principles should acknowledge that some regulations/market practices (such as share-blocking, powers of attorney and/or personal attendance requirements) have the effect of creating obstacles to voting. We consider that such an acknowledgement should be made in the Principles, in the framework of Principle I.F, *or* Principle II.A.5. Indeed, while Principle II.A.5 and its Annotation address the companies' dimension, and discourage statutory procedures that «make it unduly difficult or expensive to cast votes», the Principles do not currently address the problems posed by regulations and market practices, which are actually the greatest impediments for institutional investors' voting activity - as proven by the fact that many institutional investors regularly fail or decline to exercise their voting rights in markets that impose such obstacles.

C) Transparent nomination and selection process: A transparent nomination and selection process is at the core of good corporate governance. However, in some countries transparency is not ensured, especially if controlling shareholders are involved in the selection and nomination process. Lack of transparency on the profile of the nominees *de facto* deprives minority shareholders of their voting right on the appointment of directors at the general meeting, since they have insufficient information to assess the nominees. In light of this, we think that the Annotation to Principle IV.A.4 should be developed to provide clear guidance for the disclosure on the selection process, including timely information on:

- Who is responsible for drawing the profile of the ideal candidate and the process for doing so
- How are the candidates' qualifications accounted for in the recruitment process,
- How are the candidates short-listed (head-hunters, networking, etc.)
- Who sponsors each candidature (e.g. which shareholder)
- What is the profile of each nominee (qualifications, other directorships, whether they could be regarded as independent by the company).

D) Conflicts of interest (related party transaction): Principle V.B and its Annotations currently states that «Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly». This principle is particularly important where controlling shareholders *de facto* appoint a large proportion of board members. In these situations directors might be exposed to conflicts of interest when the board is, for instance, resolving on transactions with one of such shareholders. The Annotations to this Principle could note that in such circumstance it would be good

practice for the directors facing conflicts, to disclose their conflicts and to abstain from voting on such matters.

E) Directors' objective judgement: We believe that the Annotations to Principle V.E. should refer also to cross-directorship, and possibly provide an example along the lines of the following text. «*A typical case of cross-directorship is to have an executive director of company A as a member of the board of company B, and conversely an executive director of company B to be member of the board of company A. This can lead to inappropriate "mutual support" between directors of different companies, and conflicts of interest that could be detrimental to the interests of the company as whole, including shareholders*»[10].

I hope that you will consider Hermes' comments and will take them as constructive input to the OECD's activity.

INTERNATIONAL METALWORKERS FEDERATION

The IMF - International Metalworkers Federation represents more than 200 trade union organisations from 100 countries with a membership of more than 25 million workers worldwide.

While welcoming the decision by the OECD to request public comments on its draft revised Principles of Corporate Governance and to take the comments received into account in subsequent drafts, we would like to point at the high level of expectations among our affiliates with regard to the outcome of the Review.

The OECD Steering Committee on Corporate Governance has a great responsibility in orienting the Review process towards what can hopefully be an outcome setting new and higher standards of corporate governance at a time of intolerable corporate abuses. Responsible institutional shareholders as well as organised labour expect the revised Principles to provide an adequate, and much needed, tool to combat such abuses. We therefore urge the Steering Committee not to loose sight of the need for the revised Principles to be strengthened so to set a high standard of corporate governance and accountability.

With regard to the draft of the revised Principles currently under consideration, we fully share the concerns and the specific recommendations included in the comments made recently by the Trade Union Advisory Committee to the OECD. We believe that the proposed revisions are a watered down version of the original proposal, are too weak in many areas, and lack clarity. Among the reasons for weakness pointed at by TUAC, the Stakeholder chapter remains one of major concern for us.

In summary, we would like to reiterate the views already expressed by TUAC and other trade union colleagues with regards in particular to the following areas:

- The needs of institutional investors seeking to exercise responsible stewardship over companies within which they have invested workers retirement income or savings are far to be met. In the

[10] See TUAC's response to the OECD Consultation (6 October 2003).

light of the ongoing series of corporate scandals and collapses this appears to be a major weakness.

- The current draft doesn't reflect the needs of developing countries for a stronger set of Principles, in particular for a stronger Stakeholder chapter.

- Issues that are essential to good governance practice, especially those referring to levels of executive remuneration, power of CEOs, accountability of BoDs, shareholder responsibility and the rights of stakeholders are inadequately addressed.

- Imprecise and weak language in the current draft creates confusion on key questions, like the need for a clear distinction between public governance principles and corporate governance.

- The revised text does not reflect the need to ensure that employees and other relevant stakeholders can play an effective role against corporate abuses. Furthermore, there appears to be a dangerous confusion about stakeholder participation and performance enhancing mechanisms.

We hope that our views will be taken into account and that the Review will significantly strengthen the Principles so to improve their relevance to the present difficult situation.

GEORGE LOLADZE: CHAIR, SUPERVISORY BOARD, GEORGIAN STOCK EXCHANGE

As you may remember, I participated in the discussions on Draft revised OECD principles in Paris at the conference organized by GCGF and OECD on November 2-4, 2003.

As a representative of Eurasia region, I welcomed the amendments to the Principles which mostly respond to the CG problems revealed during corporate scandals in developed counters.

However, as I have mentioned during discussions, there still are number of CG problems in Eurasia (especially in former soviet countries), insufficiently addressed by OECD Principles. In particular, this is the problem of illiquidity of shares of privatized public companies in the region.

Really, at the one hand, in the very first line of the Annotations to the Principles, we reed: "*Equity investors have certain property rights. For example,* ***an equity share can be bought, sold*** *or transferred."* This means, that these features are considered as the most generic for equity shares. At the other hand, the Principles do not address this issue *directly*, because at the developed markets this feature of equity shares successfully works for the of public companies. However, this is not so for the greatest majority of JSCs in our region. To address this problem adequately, I suggest the amendments to the Draft Revised OECD Principles (See attached).

Hope the Steering Group on Corporate Governance will carefully consider my remarks and looking forward to your comments.

1. **To amend** Chapter I. The rights of shareholders and key ownership functions **of the OECD Principles of Corporate Governance with the following paragraph H:**
   H. Shareholders should have the opportunity to effectively buy or sell shares.

   1. **The market prices of shares should be fair and reasonably close to the assessments made by professional auditors, investment banks or financial consultants.**
   2. **The regulatory arrangements and/or corporate practices shall facilitate the liquidity of shares held by portfolio investors (shares held in amounts not triggering changes in corporate control).**
   3. **The regulatory (including self-regulatory) arrangements shall provide for sound and efficient price discovering and share transferring mechanisms.**

2. **To amend** Chapter I. The rights of shareholders and key ownership functions **of the** *Annotations to the* **OECD Principles of Corporate Governance with the following paragraph H:**

H. Shareholders should have the opportunity to effectively buy or sell shares.

Within developed markets, *ability to buy or sell* equity securities is considered as their generic feature, so that, sometimes, its importance is even overlooked. In contrast, in post-communist countries and, especially, in the Eurasia region this basic quality is missing for the shares of most public companies. (The problem originates from the fact that most of public JSCs in the region were created for the sake of privatization (state property distribution) rather than for capital raising purposes.)

However, for minority shareholders unhappy with the company performance, ability to sell shares promptly and at a fair price should be the most efficient alternative to other, more sophisticated, corporate governance tools in his/her discretion. In other words, such ability effectively imposes strict market discipline over the company governance.

1. **The market prices of shares should be fair and reasonably close to the assessments made by professional auditors, investment banks or financial consultants.**

Distribution of the core information about companies through adequate reporting mechanisms is very important. However, without professional analysis these data may remain useless for the majority of unsophisticated investors. Activities of the investment bankers, financial analysts and auditors should be encouraged to facilitate the translation of the information released by companies into the language of clear price benchmarks.

2. **The regulatory arrangements and/or corporate practices shall facilitate the liquidity of shares held by portfolio investors (shares held in amounts not triggering changes in corporate control).**

Through the agreements with brokerage companies (investment banks) or other arrangements the issuers should ensure the existence of market-making mechanisms for their shares, i.e. ensure their liquidity. Such arrangements are especially important for privatized companies in Eurasia region, where absolute majority of JSCs have illiquid shares.

3. **The regulatory (including self-regulatory) arrangements shall provide for sound and efficient price discovering and share transferring mechanisms.**

Legislation and stock-exchange rules shall ensure efficient access of investors to the market, fair prices and minimum transaction costs.

WILLIAM LIVINGSTON

This submittal is provided in response to the invitation, issued by the OECD, to comment on the draft revised "OECD Principles of Corporate Governance." As veteran professional engineer, member of the Institute of Internal Auditors (IIA), and sorely damaged victim of the 2002 NYSE market collapse, the

following response is also my duty, under your III "The role of stakeholders in corporate governance," part C.

The platform for comment: The basis for comment about principles of corporate governance is arranged to meet a central responsibility imposed on licensed professional engineers (PE) in the USA. The obligation is to alert the court having jurisdiction in civil matters of tort, when competency of our methodology advances, and instruct the court on corresponding adjustments to the standard of care for "foreseeability," established by the court case by case as the benchmark of liability (negligence).

The role of corporate governance in attenuating this civil-law exposure to corporate liability, as in Arthur Anderson, is critical. In the USA, the ratio of financial exposure for statutory and regulatory violation attributable to the organization when compared to the expense of tort-strength negligence is less than one in 500. While the design of effective codes of rules of action for regulatory enforcement has academic interest, the operational concern of corporate governance must be to preempt contemporaneous violations of tort law. It would be professional malpractice to allocate mitigation resources to compliance for a risk valued at one, while the companion risk valued at 540, frequently labeled the litigation explosion, is ignored. Citing the overriding principle of economic efficiency, the USA courts have always considered an economic choice by management to violate regulations and pay the small associated fines to be prudent, lawful commerce.

The regulatory tradition is a pre-understanding that defines the space of possible actions. It is concealed by its obviousness. It is not a set of rules so much as a way of understanding within which organizations interpret and act. This pre-understanding of governance is determined by the history of regulator-regulated interactions exhibiting the tradition. Rules of governance represent a particular structural coupling of the organization to the world in which it exists. It faces backwards in time.

The governance spotlight on avoiding tort liability, rather than non-conformance to the rules of action imposed by a distant regulatory body, forcibly switches the principal time frame of reference from hindsight to foresight; from response to preemption. Tort action is decided by the retroactive application of the PE standard of care to the time span prior to damage. The task for tort court is to objectively benchmark the "foreseeability" of the enabling circumstances of damage. Detached regulation by rules of action, hierarchically enforced, is predicated on hindsight. Rules are created and shaped during institutional reaction to damage caused during events already transpired.

In any viable control system, a restriction to hindsight commits the operational reality to rules of action. This means, in practice, that the original system goal is displaced by a linear set of rules. The distinguishing feature of rule-based operations is that when the original goal is detached as a basis for choosing action, consequences of action simultaneously lose their importance. For any hierarchical organizational structure supervising action at the work face by a chain of command, regulator included, rule-based regulation is the only form of control that works.

The requisites of foresight, what control engineers call anticipation, involve loop-wise activity. In the control loop of a non-simple system, consequences obtained by the last cycle of work are compared to the original work goal as essential intelligence for improving the goal-seeking potency of the next cycle of work. Foresight demands intelligence. Strict compliance to rules forbids intelligence. To have the hindsight system in faithful service, the foresight system must be exterminated. Coexistence is impossible. It is this extreme intrinsic incompatibility that makes classification of the regulating system type in use a trivial task. In practice, it is impossible to mistake one for the other - a feature proven helpful in informing the court.

In Daubert and progeny, the US Supreme Court delegated the standard of care gatekeeper role exclusively

to the Federal District Courts. In the Ikarian Reefer decision, professional engineers were legally bound as agents of the court as first priority. Because professional engineers, congruent with the responsibility of the court, must hold the public interest (health, safety, and welfare) paramount, the engineering profession was obliged (1) to determine when advances in the capabilities of the process of engineering to handle complexity had become material and (2) proactively alert and appropriately inform the court - as its agent.

The rationale for this obligation, unique among the professions, stems from the fact that the discipline of engineering is society's functional custodian of the science and technology of method. It is the process of engineering, its methodology, that delivers the growing stream of artifacts that shape the world we live in. Engineers are invisibly empowered in design. They silently transform traditions but they do not know what the course of the transformation will be. Society looks to its PE watchdogs to sound the alarm when the blatant attempts of its institutions to defy natural law pose a threat to survival.

The users of engineered artifacts, preoccupied with performance expectations, are aggressively uninterested in the ethical ranking of the design engineers. As a methodology inherently in conflict with business as usual, engineering has been universally despised by society for millennia. The court is also well aware that, as a group, PEs can make no claim to a superior brand of moral character. Ethical purity of the profession derives from the simple fact that engineering design governance is provided by supreme natural law. Unlike other professions, attempts to defy natural law, however impossible, are PE malpractice.

In order to meet performance specifications, design engineers must be concerned foremost about alignment of method to objective that leverages natural law. System dynamics are governed by the laws of nature, making no distinction between systems of metal and systems of flesh. Character and reputation, individual or organization, are independent, unrelated variables. As in design engineering, by framing the process of corporate governance in natural law, easier done than said, ethics is eliminated as a contributing factor.

Corporate governance is a process involving control action. Most working definitions of corporate governance are descriptions of method attributes that fail to distinguish the two incompatible domains of explanation. **Two examples.**

The US National Institute of Standards and Technology, in NIST T1393, defines corporate governance as "The system of management and controls exercised in organizational stewardship. It includes the responsibilities of corporate owners/shareholders, board of directors, and administrative leaders. Corporate charters, by-laws, and policies document the rights and responsibilities of each of the parties and describe how the organization will be directed and controlled to ensure (1) accountability to all stakeholders, (2) transparency of operations, and (3) fair treatment of all stakeholders. Governance processes include approving strategic direction, monitoring and evaluating senior leader performance, financial auditing, managing risk, disclosure, and shareholder reporting. Ensuring effective governance is important to stakeholders' and society's trust and to organizational effectiveness."

The Institute of Internal Auditors (IIA) in their ubiquitous "Red Book" defines corporate governance as "The procedures used by the governing body to provide oversight of risk and control processes administered by management." Risk management is defined as "A process designed to identify, manage, and control potential events to provide reasonable assurance regarding the achievement of organizational objectives."

Because the common thread is complexity-oriented process, it can be shown that responsible corporate governance, the IIA Red Book, the Baldrige National Quality Program Criteria, enterprise risk management (ERM), business process reengineering (BPR), the tort law standard of care, and the process

of engineering design are one and the same thing. As the incoming tide raises all boats, quantum advances in the process of engineering able to assault complexity in the extreme have profound consequences for all goal-seeking endeavors.

For simple, routine businesses enjoying stable market conditions, the issue of corporate governance doesn't even come up. When complexity in the operational reality has compounded to the level where corporate governance makes the top of the agenda, conventional mechanisms of governance, the regulatory ghetto, are grossly unable to cope.

Application limits of effective corporate governance through rules of action directed down a chain of command: The fundamental constraint in the EOCD governance plan is that it directs an organizational system (A) designed for rule-based operations to achieve what can only be attained by an incompatible methodological system (B). Because this inherent mismatch is known to both the regulator and the regulated, formalized principles of corporate governance take zero responsibility for outcomes. The reward for compliance to the rules of action is limited to avoiding fines for rule non-conformance. For instance, the vast OSHA codes make no connection between compliance to the rules and the positive reward of a reduction in workplace accidents. The basic OECD strategy has many precedents, in essentially identical situations, to learn from. The hypothesis does not need another data point for empirical validation. It can be incontrovertibly derived from natural laws.

Professional engineers are required by the conditions of their license to (1) detect when inappropriate practices are mandated by the chain of command (2) inform management of the consequences of continuation and (3) withdraw from the project. It is professional malpractice to remain associated with a project certain to fail and the PE is expected to know contemporaneously, not by hindsight, when that is the case. This fundamental PE duty to benchmark appropriate methodology for damage-avoidance is, exactly, the driving force of this commentary. The PE duty ends with informing you of the options available and the consequences of each. The actual choice of method is, of course, yours. Subsequent to being professionally informed, should you continue with a method proven to fail, the significance of that choice appears in litigation, long after damage is done, which classifies, retroactively, the negligence as intentional. The doctrine of deliberate ignorance then effectively removes the business judgment rule as a viable defense.

As the class of Enron makes its way through the field of civil law litigation, there will be several echoes of the comments made in 1990 by U.S. District Court Judge Stanley Sporkin as he viewed the scandal-caused rubble of the nation's savings and loans, "Where were these professionals when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions?"

The rights of stakeholders as established by law cannot be protected by the (A) category of corporate governance, no mater how frequently the auditors are rotated. It is not impossible because of the inevitable prevalence of ethical impurities within system A. It is impossible because natural law, deaf to all persuasion, does not allow system A to attain the attributes specified.

The functional standard of care for corporate governance: methodology effective in any application There are two large reference examples, one government and one industry, where every objective attribute specified by corporate governance, the Baldrige Criteria, the Red Book, the tort standard of care, ERM, BPR, and the process of engineering are attained on a continuous, routine basis. By definition, these attributes can be derived only from a B category control system.

There have been many books written about the organizational system of flight deck operations on aircraft carriers. It is a mature example of a class B system. There are no layers of management, no chains

of command in flight operations. The work is far too dangerous, far too intricate and complex, and far too speed-driven for anything but total objectivity, transparency and continuous integration of deck hands for it to work. Since, in this case, to keep their job, the commanders of aircraft carriers prefer results to rank formality, every sailor in flight deck operations has total authority and control to do whatever he thinks best. Imperfections in results are classified as system flaws, never character flaws. Change and adjustment in procedure is continuous. Video pictures of flight operations are provided throughout the ship. It is a reminder of the compelling purpose of a carrier of aircraft.

Likewise, there are many books available describing the FedEx corporation. FedEx was an early winner of the Malcolm Baldrige Quality Award, now 17 years mature. From the start, no attempt was made to process millions of packages a day with an organizational system cascading individual instructions to thousands of workers down a chain of command. When it came time to make their B-class system available to the client so he could track his own shipment on his own computer, information system transparency to do that was already routine operations. No other kind of information system would allow FedEx to exist in the first instance.

Baldrige Criteria for "process" is the FedEx strategy. From NIST T1391 - to wit: "Process management is the focal point for all organizational work processes. There are central requirements for efficient and effective process management: effective design; a prevention orientation; linkage to stakeholders with a focus on creating value; operational performance; cycle time; and evaluation, continuous improvement, and organizational learning. High performance work is characterized by flexibility, innovation, process improvement, knowledge development, skill sharing, alignment with organizational objectives, stakeholder focus, and rapid response to disturbances and changing requirements."

"The selection of appropriate action depends upon understanding cause-effect connections within, among, and between processes and organizational results or outcomes. Process actions and their results have a variety of resource implications. Organizations have a critical need to provide an effective analytical basis of relevant information for decisions because cause-effect connections are often unclear."

There is no need to supply many examples of A class systems in goal mismatch. The long history of the collaboration of regulators (A type) with the corporations (A type) they regulate is one dimensional, monotonous and well known. Operating in a consensual realm that does not encompass the prime mover always produces the same wreckage.

One instance. Corporate governance principles in the 19th century allowed the railroad robber barons to ignore safety with impunity. In 1890 alone, 6000 passengers were killed and 35,000 were injured in railroad accidents. There were, on average, 52 head-on collisions per day. The carnage continued for decades. Not even the OECD ministers believe the revised principles of 2004 will be any more effective in goal attainment than the "old" ones by noting, as a caveat, they were "evolutionary in nature." The producers of the Sarbannes-Oxley act said the same thing and for the same reasons.

The explanation why empirical validation of the issues in corporate governance is so readily attained, no exceptions available, is that, in all affairs of method, natural law is the prime mover. This means that, conceptually at least, natural laws of process, including control theory, Shannon's theorems of communication, and the second law of thermodynamics, can be assembled, mathematically, to create the same history independently through dynamic simulations. Such non-empirical work has, in fact, been going on by professional engineers for the last fifty years. The latest book on the subject (2003), a compilation of several thousand investigations by Rudolf Starkermann, a distinguished professor of mechanical engineering, is available as ISBN: 3-908730-29-5 (Zurich). In all applications of natural law,

of course, ethical values have no role. The dependability of natural law to exert its influence on matter and energy is no less perfect than its indifference to what or who that matter is.

The decline and fall of the judgment era: The appropriate use of judgment in the sphere of corporate governance has been quietly and drastically changed in the last five years. While continuous increases in business complexity expand the scope for the exercise of professional judgment, dramatic advances in the capability of the process of engineering to deal with complexity have, in several key places, removed the need for judgment in its entirety. As the capability to foresee becomes more and more practical, the shopping list of what the professional must foresee expands with it.

For all practical purposes, for any material system now being designed, there is nothing that can't be foreseen. It is now even practical to investigate scenarios that are "impossible," such as exposing your structural design to a 300 MPH hurricane. While considerable ingenuity is required to devise the design basis events, it is now routine PE practice to "fly it before you buy it." This awesome new capability, and the responsibility that comes with it, has evolved from the democratization of computer technology. To meet the objectives of corporate governance, today, little judgment is necessary. Task actions can be selected on the basis of knowledge and facts. Congress instructed the SEC to require it. "When the registrant fails to apply accounting principles with substantial authoritative support, no amount of disclosure can cure the problem. The corollary to that is also important. The other side of that coin says that even if the accounting is appropriate, without complete and transparent disclosure, the company's filing is still deemed to be deficient. This requirement renders the business judgment rule irrelevant."

The decreasing necessity of judgment attends every increase in the competency of the process of engineering to assault complexity. What happened to explode the span of negotiable complexity was the incessant grind of Moore's law of exponential computer power growth. Computers anyone can afford have become so powerful that real-life complexity in the extreme can be domesticated.

Computer power was, historically, the weakest link in a key knowledge-building process called Intelligence Amplification (IA). When W. Ross Ashby first announced, in 1961, that IA had come of age, scarce computer resources were seldom available to individuals. Intelligence amplification is harnessed by the PE in three steps: mathematical physics, a learning algorithm, and recursion. All dynamics of material and energy are mathematically described through the calculus. It is the only computational system that includes time. The status of deterministic systems is moved both forward and backward in time by the same calculus equations. Accident reconstruction, for example, requires the identical effort as dynamically simulating future scenarios of the same system. The critical factor in computing system dynamics is called the transfer function - a system-unique fingerprint.

It is in the gigantic computational requirements of recursion where industrial strength computer power delivers amplified intelligence. Computers used to forecast weather, for example, produce maps calculated with the equivalent of 75,000 coordinated human brains. The cell phone system requires the equivalent of 90,000 real-time brains every time you place a call. Both results can only be delivered through the calculus.

The exploitation of IA has enabled PEs to deal effectively with complexity as never before. Engineered systems can be delivered, "fully foreseen," with negligible risk of tort liability. Structural steel is being tested fit for service by dynamic simulation long before the terrorist searches, in identical manner, for a viable means to bring down the building.

Because the process is completely and scrutably connected to natural law, it is easy to demonstrate how the same process can be used to bypass the intractable issue of judgment in corporate governance. As PEs can assure themselves of judgmental immunity as-they-go (by eliminating the need for judgment),

those responsible for corporate governance can use the same process in the same way for the same purpose. The emerging new problem for fiduciaries is that the hindsight engine featured in the ghetto of regulatory compliance is being overwhelmed in litigation by an escalating standard of care in tort driven by foresight.

Summation: The standard by which tort law will determine liability, retroactively after stakeholders are damaged, is the principal benchmark for corporate governance. The focus for the professional is to employ the standard of care contemporaneously so that judgmental immunity is secured throughout the goal-seeking enterprise The answer to the question "Is it possible to conduct corporate governance in a way that eliminates the risk of tort liability - as you go?" is an unqualified "Yes." Every thesis in this commentary can be quickly and independently validated. Such is the mark of universal law.

The OECD is to be commended for enabling this convenient system for providing commentary to the OECD Steering Group.

UNION NETWORK INTERNATIONAL (UNI)

Introduction

Union Network International (UNI) which represents 15 million members in over 140 countries in more than 900 unions worldwide, welcomes the decision by the OECD to request public comments on its draft revised Principles of Corporate Governance. As this matter needs the widest possible transparency and public input, UNI congratulates the OECD on its decision that public comments received will be taken into account in subsequent drafts presented for consideration to the OECD Steering Group on Corporate Governance. We hope that comments received will be included on the OECD web site to ensure continuity of that transparency.

UNI's General Comments on the Current Draft Principles

It is UNI's view that the revised Principles must set a new and higher standard of corporate governance. They must be a key tool for governments to implement in stamping out the corporate abuses that appear on a daily basis. For the Review and the OECD itself to have credibility and to show their relevance to the current situation they must meet this expectation.

The most dramatic example of corporate corruption where UNI members have been involved recently has of course been the WorldCom scandal. But this has only been one of several hundred company failures world wide. Our members have had to face the consequences of inadequate care and stewardship in financial institutions, in commerce in Wal-Mart and Ahold, in business services such as Adecco and in Parmalat. In the US alone in one of UNI's key sectors, the telecommunications industry, more than $1trillion in market capitalisation has been lost with the failure of more than 100 public companies. Global Crossing, Adelphia, Winstar, Nextlink, COVAD, Northpoint, the list goes on and on. Around the world over a million jobs were lost in telecoms as the market and corruption bubble burst.

The Principles must be aimed at ensuring that examples such as WorldCom's highly dubious business practices in the late 1990s and the year 2000, including the controversial accountancy practices used at the time of the $37bn purchase of MCI, the largest of WorldCom's acquisitions, are not able to occur again.

We are aware of course that WorldCom's practices have been subject to investigation by the US Securities and Exchange Commission.

The process of globalisation has been accompanied by an increase in corporate corruption throughout the OECD member nations which has shaken the trust of people everywhere in the integrity of how businesses are run. The continuing occurrence of scandals has done nothing to improve confidence in the management structures and mechanisms.

A World Economic Forum survey published to coincide with this year's annual meeting concluded that 'corporate reputation is a more important measure of success than stock market performance, profitability and return on investment.'

The OECD can help the process to rebuild trust and corporate reputations but the proposals do not go far enough.

The business community appears to be looking for leadership. Over 70% of CEO's surveyed by the WEF believe that mainstream investors will have an increased interest in corporate citizenship issues, and therefore we are baffled why the OECD has failed to adequately address the role of stakeholders in governance.

Our concerns also are that company failures such as the Global Crossing's bankruptcy meant that many of its employees and former employees lost their pension rights, since the company pension fund had been self-invested in the host company. The principles must address the need for a reform of accountancy practices and for pension fund rules. Pension scheme members should be informed of how their pension fund votes in elections and shareholder meetings of the companies they invest in.

We also believe that corporate rules should be changed so that executive compensation is more closely linked with the interests of investors and workers.

In that regard all inside and outside directors should disclose all personal contracts with the firm and there must be a ban on the abuse of stock options by senior executives. UNI also believes the Principles should highlight and work to eliminate corporate greed in the form of ever increasing executive salary packages and the rules that allow CEOs and other company executives to take huge stock options that they trade while still working for the corporation.

It is our view that even though these revisions go a long way to resolving many of our concerns, they either fall short of what is required in major areas or they are buried within the annotations and lack clarity. Furthermore, the Stakeholder chapter is in retreat of the remedies required.

We would urge the Steering Group to significantly strengthen the Principles along the lines set out below. However, if the outcome to be presented for adoption by Ministers in May falls short of that required to achieve a high standard of corporate governance and accountability, we will urge a further period of deliberation by OECD governments.

The OECD seems to be in retreat from the measures required.

Outstanding issues around the current draft

In addition to specific comments that follow and which UNI sees are essential in making the Principles acceptable to the labour community and Civil Society in general, UNI would also like to associate itself to submission that the Trade Union Advisory Committee (TUAC) to the OECD has made and which we will highlight here.

In UNI's view:

- The revised text does not reflect the changes needed to accommodate the "significant changes in circumstances" that have taken place in the past three years, including the ongoing series of corporate scandals and collapses. In particular: it fails to meet the needs of those institutional investors seeking to exercise responsible stewardship over those companies, within which they have invested workers retirement income or savings. The revised text does not help those pension fund trustees wishing to see their investment managers taking a more active oversight role over the companies whose equity they hold.

- The revised text does not adequately reflect the needs of developing countries aiming to raise their standards of corporate governance. There is a clear desire among for a deeper and stronger set of Principles. Furthermore, we see the need for a more concise and stronger Stakeholder chapter that is not reflected in the current text.

- The revised text does not adequately represent those "broad features considered essential for the development of good governance practice". Our concern is that the current draft is too weak on for example: curbing inappropriate levels of executive remuneration including the abuse of executive stock options, delivering shareholder responsibility, ensuring the accountability of Boards of Directors, and giving real rights to stakeholders.

- The current draft is not "concise, understandable and accessible to the international community". Our concern here is that much of the text is unnecessarily hesitant and imprecise, lacks focus, and is hedged with too many caveats. In the current draft, some principles – such as Principle V.E – are more concerned with public governance principles, and not specifically about corporate governance. Furthermore, many of the action points are buried in the annotations to the Principles.

- Beyond that the Preamble to the posted text (paragraph 6) correctly indicates that employees and other stakeholders have a role within corporate governance frameworks. However, the Steering Group as a whole has failed to take on board the revisions needed to the text so as to ensure that employees and other relevant stakeholders can play an effective role in helping to stamp out corporate abuses.

Comments by chapter

As indicated earlier, many specific comments have been made by TUAC and UNI would like to associate itself to some of those specific comments as well as adding some additional comments in particular concerning the Chapter on Disclosure and Transparency where we believe the issue of abuse of stock options by senior executives has been poorly dealt with.

Chapter I "The rights of shareholders and key ownership functions"

- **Title of the chapter "The rights of shareholders and key ownership functions"**

The proposed change of title is moving in the right direction and reflects the need for shareholders to have rights and responsibilities in corporate governance. However, for the title to be clear and concise it should simply be stated as: **"The rights and responsibilities of shareholders"**. We are also concerned that the ensuing Principle (I.C.3) is too weak:

The softening of the text regarding the participation of shareholders in the remuneration process lags far behind best practice emerging in Member countries. A clear trend is discernible toward shareholder approval of total remuneration packages, rather than merely having their views known. The reference to shareholder approval for the "equity component" further lags behind best practice. The deletion of any

reference to shareholders having access to the "proxy process" further undermines the credibility of the Principles.

Chapter III "The role of stakeholders in corporate governance"

We have deep concerns at the apparent lack of political will to bring the chapter in to line with current best practices. We wish to associate ourselves with the new text submitted by TUAC for the chapter.

That is: **Include a generalised right to stakeholder representation**

The current text of chapter III is another example where the Principles do not focus on specific outcomes of corporate governance. To respect the rights of stakeholders "as established by law" is a requirement of good public governance (in the header of the chapter, and Principles A & B). It does not inform corporations as regards the rights and the responsibilities of the stakeholders. It is essential that the revision calls for a generalised right to stakeholder representation:

- The title of the chapter should be **"The rights and responsibilities of stakeholders"**.

- The header of the chapter should by revised to adopt the June 2003 proposal of the OECD Secretariat, that is **"The corporate governance framework should recognise the established rights of stakeholders as established by law"**.

- Principle III.A should be drafted as follows: **"The corporate governance framework should include stakeholder representation assure that the rights of stakeholders that are protected by law are respected".**

These changes are required to ensure that the chapter reaches a minimal level of relevance for OECD countries – and in particular to reflect the European model of social dialogue – and for the developing world. Furthermore, the current text includes a conceptual misunderstanding regarding the participation of stakeholders and the distinction between representation and performance enhancing mechanisms:

- **No consideration for continental European worker participation and non-OECD countries.** The credibility of the chapter and its relevance to many OECD countries within continental Europe, and also developing and transition countries is at stake. This chapter is at odds with the Continental tradition on social dialogue: the European Works Council directive, the directive on generalised information and consultation rights for employees, the European Company Statute, and lately the proposed take-over directive that specifically includes a model for employee consultation (article 14). We strongly urge the EU members and the European Commission participating in the Steering Group to consider the consistency of their positions on the stakeholder participation in corporate governance within that OECD forum and the various EU commitments.

- **Conceptual misunderstanding about stakeholder participation and performance enhancing mechanisms.** The text does not distinguish between performance enhancing mechanisms and representation of stakeholders. In short employees share ownership schemes (ESOPs), and employee representation (e.g., works councils, board level employee representation) are separate issues within the corporate governance framework. ESOPs are company specific, and subject to change. Employee representation does target corporate performance but is not confined to that objective. It also targets employees' participation at the board level (a voice in all major corporate decisions), and over safety and health issues, and importantly participation in restructuring processes, all of which are not strictly performance-related matters. Where should the practice of employee representation then appear in the chapter? The other employee related Principles: B, D, and E address the issues in part. But none of them encompasses the principle of employee representation in the corporate governance framework.

Chapter IV "Disclosure and transparency"

- **Principle IV.A.4**

This principle should be drafted as follows; **Members of the board and key executives, and their remuneration including any stock options which must not be traded while they are under obligations to the corporation. For board members, disclosure should also include their qualifications, the selection process, other company directorships, all personal contracts with the corporation, and whether they are regarded as independent by the company.**

The current text is clearly deficient in the areas of disclosure of personal contracts that board members may have with the corporation and which could influence their decision making. In our view this wording must be clear and unambiguous that board members must disclose all dealings and contracts that they have with the corporation.

Further there is no wording currently that covers the concern that board members and executives are taking stock options and trading those stocks while they have obligations with the corporation. This must be tightened and there must be a ban on the abuse of stock options by senior executives. UNI also believes the Principles should highlight and work to eliminate corporate greed in the form of ever increasing executive salary packages and the rules that allow CEOs and other company executives to take huge stock options that they trade while still working for the corporation.

Chapter V "The responsibilities of the board".

Again we are in total agreement with the TUAC comments, namely;

- **Principle V.C "The board should apply high ethical standards ensure compliance with applicable law. It should and take into account the interests of stakeholders".**

This proposed Principle lacks focus and is imprecise. The two issues should be distinct and separate Principles.

- **Principle V.E "The board should be able to exercise objective judgement on corporate affairs independent, in particular, from management, controlling shareholders and others in a special position to influence the company"**

To exercise "objective judgement" is not a specific outcome of good corporate governance; it is a general principle of good governance. At the same time the annotations refer to specific outcomes of corporate governance. The criteria to choose independent directors and the separation of the Chair and the CEO functions – which are included in the annotations – are specific corporate governance reform outcomes. They should be stand-alone principles. The length of the annotations, one page long, further indicates the unwillingness of the Steering Group to tackle directly issues of board accountability.

We also note the absence of the proposal to include stakeholders in the list of areas where independent directors "can play an important role". This paragraph should include language on the practice of interlocking directors and cross directorships as a concern for independence of board and conflict of interests.

We propose to replace existing Principle V.E with the following two principles:

"The organisation of the board should ensure separation of supervisory and management functions of the company"

Annotation: "In a number of countries with single tier board systems, the objectivity of the board and its independence from management may be considered to be impaired when the role of Chief Executive and Chairman are combined. Separation of the two posts may be regarded as is good practice, as it can help to achieve an appropriate balance of power, increase accountability and improve the board's capacity for decision making independent of management. Separation can also increase the capacity of the Chairman to ensure high quality governance of the enterprise and the effective functioning of the board. The Chairman may in some countries, be supported by a company secretary.

Where the two roles of Chief Executive and Chairman are not separated, other methods to establish appropriate checks and balances may be necessary and might include the appointment of a lead non-executive director and by meetings from time to time of only the non-executives of the board. In the case of dual board systems, analogous conflict of interest issues might arise if there is a tradition of the Chief Executive becoming the Chairman of the Supervisory Board on retirement."

"The board should be sufficiently independent from management, dominant shareholders and others in a position to influence the company, while remaining accountable to relevant stakeholders"

Annotation: "Independence of the board from management has a number of implications for both the composition of the board and for the characteristics of its members. To have non-executive board members may be a necessary but not sufficient criteria for effective independence. The variety of board structures and practices in different countries will require different approaches to the issue of independent board members. Board independence usually requires that a sufficient number of board members not be employed by the company or its affiliates and not be closely related to the company or its management through significant economic, family or other ties including service on the boards of other companies, such as customers and suppliers for whom the relationship of the company is material. This does not prevent shareholders from being board members. Some national principles of corporate governance have specified quite detailed presumptions for non-independence which are frequently reflected in listing requirements. While establishing necessary conditions, such 'negative' criteria defining when an individual is regarded as independent can usefully be complemented by 'positive' examples of qualities that will increase the probability of effective independence. In countries characterised by controlling shareholders who are able to determine the composition of the board, the concept of independence is usually extended to also consider the relationship with such shareholders. This is particularly important in jurisdictions where the duty of the board and individual members to the company and to all its shareholders is not well developed or enforced. Some jurisdictions have also experienced cases where creditors have exercised undue influence over the board. Independent board members can contribute significantly to the decision-making of the board. They can bring an objective view to the evaluation of the performance of the board and management. In addition, they can play an important role in taking account of the interests of stakeholders or in areas where the interests of management, employees, the company and shareholders may diverge such as executive remuneration, succession planning, changes of corporate control, take-over defences, large acquisitions and the audit function. In order for them to play this key role, it is desirable that companies declare who they consider to be independent and the criteria for this judgement.

ASX

ASX appreciates the opportunity to comment on the January draft of the OECD Principles of Corporate Governance. We support the work of the Steering Group on the Principles. ASX has been

actively involved with the ASX Corporate Governance Council (ASX CGC) in developing Principles and Best Practice Recommendations for companies in Australia and note that the OECD Principles and the ASX CGC Principles broadly concur. We also appreciate the significant work done to incorporate suggestions and feedback. This has resulted in what we consider will be a very worthwhile document. We would like to put forward a few brief comments, but remain essentially supportive of the result.

I. The rights of shareholders and key ownership functions

1. We support the reference to use of technology in communicating with and facilitating the rights of shareholders in the annotation on page 17. We believe that, given the increasing availability of technical solutions, it merits some express recognition in Principle 1.

2. The reference on page 19 to the need for a fiduciary institutional investor to set aside appropriate human and financial resources to pursue a disclosed CG policy could be strengthened. We believe that those acting in a fiduciary capacity should ensure that they exercise their rights after appropriate enquiry, investigation and analysis.

3. It is relatively common practice in Australia for non-executive directors to receive part of their remuneration in the form of shares purchased on market. The ASX CGC Principles provide similar guidance to that at C.3 and a number of ASX listed companies have sought clarification whether the recommendation for shareholder approval relates to purchases on market. It may be useful for the OECD to provide similar clarification.

4. As mentioned in our response to the September draft, shareholder approval of thresholds for remuneration over a longer period (3 years for directors in Australia) is a useful option which facilitates the exercise of shareholder rights while maintaining flexibility for the company.

II. The equitable treatment of shareholders

1. We support the amendments in A 2. These clarify the issue of fair attribution of risk and control in protecting shareholder rights.

2. A.3 page 23 states that "it is sufficient to disclosure to the shareholders…[that] the custodian will vote the shares in the way he deems consistent with shareholder interest." We support this approach, however, ASX's views go further than those proposed in the draft. The ASX CGC has provided guidance that shareholders should be clearly informed how the custodian intends to vote undirected proxies on each resolution.

III. The role of stakeholders in corporate governance

We support the amendments. As noted in our response to the September draft, we agree with maintaining clear links between stakeholder rights and those protected by law and the inclusion of protection for 'whistle blowers'.

IV. Disclosure and transparency

1. As mentioned in our response to the September draft, the specific reference to the establishing the link between remuneration and company performance is in line with the ASX CGC Principles. The link between this and Principle 1 C.3 could be usefully emphasised in the annotation to Principle 4.

2. As part of disclosure of a company's remuneration policy (A.4), disclosure should also be provided regarding mechanisms used to limit the economic risk of performance related incentives e.g. hedging

of options. This enables investors to understand and assess the true correlation between this type of remuneration and performance.

3. We support the comments in the annotation at A.6. We believe this could usefully go further than currently envisaged and incorporate disclosure of material changes to the company's risk profile and its systems to oversee and manage risk.

4. ASX still considers that IV C would be enhanced by a reference to the integrity of financial statements, as well as their preparation and presentation, as the mechanisms to support financial integrity are central to good corporate governance. We note that this is explored in V D.7 page 36.

V. The responsibilities of the board

1. We support the principle outlined in D 1. We consider that annotation could be provided, however, to emphasise the role of the board in establishing risk policy and strategy. ASX is concerned that the annotation to D should emphasise the value of an over-arching and coherent risk policy. Such a policy sets parameters for the successful operation of the company and ensures a cohesive approach to establishing control structures to minimise specific risks.

2. We believe the review processes outlined at D.3 and D.5 are essential to effective corporate governance. We note that they do not include review of the performance of the existing board as a whole and also individually. The ASX CGC Principles recognise the importance of on-going evaluation of board performance to identify development needs and to enhance the nomination process for new directors. This also is related to the practice identified in the preamble to Principle V that companies explicitly articulate the responsibilities of the board. In ASX's view, such clarity is necessary to enable a proper assessment of the board's and management's functioning. The statement in the preamble could be made stronger to encourage companies to make a clear delineation between board and management responsibilities. A recommendation to include a formal review of board performance would augment the recommendations currently in D.3.

3. It would be worth noting as part of the preamble to E that, while independence is necessary for the board to successfully fulfil its responsibilities, this needs to be balanced with sufficient knowledge and experience of the business itself. Furthermore, while the sources of this knowledge and experience may preclude independent status, all directors are expected to act in the best interests of the company.

THE LIFE INSURANCE ASSOCIATION OF JAPAN: LIAJ

1. **General Issues**

- Following the development of internationalization, corporate governance needs to be more credible and better understood across the borders. The good model of corporate governance also helps the company to use its capital more efficiently. Therefore, it would be important to continue to analyze and address the issues concerning corporate governance, in light of socio-economic environment in each country.

We would like to express our respect for the efforts made by all parties concerned toward drafting the revision of OECD Principles of Corporate Governance.

- As pointed out in Preamble, there is no single model for good corporate governance. We believe that it is extremely important to give much respect for the variety of the models, which would allow the company to make much use of their creativity and to contribute to the development of national economy through their long term success. From this point of view, we support the concept in Preamble that the Principles of corporate governance should be developed "to embrace the different national models that exist" based upon "some common elements that underlie good corporate governance". We, therefore, would like to require that the Principles be so minimum that they enable prompt and flexible response to the socio-economic surroundings in each country based on historical and cultural backgrounds in each country, and that the Principle contribute to the desirable corporate governance.

2. **Particular Issues**

○ I-F (Position of LIAJ) "The voting record of such investors should also be disclosed to the market on an annual basis" of I-F should be deleted.

(Reason)

1.

- The revision of the Principles has been based on the survey conducted from 2002 through 2003. The survey takes US mutual funds as an example in relation to the requirement of disclosing voting records of institutional investors acting in a fiduciary capacity. However, in fact, SEC received many objections and comments pointing out negative effects of the requirement during the public comment period. There has been no verification whether or not the disclosure actually has advantages that outweighs disadvantages as pointed out in the pubic comment, because the requirement for disclosure set in February 2003 has not taken effect until August 2004.

- As mentioned above, it is not appropriate that the revision of the Principles, which should be minimum, is based on the case where its effectiveness had never been verified. Any judgment should be made on an empirical basis, after the system has been proved to work in each country.

2.

- I-F of the Draft revised Text of OECD Corporate Governance cites "to facilitate the exercise of ownership rights by all shareholders" as the base of the requirement that "voting record of the institutional investors acting in a fiduciary capacity should be disclosed to the market".

- Because in many cases, institutional investors acting in a fiduciary capacity hold a wide variety of domestic and foreign stocks, the disclosure of the records of voting for all kinds of stocks would bear the substantial cost. We believe that institutional investors acting in a fiduciary capacity should act for the sake of their beneficiaries and that any burden must lead to the interest of the beneficiaries, not that of other shareholders of the company for which the institutional investors exercise the voting right.

- We agree the concept in the Annotations that the Principle requires the institutional investors acting in a fiduciary capacity to disclose the voting records only if the advantages prevail the disadvantages from the point of the interests of their beneficiaries with due diligence of cost effectiveness. However, we believe that international standards can set out such requirement, only if it has been born out that the benefit outweighs the cost in line with systems, regulations and actual circumstances concerning institutional investors in each country. Such burden for institutional investors acting in a fiduciary capacity without clear-cut verification means cost distribution only for certain shareholders of the company, which would be inconsistent with the context of "II. Equitable Treatment of Shareholders" of the Principle.

○ Annotations to I-F

(Position) “Pensions fund, mutual investment schemes and some activities of insurance companies” mentioned as examples of institutional investors acting in a fiduciary capacity in the annotations to I-F should be deleted.

(Reason)

- The Annotations to the Principles states that “for institutions acting in a fiduciary capacity, the right to vote can be considered part of the value of the investment being undertaken on behalf of their clients”, and pension funds, mutual investment schemes and some activities of insurance companies are mentioned as examples of such institutional investors.

- Some institutional investors do act in a fiduciary capacity, but laws and regulations that confer responsibility as fiduciary upon such investors vary country-by-country. So do the contents of the responsibility. In some cases, voting rights may not be recognized as part of the value of the investment.

- From this point of view, it would be inappropriate to exemplify “institutional investors acting in a fiduciary capacity”, as if the exemplifications could be uniformly applied to any country, in the Annotations to the Principle that should be minimum without verification of systems, regulations and real circumstances in each country.

PENSIONS & INVESTMENT RESEARCH CONSULTANTS LTD: PIRC

Pensions & Investment Research Consultants Ltd (PIRC) is an independent adviser to institutional investors on issues of corporate governance and corporate responsibility.

PIRC’s clients have combined assets in excess of £400 billion and include some of the largest pension funds, investment management companies and insurance companies in the UK and overseas. Together, they comprise a diverse group of institutional investors with long term liabilities and broad fiduciary duties.

PIRC undertakes company research on corporate governance and corporate responsibility issues at public companies, and provides advice to clients on proxy voting strategies and other active shareholder initiatives. Our comments are based on 15 years of practical experience, which inform our views on the strengths and weaknesses of disclosures, governance structures, and the interaction of statute, regulation and codes of practice in the United Kingdom.

PIRC is also a member of European Corporate Governance Service (ECGS) Limited. ECGS comprises eight members from various EEA member states who are local market experts that have come together to provide corporate governance analysis and proxy voting advice for institutional investors in the largest listed European companies by market capitalisation.

Overview

PIRC welcomes the opportunity to comment on the draft revision of the OECD corporate governance principles, following on from the consultation meeting we attended in November 2003 to discuss the marked up OECD Principles released in September 2003.

Overall we consider the new draft has succeeded in substantially strengthening the guidelines, and we welcome the vast majority of the revisions. We restrict our comments to a number of key points attached to amendments from the old principles or from the marked-up text of September 2003, and on areas we consider the principles still require additional strengthening.

I. The rights of shareholders and key ownership functions

C.2. Shareholder resolutions : p16

We welcome the addition to the Principles supporting the rights of shareholders to propose resolutions at company meetings. We agree that rules setting down time limits or requiring certain shareholding limits are justified in protecting against frivolous, vexatious or repetitive matters. However, we consider that the Principles would be strengthened and better balanced through a reference to the effect that these rules should not be excessively restrictive, nor unreasonably subject to management discretion.

C.3. Remuneration: p17

Whilst we welcome the greater focus in the new Principles on remuneration disclosure, we are disappointed in the reduction of some shareholder powers in the draft text in comparison to that in the marked-up September 2003 version. The experience of the UK has shown that an advisory vote on remuneration policy is a very valuable way of holding the Board accountable, and in increasing the level of scrutiny given to executive pay. In the light of the UK experience, a number of other countries such as the Netherlands are now looking to bring forward similar rules. We consider that the OECD Principles should continue to use the words 'good practice' (marked-up version) to help encourage this development.

C.3. Voting on equity based schemes: p.17

In our view, all equity based schemes should be subject to shareholder approval, given the potential for dilution and abuse of shareholder rights. Furthermore, we consider shareholders should have the power to vote on the nature of equity based schemes, such as performance targets, maximum individual award levels and takeover provisions, rather than simply the maximum number of shares which can be issued. Shareholders should be given sufficient information to determine for themselves the extent to which such schemes effectively link pay to performance.

F.1. Investor responsibilities : p.19

We welcome the extra addition to the Principles of the section on investor responsibilities. Institutional investors calling for openness and accountability from companies should, in turn, be open and accountable regarding their corporate governance activity. We support the publication by institutional investors of their corporate governance voting policies and their full voting records to their clients. In addition, we welcome the section in the new draft principles covering disclosure of potential conflicts of interest.

II. The equitable treatment of shareholders

A.1. 'One share one vote': p.22

We are disappointed that the Principles do not recognise the concept of 'one share one vote' as best practice, as this is increasingly the case in governance regimes around the world. While we appreciate that the intent of dual share structures may be to encourage long term investment, in too many cases the effect is simply to benefit one set of shareholders at the expense of others and to act as a deterrent to takeovers by entrenching management. In our view any benefits from dual share structures are outweighed by the potential for abuse as identified in the Principles in section A.2.

A.2. Pre-emption rights: p.23

We consider that the Principles should be more forthcoming in supporting the concept of pre-emption rights, which serve as a vital shareholder protection from abuses by corporate management or large shareholders.

A.4. Cross border voting: p.24

We strongly support the greater emphasis that the new draft of the Principles places on facilitating cross border voting. Beyond the legal and technical barriers, we concur that the very short notice period for general meetings and the failure in many markets for companies to provide adequate information prior to voting deadlines are major barriers to increased cross border voting. This is compounded by the truncated nature of the proxy season in which the majority of companies hold their annual general meetings in the largest markets. Companies holding general meetings in this relatively busy period should be encouraged to give the maximum possible notice and provision of information.

III. The role of stakeholders in corporate governance

Of all the revised sections of the Principles we are most disappointed with the section on the role of stakeholders. In our view the draft of this section is a missed opportunity to reflect the growing consensus around the world of the importance of corporate social responsibility and the contribution it makes to business success. Emphasis here should be on the desirability of companies going beyond the restrictive approach of legal compliance in addressing stakeholder issues. For example in point C. we consider the Principles should be more forthcoming in identifying good practice as allowing employees to participate more in the company's affairs and identifying the benefits this can produce (as included in the marked-up text from September 2003). We consider an explicit reference to the OECD Principles on Multinational companies would be appropriate in this section, as well as direct reference to the need for greater disclosure from companies on business ethics, the environment and community issues (as on section A.2 p29 and A.7. p31).

E. 'Whistle blowing' provisions: p.27

We welcome the new provision relating to 'whistle blowers'. The need for free communication of unethical practices in companies by employees to independent board members without fear of punishment has been clearly shown in a number of recent corporate scandals.

IV. Disclosure and transparency

C. Independence of auditors: p.32

We see no justifiable argument for companies not disclosing full details of non-audit fees paid to the auditor and consider the Principles should call for such disclosure.

D. Appointment of auditors: p.33

We strongly support the statement in the Principles that it is good practice for independent audit committees to be given the task of recommending the appointment of auditors. However, we consider this statement would be clearer put under point C, and that audit committees should consist entirely of independent non-executive directors.

V. Responsibilities of the board

D.2. Board and director appraisal: p.36

We welcome the reference to board and individual director appraisal. To ensure the worth of such processes we consider shareholders should be provided with sufficient information to be able to assess that appraisal procedures are independent and rigorous, and that the board is efficiently pursuing the long term interests of the company.

D.4 Independent remuneration committees: p.37

We advocate a more forceful statement on the importance of independent remuneration committees, as a means of avoiding conflicts of interest.

D.5 Nomination processes

We consider that the Principles should highlight the importance of independence in the nomination process, and that this is best achieved through the appointment of a fully independent nomination committee.

E. Board independence: p.38

We consider the Principles should be more positive in supporting the presence of a significant number of independent directors. As previously noted we consider independent audit, remuneration and nomination committees to be a fundamental element of good corporate governance and that the Principles should more explicitly recognise this. We agree that independence in this sense is not by itself a guarantee of effective independence, and we advocate extensive disclosure to shareholders on the biographical details of directors to help shareholders form their own view on this issue.

E. Separation of roles: p.39

We strongly support the clear statement in the Principles on the separation of the roles of chairman and chief executive being good practice. We consider that the Principles should include the need for a greater proportion of independent non-executives on the board when the CEO/Chairman positions are combined in one person. Additionally, we believe it should be clearly stated that problems relating to the chief executive moving up to the position of chairman are not restricted to two-tier boards. On unitary boards (as on two-tier boards) this practice risks difficulties in respect of the board's supervisory function and may inhibit an objective assessment of management strategy, and the initiatives of the successor CEO.

E.3 Attendance records and training: p.40

We support the disclosure by boards of director attendance records. In addition we consider the provision of specialised training for directors to be best practice.

CHRISTIAN STRENGER

(Member of the 'Private Sector Advisory Group' of the World Bank's Global Corporate Governance Forum; Member of the 'German Government Commission on Corporate Governance')

The views presented below are a contribution by the representative of the 'Global Corporate Governance Forum' at the previous consultations in 2003. They represent personal views that have not been expressly agreed with the members of the 'Private Sector Advisory Group'.

1. General comments

Overall, the proposed enlargements to the OECD Principles are balanced and should receive full support. The revised Principles should clearly remain general standards and guidelines for good governance that should be applied by countries, companies and their shareholders taking their respective legal, regulatory and institutional framework into account.

§ Important amendments of the revised Principles that are fully supported are (for details see section 2):

- I. G: Exercise of ownership rights by all shareholders

- II. C: Protection of minority shareholders against controlling share-holders

- II. A.4: Facilitation of cross-border voting

- IV: Duty of care of the external auditor

§ The following points should find further consideration (for details see section 2):

- I. C.3: Approval of remuneration schemes

- IV. C: Auditor independence to assume competence and qualification

- V. D.4: Board function regarding remuneration issues

§ The following points in the draft should be considered for inclusion or for clarification (for details see section 2):

- Disclosure of conflicts of interest by institutional investors (section I. F.2)

- Disclosure of conflicts of interest by members of the board and key executives for all matters affecting the corporation (section II.C)

- Limitation of audits of group subsidiaries not performed by the principal auditor (section IV.D)

- Requirement to regularly perform board reviews (section V.D)

- General obligation to establish board committees, especially the audit committee (section V. E.2)

2. Detailed comments on the revised Principles

I. The rights of shareholders and key ownership functions

§ Ad C.3: 'Effective shareholder participation ?, such as the nomination ? of board members should be facilitated.' This new principle should certainly be adopted but, not only in Germany, its implementation requires a change in company law.

Regarding the remuneration policy it would be preferable in addition to the right to 'make their respective views known to board members' to give shareholders the right to approve the entire remuneration scheme (but not the details) for key executives and board members ? and not only 'the equity component of compensation schemes' as proposed in the current draft of the Principles.

§ Ad F.2: Instead of the mere demand to 'disclose how institutional investors manage material conflicts of interest that may affect the exercise of key ownership rights regarding their investments' they should also be obliged to disclose material conflicts of interest. Without such an obligation the clients would be unable to assess the real independence of institutional investors. § Ad G: 'Shareholders ? should be allowed to consult with each other ? .' This important new principle should be defended against critics that view such behaviour as a case of 'acting in concert' without cause.

II. The equitable treatment of shareholders

§ Ad A 4. Of major importance is the facilitation of unrestricted cross border voting to increase shareholder participation at General Meetings, also in light of the revision in section I. of the Principles regarding key ownership functions. § Ad C. 'Members of the board and key executives should' not only 'be required to inform the board whether they, directly or on behalf of third parties, have a material interest in transactions directly affecting the corporation' but also should be required to inform shareholders as it was already included in the September 2003 version of the revised Principles. The original language should be restored.

III. The role of the stakeholders in corporate governance

§ Ad C: 'Performance-enhancing mechanisms for employee participation should be permitted.' The replacement of the word 'stakeholder' by 'employee' leads to a more focused policy advice, i.e. no general support of stakeholder participation but explicit recommendation for appropriate employee participation. § Ad E: 'Stakeholders, including individual employees, should be able to freely communicate their concerns about illegal and unethical practices to the company board and their rights should not be compromised for doing so.' This new principle defines ('whistle blower'-provision) is now more reasonably formulated compared to the September 2003-version of the Principles.

IV.Disclosure and transparency

§ Ad C: Additional requirement for auditors not only to be independent but also competent and qualified. Independence includes that competence and experience are given. The amendments are therefore not mandatory.

JAPAN BUSINESS FEDERATION (NIPPON KEIDANREN)

The Japan Business Federation (Nippon Keidanren) comprises 1,541 major Japanese business firms and industrial associations. The following opinion reflects the results of deliberations held regarding the OECD Principles of Corporate Governance Draft Revised Text (January 2004) by the Sub-committees on Corporate Governance and Corporate Law of the Japan Business Federation's Committee on Economic Law.

In Japan, ongoing efforts to address issues of corporate governance have been based on the view that there is no single model of good corporate governance, as mentioned in the current Principles. As in other countries, it is considered desirable that the market be entrusted with evaluation of corporate governance systems, on the premise that corporations will disclose their systems.

Similarly, we would find it desirable for the OECD to continue to adhere to the above position in the latest revision of the Principles and Annotations (Annotations to the OECD Principles of Corporate Governance), namely, that it would respect the diversity of existing corporate governance systems and refrain from seeking to prescribe best practice. This is advisable because respect for historical developments of the regulatory systems of different countries, and the cultural backgrounds of these, as well as for the diversity of corporate activities under such systems, has been a driving force of business creativity. This creativity has played a valuable central role in contributing to national economic development through companies' long-term growth. We request that work on the revision does not, in an attempt to draft detailed Principles and Annotations, seek convergence on a single model of corporate governance practice or patterns of action that are being followed in particular countries. In accordance with our stance that the OECD should not act as a de-facto regulator, we would like to comment as follows.

Preamble

Some have contended that there is a linkage between corporate governance on the one hand and "economic efficiency and growth," "protecting private savings" and companies' competitive strength. As indicated in the Survey of Corporate Governance Developments in OECD Countries, however, a number of limiting conditions attach to these assertions, which have yet to pass the test of conclusive empirical analysis. Moreover, more than a few theses arrive at other conclusions. Despite that inconclusive debate on the issue, the second paragraph of the draft revised text presents a conclusive pronouncement: "One key element in improving economic efficiency and growth as well as protecting private savings is corporate governance." Further, the ninth paragraph holds that "To remain competitive in a changing world, corporations must innovate and adapt their corporate governance practices so that they can meet new demands and grasp new opportunities." Both of these pronouncements should be removed.

The current Principles place the main focus on the relation between shareholders and management. While acknowledging the existence of other related parties, it avoids unnecessary specific references. As a result, clarity is much enhanced across the differences between jurisdictions and cultural factors of individual countries. Corporate stakeholders comprise executive officers, directors, and shareholders, as well as creditors, employees, accountants, analysts, and a range of other related parties. The purported functions and rights of these constituencies are, however, different from country to country. We request that the revised Principles do not sacrifice this clarity by expanding the scope of covered functions held by a multiplicity of related parties.

I. The rights of shareholders and key ownership functions

Section B subsumes “the transfer of assets” under “extraordinary transactions.” However, only small parts of “the transfer of assets” fall into the category of “extraordinary transactions.” The concept of impairment of shareholder capital is also unclear. The current version of the Principles should therefore not be altered.

The first paragraph of annotations to section C.3 stipulates “full disclosure of the experience and background of candidates for the board” in addition to the process of nomination of board member candidates. It is sufficient for shareholders to have information enabling them to vote for or against a proposal, and further, the scope of disclosure can be different from country to country and between corporations. This proposition should be removed.

The second paragraph of the annotations to section C.3 calls for disclosure of the connection between remuneration and company performance. It is our understanding that in European and US cultures, corporations offer high amounts of compensation to hire outstanding executives in order to achieve superior business performance. In Japan, however, the posts of corporate officers are tied in with long-standing, in-house promotion systems, and compensation amounts are not high as those in Europe and the US. For this reason, we do not consider this type of information essential to shareholders. We believe that this requirement is predicated on a one-sided view and thus inappropriate. It should therefore be removed.

Also removed should be the proposition in section F.1 that “The voting record of such (institutional) investors should also be disclosed to the market on an annual basis.”No definition is provided of institutional investors having fiduciary responsibilities, and in the case of institutions acting at their own discretion, no clarity exists over the relation between disclosure of voting record and the duty of confidentiality toward their beneficiaries.

This latest draft revision of the Principles is based on a survey conducted between 2002 and 2003. As an example for disclosure of voting records of institutional investors having fiduciary responsibility, the survey’s findings take up US mutual funds. However, in the US, upon implementing the mandatory disclosure of mutual funds’ voting records, the SEC solicited public comment, and many saw this as a harmful practice and remain opposed to it. Disclosure of voting records was enacted in February 2003, but will not be implemented until August 2004. Hence, since there is still no precedent, evidence has yet to emerge that the positives of the practice will outweigh the negatives that have been pointed out by opponents of the measure. We believe it is inappropriate for the revised Principles to incorporate matters like these that remain to be verified.

The second paragraph of the annotations to section F.1 holds that “Such a dialogue between institutional investors and companies should be encouraged, especially by the regulatory system.” This proposition amounts to excessive government interference and signifies action that contradicts with market principles. It also contravenes equitable treatment of shareholders and should therefore be removed.

II. The equitable treatment of stakeholders in corporate governance

The third paragraph of the annotations to section A.2 holds that “Other means of improving minority shareholder rights include derivative and class action lawsuits.” This perception is flawed, however, because derivative lawsuits are not a means to improve minority shareholder rights, but rather, intended as a system for the recovery of damage a company has sustained.

Moreover, Japan has adopted an appointed party system under which participating plaintiffs are appointed from among shareholders who can represent their common interest. Based on lessons learned from the US, this system is different from the class action suits whose misuse has become problematic in the US, and is designed to avoid the negative experiences of the US. Instead of the term “class action suit,”

a concept which has become problematic through misuse, we propose that the wording of the revised Principles should select an expression relating to litigation on behalf of shareholders' common interest.

Furthermore, in its White Paper on Corporate Governance in Asia, the OECD observes that "critics point in particular to shareholder suits' potential for excessive or frivolous litigation." It continues that "each legal system must try to strike a balance between allowing investors to seek remedies for infringement of their rights and avoiding excessive litigation." These discussions suggest that the annotation should include an addition to the effect that "Shareholders shall not engage in excessive or frivolous litigation."

III. The role of stakeholders in corporate governance

We object to section C in that, while the current Principles afford stakeholders participation in performance-enhancing mechanisms, the revision attempts to narrow such participation to employees. Certainly, it would be inappropriate if creditors were to interfere in the management of a financially healthy business. In relation to mechanisms to enhance performance, however, involvement from varied stakeholders is possible. Assuming that provisions concerning stakeholders, compared with other stakeholder-related stipulations, were limited exclusively to employees in these matters, this might be seen as a form of privileged employee participation.

As specific case-examples of mechanisms to enhance performance, the annotations to section C mention in particular employee representation on boards and governance processes such as works councils that consider employee viewpoints in certain key decisions. However, any of these concepts would be difficult to implant into the framework of the customary labor-management dialogue that permeates Japanese corporations, and should therefore be removed from the case-examples provided in section III.C.

In 2002, Japan's Commercial Code underwent a revision of provisions that until that point had restricted the scope of stock option grant beneficiaries to directors and employees. This revision made it possible to grant stock options also to directors and employees of affiliates, as well as to advisors of the company. In other words, the revision introduced eligibility for stock option grants for related parties who can contribute to the growth of companies. Thereby, companies that cannot easily raise funds on the merits of tangible assets as collateral can receive the advice of able parties by granting stock options. Any revisions that purport to introduce restrictions on such arrangements are not acceptable. The current version of section C of the Principles should therefore not be amended.

Although we endorse the content of section E, the term "ethics" indicates different notions depending on the country or region. Since we are concerned that there may not be a sufficiently shared universal concept of ethics, we maintain that this term should be removed.

As to section F, matters of bankruptcy law are not central to corporate governance. Nor can one necessarily claim that an endorsement of "enforcement of creditor rights" would lead to corporate governance reform. Including all these points in the revised Principles would over-extend the scope of the issues, and will only serve to diffuse the Principles' focus. This step would also contravene the policy set forth in the Preamble, under which the Principles focus on governance issues resulting from the separation of ownership and control. This proposition should be removed.

IV. Disclosure and transparency

Section A.4 requires board members to make disclosures of "their qualification [and] the selection process." Owing to its vagueness, this concept should be deleted.

The third paragraph of annotations to section A.4 calls for disclosure of the connection between remuneration and company performance. It is our understanding that in European and US cultures, corporations offer high amounts of compensation to hire outstanding executives in order to achieve superior business performance. In Japan, however, the posts of corporate officers are tied in with long-standing, in-house promotion systems, and compensation amounts are not as high as those in Europe and the US. For this reason, we do not consider this type of information essential to shareholders. We believe that this requirement is predicated on a one-sided view and thus inappropriate. It should therefore be removed.

It would appear that describing disclosure of corporate officers' individual remuneration as "increasingly regarded as good practice" amounts to a recommendation of the practice itself. At least in Japan, however, opinion remains divided on how to reconcile the positive effects of disclosure with the values connected to the protection of privacy. We believe that these recommendations should be removed.

As for section B, we endorse the view that conversion of individual national standards to an internationally recognized standard should be pursued in order to promote the globalization of finance, facilitate fundraising by corporations, and lighten the burden on corporations from having to accommodate different sets of disclosure rules in their disclosures activities. Currently, however, there exists no "internationally recognized" standard that could be shared by all OECD countries. The phrase "internationally recognized" should be added only after agreement on an internationally recognized standard has been reached among the involved countries. As for now, its usage is not appropriate and it should therefore not be included in the revised text of the Principles.

We would endorse the content of section F. However, real-world requirements on matters regarding analysts, brokers, rating agencies, etc., are broader in scope than those stipulated. Including these specific provisions in the revised Principles would indicate that the revised Principles limit the scope of responsibilities of these parties and diffuse the focus of the Principles. We recommend removal of these requirements.

V. The responsibilities of the board

Section C requires the board to adhere to "high ethical standards." We are concerned that there may be no sufficiently shared universal concept of "ethics." The current proposition of the Principles in terms of ensuring compliance with applicable law should not be modified.

Section E requires independence from controlling shareholders. However, from the start, boards are expected to serve and take duties upon themselves for the benefit of all shareholders. This requirement should therefore be removed.

The first paragraph of annotations to section E requires boards "to have non-executive board members." Since this is not applicable in instances of legally required mutual supervision among board members, this requirement should be removed.

Section E.1 gives examples of cases in which "independent judgment" should be undertaken by "a sufficient number of non-executive board members." This proposition should be removed. Such cases require expert judgment. Requiring non-executive board members to judge such cases may lead to inflation of their remuneration, and such high remuneration in turn could cause concern over their independence from the executives. In particular, non-executive board members would find it difficult to exercise informed judgment regarding board nomination and executive and board remuneration, since they are inexperienced in the practice of execution of operations.

Annotations to section E.1 assert that “independent non-executive board members can provide additional assurance to market participants.” On the contrary, a lack of assurance may ensue on the part of investors if company management is occupied by independent non-executive board members who are inexperienced in business management. Moreover, more than a few companies with predominantly executive board members have been successful in achieving higher corporate value than others. This requirement should be removed.

The second paragraph of annotations to section E.3 endorses the usefulness of in-house training and external courses for board members. This is not in the best interest of shareholders, however, since the concomitant cost has to be borne by the company. The capability to exercise their jobs should be required of board members, without incurring such cost to the company. This proposition should be removed.

THE GENERAL INSURANCE ASSOCIATION OF JAPAN

The General Insurance Association of Japan, the trade association representing Japanese non-life insurers, is most appreciative of the opportunity to present our comments on the draft text of the revised OECD Principles of Corporate Governance. We hope it would be of any help to the review.

For the following two reasons, we think that the last sentence of I. F.-1, "The voting record of such investors should also be disclosed to the market on an annual basis." should be deleted.

1. The sentence reflects the idea that the public disclosure of the voting records by investors acting in a fiduciary capacity would be of interest to the beneficiaries. However, it is a clear fact that the disclosure of voting records would entail a considerable cost burden on institutional investors. In such cases when the cost burden exceeds the benefit of disclosure, it can be reasonably said that the disclosure does not necessarily serve the interest of the beneficiaries. While the cost effectiveness is referred to in the "Annotations to the Principles", it is referred only in relation to the "exercise (of) ownership functions". It does not clearly state how cost effectiveness should be considered with regard to the disclosure of the voting records.

2. The principle aims to be applied internationally. Therefore, it should stipulate common minimum requirements applicable to every type of institutional investors, e.g., pension funds, mutual investment schemes, insurance companies, etc., in every jurisdiction. In doing so, it should duly take into account the varying regulations and legal systems surrounding institutional investors in different jurisdictions and the different characteristics and role of each type of institutional investor. We think that the current draft lacks due considerations and identifications regarding the specific issues of different jurisdictions and types of institutional investors, as well as regarding the relation between the cost burden and the benefit, as stated in 1. Therefore, we think that the sentence is not appropriate to be stipulated as an international principle.

SHANN TURNBULL

Preamble

The preamble is biased towards management and economic efficiency rather than concerns of shareholders or the social and political concerns of communities that give corporations the right to exist.

For example the preamble defines "*Good corporate governance*" in terms of:

Incentives for "*the board and management to pursue objectives*" rather than providing power to shareholders to make board and management accountable for achieving their objectives in controlling their savings.

"*Encouraging firms to use resources more efficiently*" without concern of the social, environmental and political impact of corporations.

"*Economic performance*" and "*efficient markets*" without concern on how corporations can influence the quality of life or undermine and replace democracy with autocracy and plutocracy.

The OECD Principles allows corporate owners and/or managers who represent a small minority of citizens to deny direct democratic control of the corporate economy to undermine and erode local autonomy.

I. The rights of shareholders and key ownership functions

The corporate governance framework should protect and facilitate the exercise of shareholders' rights

However, the excessive powers that directors possess over shareholders' exercising their rights is largely ignored in the OECD Principles as is the excessive conflicts of interest that corporate constitutions vest with the directors. For example:

The Principles do not provide to shareholders the right to be informed of the nature of counter parties when they transfer shares to expose shareholders to unwittingly trade with insiders, manipulators and other parties whose identity would constitute price sensitive information ***(A3).***

Provision for shareholders to only have "*the right to participate in*"… "*fundamental corporate changes*" so shareholders do not necessarily have the right to make corporations subject to their will ***(B).***

The Principles do not entitled shareholders to determine or control the rules and conduct of general shareholder meetings and so they are subject to the grace, favour and determination of the directors as to how they might "*participate effectively and vote*" ***(C).***

No provision to protect minority shareholders as only disclosure of their position is required ***(D).***

Requirement only to make management and the board accountable for entrenching their position not to protect shareholders from the management and the board from becoming and maintaining their entrenchment ***(E).***

No requirement for shareholders to disclose their ultimate beneficial owners and/or controllers which can be both price and political sensitive information as well as hiding insider trading ***(F/G).***

No mention of any obligation of governments to protect the rights of shareholders, stakeholders and community interests.

No mention of any obligation on shareholders and/or stakeholders to regulate corporations instead of governments to "*improve the legal, institutional and regulatory framework*" ***(Preamble)***

No requirement to protect shareholder rights with material quorums

II. The equitable treatment of shareholders

The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity obtain effective redress for violation of their rights

The Principles allow the wealthy to control corporations with one share one vote to create a plutocracy. When wealthy shareholders like institutions do not vote or give their proxy vote to corporations, directors become accountable to, and are appointed by them-selves to create an autocracy. Either way democratic control of an economy is reduced to be inconsistent with aims of the OECD, World Bank, BIS and IMF. It means that the degree that an economy is subject to democratic control and accountability is eroded when corporatization and privatisation uses one vote per share as is now common but which was judged to be unlawful by the New Jersey Supreme Court in 1834[1]***(A1).***

Minority shareholders are dependent upon controlling shareholders or unspecified external agents to protect them from abuse rather than requiring corporations to establish effective internal means of protecting, redressing and/or compensating minority interests ***(A2).***

Likewise the ability of shareholders to make corporations accountable is left to "*Company procedures*" and the untenable conflicts of interests of having procedures determined by the directors who are being held accountable. The authority given by governments for corporations to exist need corporate constitutions to safeguard the "*equitable treatment of all shareholders*" and "*not make it unduly difficult or expensive to cast votes*"***(A4).***

The statement that "*Insider trading and abusive self-dealing should be prohibited*" is inadequate without corporate constitutions requiring all valid share transfers to be predicated upon full disclosure at the time of transfer of all ultimate beneficial owners and/or controllers with a declaration of any insider knowledge or relationship ***(B).*** Such "sunlight share trading" would allow shareholders to protect themselves by tracing and checking the possibility of insider trading and sue for compensation when improper disclosure was found.

The statement that " *board and key executives should be require to inform the board whether they*"..."*have a material interest in corporate transactions*" does little or nothing for the equitable treatment of shareholders if such interests are not reported to them or there is no redress for non disclosure or for loss of value through such transactions ***(C).*** What is required are corporate constitutions that forbid any director or executive to hold their position with the corporation if there is non-disclosure of any related party transactions or if such transactions are not reported and approved by the shareholders or their representatives.

[1] Dunlavy, C.A., 1998, 'Corporate Governance in Late 19th-Century Europe and the U.S.: The Case of Shareholder Voting Rights', in *Comparative Corporate Governance: The State of the Art and Emerging Research,* eds. Klaus J. Hopt, Hideki Kanda, Mark J. Roe, Eddy Wymeersch, and Stefan Prigge, Clarendon Press, pp. 5–39, Oxford.

The Principles are inadequate as there are:

No rights for shareholders to be informed of other shareholders with inside information

No rights for shareholders to know who is trading shares

No requirement for statutory insiders to disclose their trading intentions

Reliance on legal rights rather than administrative rights to protect shareholders

Assumes shareholder rights depends upon directors not shareholders/government

III. The role of stakeholders in corporate governance

The corporate governance framework should recognise the rights of stakeholders as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability for financially sound enterprises.

Does not provide guidelines or processes to assure that stakeholders are protected as required by law ***(A).***

Does not protect stakeholders not protected by law ***(A).***

Does not provide guidelines or processes to assure that stakeholders can obtain redress for violation of their rights ***(B).***

Ignores the ability of stakeholder engagement to replace government regulation and/or act as co-regulators ***(B&D).***

Employees, on whom any business depends for its existence, are not given rights to participate in the governance of a corporation ***(C).***

Does not recognise that no firm can exist without stakeholders and so stakeholder engagement and participation in corporate governance should be a fundamental requirement ***(D).***

The suggestion that "stakeholders and individual employees, should be able to freely communicate their concerns about illegal or unethical practices to the company board" is likely to be counter-productive for the stakeholders with companies so governed centrally with a single board **(E).**

The Principle of a division of power with checks and balances to detect and protect the company, its shareholders and stakeholders from illegal and unethical practices is ignored ***(E).***

The Principles are dependent upon outside agents to protect creditors. They ignore the contribution that creditors can make by being engaged in the governance of firms to protect themselves, the company, shareholders and other stakeholders ***(F).***

IV. Disclosure and transparency

The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company

No requirement for directors, auditors, employees or any other stakeholders to disclose to anyone unethical practices, malfeasance, fraud and/or illegal acts ***(A).***

No provision to establish and protect whistleblowers ***(A).***

No provision for stakeholders to disclose to the board and/or the shareholders the Strengths, Weaknesses, Opportunities and Threats (SWOT) in the business operations, employees, management and/or the board ***(A).***

No provision for corporate constitutions to separate the power and conflicts created by those responsible for corporate performance being also responsible for reporting on their performance ***(B).***

No requirement in corporate constitutions to prohibit directors engaging auditors to carry out other duties for the company ***(C).***

Conflicts of interest and confused accountability of auditors created by requiring them to "*be accountable to the board as well as shareholders*" and owning "*a duty of care to the company*" ***(D).***

No provision to disclose standards of corporate behaviour including standards of disclosure ***(E).***

No provision to disclose integrity of processes to report deviations from disclosed standards.

No provision to disclose integrity of processes to correct deviations from disclosed standards.

V. The responsibilities of the Board.

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and its shareholders.

Ignores the fact that many corporations only have members not shareholders ***(A).***

Ignores the fact that "*the best interest of the company*" may be not to have shareholders, especially companies providing education, health, and other community services where shareholder interests can jeopardise the integrity of the reason for the company to exist ***(A).***

Ignores the need for "*different shareholder groups*" to have their own elected representatives to voice their perspective to allow the board to "*treat all shareholders fairly*" ***(B).***

Ignores the unethical practice of boards or the board chairperson controlling the process by which the board is held accountable to shareholders at general meetings and the conflicts created by a director chairing a meeting of shareholders ***(C).***

Ignores the need for stakeholders to have their rights protected in the corporate constitution to give advise to the board on how to "*take into account the interest of stakeholders*" ***(C).***

The Principles concerning the functions of the board introduce untenable conflicts of interest with opportunities for directors to self deal, determine their own remuneration and entrench their position of power, privilege and influence without meaningful checks and balances or processes to mediate their conflicts ***(D).***

The board functions required by the Principles in large and/or complex dynamic corporations introduce unrealistic workload, information assimilation, analysis, and responsibilities that are beyond the capabilities of gifted humans to creditably achieve on a reliable manner ***(D).***

The Principles provide no creditable processes for directors to carry out their key function of monitoring management and the business, independently of the management that they are monitoring ***(D. 3).***

The Principles provide no creditable or systemic processes for directors to discover when their trust in management might be misplaced and so represent irresponsible governance over the savings of investors' and the interest of its employees, customers, suppliers and host community ***(D).***

The Principles assume that directors and key executives require economic rewards "*to best serve the longer term interests of the company*" when this approach may be unnecessary and counter productive ***(D4).*** Non economic incentives and internal competition by management for recognition and job satisfaction are ignored.

The Principles are only concerned with "*potential conflicts of interest of management, board members and shareholders"* and not the actual conflicts. Contentious and crucial actual conflicts for directors commonly arise from determining their own remuneration, the conditions of other related party transactions, their re-nomination to the board, methods of determining profit or loss within accepted accounting standards, and the process of being accountable to members ***(D6).***

The Principles are unrealistic in expecting board to manage, mediate and/or report all their own conflicts of interest without corporate constitutions establishing processes to avoid, minimise and/or mediate conflicts as commonly found in sustainable employee controlled firms ***(D, E1).***

The Principle that the board should "exercise objective judgement" independent from "dominant shareholders" ***(E)*** is inconsistent with the Principle in Section ***II (A.1.)*** which states "*Within any class, all shareholders should have the same voting rights*" as this makes directors beholden to a dominant shareholder.

The Principles ignore the ability of strategic stakeholders such as employees, customers, supplies and host communities to complement and simplify the duties of directors by providing them with inside expert and committed information independently of management on the SWOT of management and the business operations ***(D).***

The Principals are inconsistent with the natural laws of governance that allows biota to sustain their existence on a reliable self-regulating and self-governing basis as explained in my article 'The Science of Corporate Governance' http://papers.ssrn.com/sol3/papers.cfm?abstract_id=316939

THE INSTITUTE OF INTERNAL AUDITORS – UK AND IRELAND

Overall, we support the existence of internationally recognised and high level principles of corporate governance and we welcome the idea that they should be reviewed and revised on a regular basis as practices evolve. We have no comments on the changes that are currently proposed but we do believe that

further additions should be made, namely to emphasise the importance of internal audit and of risk management. Our detailed response is provided in the attached note but we would like to take this opportunity to outline the role of internal audit in corporate governance.

A professional, well-resourced internal audit function is an integral and necessary part of an effective corporate governance framework. Alongside the board, executive management and external audit, internal audit is one of the four cornerstones of good governance. This fact has now been recognised by listing authorities both in the United Kingdom and in the United States, and we urge the Steering Group to reflect these developments by referring to internal audit within the Principles.

1. Introduction

The Institute of Internal Auditors – UK and Ireland (IIA) is the primary body representing, promoting and developing the professional practice of internal auditing in the UK and Ireland.

The IIA qualification (MIIA) is regarded as the leading professional qualification for internal auditors. Qualified members of the IIA are grounded in risk management and control, corporate governance, financial and management accounting, and business information systems. The commercial relevance of the IIA's qualification is ensured by the fact that membership of the Institute is only granted when a student has recorded a career profile demonstrating at least three years' relevant experience. Through constant monitoring of the syllabus, the IIA ensures that its qualification covers the latest business issues in a rapidly changing marketplace.

All IIA Members are expected to observe high ethical standards of professional conduct. They share the fundamental principles of the profession - the *Code of Ethics* and the *International Standards for the Professional Practice of Internal Auditing* - with over 85,000 internal auditors worldwide.

2. Detailed Response

Internal Audit essential to good corporate governance

A professional, well-resourced internal audit function is an integral and necessary part of an effective corporate governance framework. Alongside the board, executive management and external audit, internal audit is one of the four cornerstones of good governance. This fact has now been recognised by listing authorities in both the United Kingdom and in the United States.

In the United States, the New York Stock Exchange requires listed companies to have an internal audit department. In the United Kingdom, the Combined Code on Corporate Governance highlights the value of an internal audit function and requires the Audit Committee of the Board to take an active role in ensuring that the function remains independent, objective and effective.

An effective internal audit function must have the power and authority to look at the key risks, to report results and to drive improvements; it must conduct its work independently and objectively, applying the appropriate skills, knowledge and professional care; and it must strive to measure and to improve the quality of its work. All these elements are covered in the *Institute of Internal Auditor's Code of Ethics* and *International Standards for the Professional Practice of Internal Auditing*. These *Standards* are the profession's recognised measure of internal audit effectiveness and are followed by 85,000 IIA members around the world.

The Smith Guidance, annexed to the Combined Code, endorses the *Code of Ethics* and the *Standards*, using them to indicate the elements it expects to see in the effective internal audit function.

The role of internal audit could be included in either Section IV Disclosure and transparency or Section V The responsibilities of the board. We recommend that you refer to the *Code of Ethics* and the *Standards.*

Importance of Risk Management to Corporate Governance

Organisations face risks when they are trying to achieve their objectives. The way their board members manage those risks is a vital element of their Corporate Governance. However, at present, the Principles make only indirect references to risk management, which seems inappropriate given its importance, or couch the references in terms of accounting and financial reporting structures.

In an organisation with the highest levels of risk maturity, risks are taken into account at all levels and on a continuing basis. This does not impede risk-taking; rather it ensures that risks are properly evaluated, appropriate compensatory actions are taken and organisational objectives are more likely to be achieved. An overarching framework allows risks to be discussed using common language in all functions and at all levels and ensures that the senior executives and the board members are fully aware of the risks being accepted, taken and monitored.

Risks will be identified and assessed then a decision will be taken how to handle them. Depending on the organisation's particular appetite for risk, individual risks may be accepted, monitored, transferred to another party, terminated by ceasing the related activity or controlled. The internal control structure exists to handle risks, both financial and operational.

We recommend that in Section V of the Principles, you include a clear statement that the Board is responsible for establishing, taking part in and overseeing a system of risk management. This responsibility should be separated from and take precedence over any responsibility for accounting and financial reporting systems, which are only part of the risk population. We recommend further that the disclosures required in Section IV should include explanations of the nature of the risk management system.

Internal Control Structure – financial and operational

At present, the Principles give little prominence to the importance of the internal control structure and where this is mentioned, the discussion is weighted more towards financial controls than towards operational controls. In more integrated and complex organisations, it is difficult to separate these two kinds of controls.

The Board is responsible not only for setting up systems of internal control that adequately address the risks facing the organisation, but also for ensuring that those controls continue to operate to address those risks. Regular management activity will provide the board with assurances on internal controls, but a professional, well-resourced internal audit function is the most effective source of independent assurance. This is one of the key reasons why internal audit is so important to corporate governance.

We recommend that in Section V of the Principles, you include a clear statement that the Board is responsible for the effectiveness of the structure of internal control; and that the disclosures required in Section IV should include some recognition of this responsibility.

MÜNCHENER RÜCKVERSICHERUNGS-GESELLSCHAFT

I.C.2: Shareholders should have the opportunity to ask questions to the board and the external auditor, (…).

Shareholders of German stock corporations have the opportunity to ask questions to the board of management (Vorstand) at the annual general meeting of shareholders; however, the shareholders are not entitled to ask questions to the supervisory board (Aufsichtsrat) and the external auditor, and we cannot identify a need to implement such right under the conditions and circumstances of the so called two tier system which is authoritative for German stock corporations.

I.C.3: Effective Shareholder participation in key corporate governance decisions, such as the nomination and election of board members should be facilitated.

The shareholders of German stock corporations do participate in the election of the members of the supervisory board; however, they are generally not involved in the process of nomination of the members of the supervisory board. As a basic principle, the supervisory board itself has the exclusive right to put up someone for election to the supervisory board by the annual general meeting of shareholders. We strongly believe, that this separation of powers has stood to the test and should be conserved under the conditions and circumstances of the so called two tier system.

VI.A.4: Disclosure should include, but not limited to, material information on: (...) Members of the board and key executives, and their remuneration (...).

From our point of view, it should be sufficient to inform about the overall remuneration of the members of the board of management and the supervisory board, split up into the different components of remuneration. We assume that reasonable investors have no interest to learn about the exact amount of remuneration of each individual board member.

STANDARD & POOR'S RATINGS SERVICES

This letter is submitted by Standard & Poor's Ratings Services ("S&P Ratings Services"), a part of Standard & Poor's, a division of The McGraw-Hill Companies, Inc., in response to the OECD's request for public comment on its recently released draft Principles of Corporate Governance.

While S&P Ratings Services applauds the overall direction of the Principles, their emphasis on good governance and the roles that management, boards, and auditors can and should play in developing and enforcing rules and procedures that protect investors and other stakeholders, we are concerned that in the latest draft of its Principles, the expansion of OECD's focus to include credit rating agencies risks diluting the effort's overall purpose and design and disregards the separate and ongoing work of such financial securities agencies as IOSCO, and various regulators including the U.S. Securities and Exchange Commission. Indeed, at a time following considerable research and public discussion when several of these organizations are about to offer comments about how rating agencies can better assist investor and market needs, S&P Ratings Services believes it is more appropriate and better for consistency and the

global markets overall if the OECD does not expand its efforts into rating agencies. This approach would allow the entities currently conducting and coordinating their reviews to complete their work on the same issues.

In addition, not only does reference to credit rating agencies in the Principles risk confusing rather than complementing other organizations' work, but the language indicates a misinterpretation of IOSCO's Statement of Principles Regarding the Activities of Credit Rating Agencies, and does not reflect the long-standing record of success that rating agencies like S&P Rating Services have maintained offering opinions of creditworthiness of obligors and managing potential conflicts of interest.

With respect to the IOSCO Principles cited in OECD's draft Principles (Section IV, Paragraph F), in neither the IOSCO Principles nor IOSCO's Report on the Activities of Credit Rating Agencies does IOSCO advocate the regulation of rating agencies or regulation to address any potential conflicts of interest, as the OECD draft Principles imply. We are also surprised that, as a general matter, the OECD draft Principles appear to encourage regulation despite the research conducted on the issues surrounding regulation and the pending work of the organizations mentioned above.

For example, the effective manner in which S&P Ratings Services manages conflicts of interest around our business model has been recognized by numerous market participants. In addition, a recent white paper produced by the US Federal Reserve acknowledged publicly that ratings do not appear to be influenced by rating agency conflicts of interest but, rather, suggests that rating agencies are motivated primarily by reputation-related incentives ("Testing Conflicts of Interest at Bond Ratings Agencies with Market Anticipation: Evidence that Reputation Incentives Dominate" Federal Reserve Board, 2003; authors: Daniel M. Covitz and Paul Harrison, available at www.federalreserve.gov/pubs/feds/2003/index.html.

S&P Ratings Services believes that over the last century credit ratings have served the global securities markets extremely well, providing an effective, independent and objective tool in the market's evaluation and assessment of credit risk. S&P Ratings Services believes that the availability of credit ratings that are credible and, as demonstrated by their performance, reliable is a principal factor in the international debt markets' depth, breadth, efficiency and cost effectiveness.

ETHICS & POLICY INTEGRATION CENTRE

We offer this letter in response to the Steering Group's invitation to comment on its proposed Principles of Corporate Governance. Mr. Johnson has consulted internationally on corporate responsibility, including corporate governance and ethics and compliance programs, with an emphasis on program evaluation and good governance in emerging market economies. Mr. Zorzopulos has worked on corporate social responsibility issues with the World Bank and served as Corporate Responsibility Manager for Chiquita Brands, International.

We believe that, on balance, the proposed changes reflect well-considered evaluation of the international corporate governance experience over the last few challenging years. Largely reflecting best practices, however, we believe that the principles can be improved if they are modified to reflect certain fundamental premises. In particular, we believe that (1) the introductory principle should embrace the role of self-regulation and voluntary commitments in establishing the Corporate Governance Framework, (2) the role of stakeholders other than those specifically protected by law, including the community and environment, should be respected throughout the Principles, and (3) the board's primary governance role as link between the owners and operators, rather than as advisor to management, should be reinforced in Principle V.

Recommendation A. Make explicit that an effective Corporate Governance Framework includes self-regulation

Commentary to the proposed guidelines explicitly recognizes that "governments have an important responsibility for shaping an effective regulatory framework that provides for sufficient flexibility to allow markets to function effectively and to respond to expectations of shareholders and other stakeholders." It further recognizes that:

This corporate governance framework typically comprises elements of legislation, regulation, self-regulatory arrangements, voluntary commitments and business practices that are the result of country specific circumstances, history and tradition. The desirable mix between legislation, regulation, self-regulation, voluntary standards, etc. in this area will therefore vary from country to country.

However, the Introductory Principle, "Ensuring an effective corporate governance framework," addresses only legal and regulatory requirements and agency relationships.

We recommend that the introductory principle add a fifth subPrinciple recognizing self-recognition and voluntary commitments as integral parts of a Corporate Governance Framework.

In a related sense, we recommending that the Introductory Principle provide that "legal and regulatory requirements" are enforceable by authorities and stakeholders protected by law."

Recommended Modifications to Introductory Corporate Governance Principle

Ensuring an effective corporate governance framework

The corporate governance framework shall be developed with a view to its overall economic performance….

The legal and regulatory requirements that affect corporate governance practices in a jurisdiction should be transparent and enforceable by authorities and stakeholders protected by law.

The division of responsibilities….

Supervisory, regulatory and enforcement authorities should have the authority, integrity and resources to….

Where codes and principles are used as substitutes for legal and regulatory provisions to encourage self-regulatory arrangements, voluntary commitments, or business practices, their status in terms of coverage, implementation, and sanctions should be specified to ensure market credibility.

End of Recommended Modification

Recommendation B. Provide a more inclusive and consistent definition of "Extraordinary Transactions" in Principle I. The rights of shareholders and key ownership functions

Principle I refers to "extraordinary transactions" in two places. Principle I.B refers to "transfer of assets" and Principle I.E.1 refers to "mergers, and sales of substantial portions of corporate assets". These two references are inconsistent and do not include a major corporate event, acquisition of other corporate assets.

We recommend that "extraordinary transactions" be defined consistently and include mergers, acquisitions, and transfer of assets.

Recommended Modifications to Introductory Corporate Governance Principle

B. Shareholders shall have the right to participate in … 3) extraordinary transactions, including mergers, acquisitions, and sales of substantial portions of corporate assets that in effect result in a substantial change in the corporate assets or an impairment of shareholder capital.

E. Markets for corporate control should be allowed to function in an efficient and transparent manner.

1. The rules and procedures governing the acquisition of corporate control in the capital markets, and extraordinary transactions such as mergers, acquisitions, and sales of substantial portions of corporate assets, should be clearly articulated and disclosed so that investors understand their rights and recourse. Transaction should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class.

End of Recommended Modification

C. The Corporate Governance Framework should provide for a more proactive minority shareholder role

Principles A.1-5 suggest how corporate governance can be established in ways that protect minority shareholder rights. We recommend that the commentary to Principle A.2 include language reflecting the ability of minority shareholders to introduce shareholder resolutions.

Recommended Language modifying

Commentary to Principle II. The equitable treatment of shareholders

2. Minority shareholders should be protected from abusive actions by, or in the sole interest of, controlling shareholders and should have effective means to influence company policy decisions and effective means of redress where their rights are violated.

Many publicly traded companies….

In addition to disclosure….

Other common provisions to protect minority shareholders, which have proven effective, include preemptive rights in relation to share issues, qualified majorities for certain shareholder decisions, the power to introduce shareholder resolutions to influence company policy and the possibility to use cumulative voting in electing members of the board. ….

End of Recommended Modification

Recommendation D. Broaden the definition of "stakeholders in corporate governance"

As a creature of statute, there are some who argue that the purpose of a corporation is only to create wealth for its shareholders. Indeed some argue that the fiduciary duties of the members of the board of directors as representatives of the shareholders even preclude their setting company policies that reflect commonly held notions of corporate social responsibility. Setting forth a corporate governance framework recognising only the "rights of stakeholders as established by law" tends to perpetuate this misperception.

Expanding the definition of "stakeholders in corporate governance" to include all stakeholders who have reasonable expectations of the company, many created by the decisions and activities of the company itself, tracks the Introductory Principle, which recognizes that the Corporate Governance Framework includes self-regulation and voluntary commitments.

We recommend the language to reflect that specific legal and regulatory provisions in the Corporate Governance Framework relating to corporate are not the sole source of reasonable stakeholder expectations.

Further, a key provision providing stakeholders with the opportunity to influence corporate governance includes being able to safe and freely communicate with the company board. As drafted, Principle III.E. provides that the company should allow stakeholders to freely communicate their concerns about misconduct. This provision should be expanded to include allowing stakeholders to freely "seek guidance," since the goal of corporate governance controls is to avoid misconduct.

Moreover, many of the best practices that have developed over the last two decades suggest that being able to promise anonymity and confidentiality to stakeholders, as appropriate, are important capabilities for a company to be able to provide the means for stakeholders to be able to communicate freely and safely. However, a promise of confidentiality requires appropriate legal or regulatory support to be enforceable. Being able to provide for mechanisms allowing for anonymous and confidential communications as a matter of law, therefore, should be an integral part of the Corporate Governance Framework.

Recommended Language modifying

Principle III. The Equitable treatment of stakeholders

The corporate governance framework should recognize the rights and reasonable expectations of all stakeholders, whether protected by law or having interests resulting from the decisions and activities of the company itself, including the community and environment, and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises

A. Though a creature of statute, the corporation has diverse stakeholders—those involved in, affected by, and in a position to influence the company—whose rights and reasonable expectations should be respected.

B. Where stakeholder interests are protected by law….

C. Performance-enhancing mechanisms for employee participation….

D. Where stakeholders participate….

E. Stakeholders, including individual employees, should be able to seek advice and communicate their concerns about illegal and unethical practices to the company board without fear of retaliation through mechanisms allowing for anonymous communication and promises of confidentiality, where appropriate and enforceable as a matter of law.

End of Recommended Modification

Recommendation D. Responsibilities of the board

There are a number of fundamental concepts underlying the role of Boards of Directors that need to be more explicit, and the principles and practices that the proposed corporate guidelines address need to be consistent and aligned. In large part, the Principles reflect a global tendency for directors to be focused on advising management and controlling company performance. As Sir Adrian Cadbury has observed:

Boards, as we know them, face the problem of where and how to draw the line between direction, which is the task of the board, and management, which is the task of the executive. The temptation is always for direction to seep into management. Running a business is more immediate, more gripping, and more easily grasped than determining the purpose of the business and setting the framework within which the business has to be managed. The consequence is that boards tend to look inward at management rather than outward to the owners and how best to govern on their behalf. Once a board has defined ends and bounded means, it has established an unequivocal basis for the separation of board and management roles.[11]

However, the principles underlying the Corporate Governance Framework for the board of directors are essentially those of advisors not the voice of the shareholder-owners. In other words, the distinction between governance and management, especially the role of the board as representative of the owners, is not clear. We recommend that Principle V include specific references to the essential role of the board to establish governing policy, which includes (1) establishing the *ends* of the company, its purpose and performance expectations; (2) limiting the *means* the company can employ in pursuit of its purpose and

[11] Adrian Cadbury, Forward to John Carver and Caroline Oliver, *Corporate Boards That Create Value: Governing Company Performance from the Boardroom* (San Francisco, California: Jossey-Bass, 2002), p. xiv. Our recommendations include language adapted from a sample "Governance Process Policy" contained in *Corporate Boards that Create Value*, pp. 40-41.

performance expectations; (3) delegating authority to management to manage the company accordingly; and (4) establishing the philosophy and processes prescribing its own internal operations.

Recommended Language modifying

V. The responsibilities of the board

The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability and loyalty to the company and the shareholders.

A. The purpose of the board is to act faithfully on behalf of the shareholders to see to it that the company (a) achieves appropriate results for the shareholders and (b) avoids unacceptable actions and situations, subject to the underlying obligations of contributing to the social order inherent in good citizenship.

B. As the representatives of the shareholders' interests in the company, the board should establish a clear separation between the roles of board governance and management while maintaining a credible and continuing link between owners and management.

C. Board members should act on a fully informed basis….

D. Where board decisions affect different shareholder groups differently….

E. The board should apply high ethical standards. It should take into account the interests of all stakeholders, whether protected by law or created by the decisions or activities of the company itself.

E. The board should fulfill certain key functions, including:

1. Defining in general the ends and bounded means of the company; setting performance expectations; reviewing and guiding company strategy, major plans of action, risk policy, annual budgets and business plans; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.

2. Establishing the guiding policy for the company's governance practices, monitoring their effectiveness, and making changes as necessary.

7. Ensuring the integrity of the company's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management; financial and operational control; compliance with the law and relevant standards; and otherwise meeting the reasonable expectations of company stakeholders, including the community and environment.

End of Recommended Modifications

ICFTU

Further to our discussion in Davos, I am writing to share some concerns with respect to the "Draft revised Principles of Corporate Governance". We are aware that several Global Union Federations have also forwarded their concerns. Our views are in support of these other comments and, in particular, we fully support the comments raised by TUAC.

The ICFTU has 233 affiliated organisations in 152 countries and territories, representing a total of over 150 million members. Most of the national trade union organisations, both inside and outside the OECD area belong to the ICFTU.

As has been the case with a number of documents adopted and decisions taken by the OECD in the past, we believe that this document too has the potential to become very important for countries outside of the OECD area. Within the scope of the 12 core standards of the Financial Stability Forum, the World Bank and the IMF use monitoring of the OECD Principles as an element guiding their lending decisions. As such, the Principles are increasingly regarded as a “soft” conditionality. This implies that the revised text should also be looked at from a non-OECD country perspective. The current text lacks precision and focus to be as valuable as it might be.

In view of this, we feel that the draft revised text does not sufficiently reflect the needs of developing countries. As the OECD principles will, in all likelihood, influence the debate for OECD and non-OECD countries alike, the ICFTU's affiliates from developing countries are among those that would like to see a deeper and stronger set of Principles. The corporate governance framework should be seen as part of a larger and broader governance issue. The context of the principles needs to incorporate a much broader range of public interest in the accountability of management.

We must concur with the view of TUAC that the revised text does not adequately represent those “broad features considered essential for the development of good governance practice”. We share the concern that the current draft is too weak on such issues as curbing inappropriate levels of executive remuneration, delivering shareholder responsibility, curbing excesses of power of “imperial CEOs”, ensuring the accountability of Boards of Directors, and giving real rights to stakeholders.

The ICFTU also joins the opinion of TUAC that the present text does not sufficiently meet the needs of those institutional investors that seek to exercise responsible stewardship over specific companies. Many pension fund trustees would like to take a much more engaging role, often through their investment managers. How to make sure that workers, who, through their retirement funds, essentially own parts of companies and who depend on its well-functioning for their retirement, is an important aspect of this debate. These principles of corporate governance are not only a way to regain the confidence by the general public, it is also a way to protect their interests as, increasingly, it is their money that is being invested.

As to the text of chapter III, we fully support the view of TUAC and others that the stakeholder chapter must be strengthened. Presently the chapter seems to be an attempt to settle an ongoing debate with a minimalist position. This is despite a growing recognition that expectations with respect to management accountability must be brought closer in line with the expectations of society concerning the positive effects of business activity. The current revised text does not inform corporations on the best practises that contribute to the effective representation of the interests of stakeholders whose rights are established (by law, by contract, sector wide agreements or by any other voluntary commitment of the corporation). This chapter should be in line with current trends, as well as with those best practises.

It is especially regrettable that there is no consideration in the text of the practise in many continental European continental countries for workers' participation and social dialogue. The chapter does not reflect the situation of many OECD members or of most European countries with respect to this issue. The European Works Council Directive, the directive on generalised information and consultation rights for employees, the European Company Statute, as well as the proposed take-over directive that specifically includes a model for employee consultation (article 14) constitute important practices with respect to stakeholders that ought to be reflected in this chapter.

The treatment of stakeholders does not sufficiently distinguish among various stakeholders by taking into account the nature of their various interests and their role in increasing accountability. This is especially important with respect to employees whose interests should be provided for within the corporate governance framework. Such employee representation cannot always be linked to economic performance. We agree with TUAC that there is a conceptual misunderstanding between performance enhancing mechanisms and representation.

LA CONFÉDÉRATION GÉNÉRALE DU TRAVAIL (FRANCE)

La Confédération Générale du Travail (France) s'intéresse aux débats autour du gouvernement d'entreprise en raison des impacts de ces pratiques d'une part sur l'emploi et les conditions de vie et de travail des salariés et d'autre part sur l'ensemble de la société. Il paraît ainsi important qu'il existe au niveau international des repères clairs et efficaces pouvant servir de référence de haut niveau à la définition des politiques au niveau des Etats et/ou des unions d'Etats en la matière.

Depuis leur lancement en 2003, la CGT suit avec attention les négociations engagées dans le cadre de l'OCDE pour réviser les Principes relatifs au gouvernement d'entreprise de 1999. Elle participe aux travaux menés en ce sens par la Commission syndicale consultative auprès de l'OCDE (TUAC) et en soutient les principales propositions.

Le processus de révision mené par « le groupe de direction de l'OCDE sur le gouvernement d'entreprise » entrant maintenant dans sa phase finale – l'adoption des principes révisés pouvant avoir lieu lors du prochain Conseil ministériel de l'OCDE des 13 et 14 mai 2004 – la CGT souhaite donner son opinion sur le projet soumis à consultation publique.

D'une façon générale, nous considérons que le projet proposé reste très en deçà des exigences issues « *des évolutions survenues depuis 1999 dans le domaine du gouvernement d'entreprise* » [Préambule, 2ème paragraphe]. La multiplication des scandales et les dysfonctionnements graves constatés dans les processus de décisions de nombreuses entreprises dans les pays membres de l'OCDE ou non membres appellent en effet une révision en profondeur des Principes qui devront former *« le socle des initiatives prises en ce domaine par les pays.*» [Préambule, 1er paragraphe].

En l'état actuel du projet, tel n'est pas le cas. Au surplus le projet proposé à consultation paraît même en retrait par rapport à la version de départ proposée par le secrétariat de l'OCDE.

Si nous prenons acte des quelques progrès réalisés dans la protection des droits des actionnaires minoritaires, ceux-ci ne peuvent compenser les graves insuffisances du texte en matière de transparence et

de contrôle des processus de décisions, de démocratisation de ceux-ci et de reconnaissance des droits des salariés et autres parties prenantes dans le gouvernement des entreprises.

Dans cette contribution, la CGT entend, pour aller à l'essentiel, se concentrer sur quelques points.

Le premier concerne la rémunération des dirigeants et la prévention des conflits d'intérêts. Le projet proposé se contente de souligner que « *les actionnaires doivent pouvoir faire entendre leur opinion concernant la politique de rémunération des administrateurs* » [Principe I.C.3]. Pour la CGT, la politique de rémunération, à l'origine de nombre de scandales récents qui ont ému les opinions publiques, devrait absolument recevoir l'approbation formelle des actionnaires mais aussi des représentants des salariés. Ce droit d'ores et déjà mis en place dans quelques entreprises devrait être retenu comme un Principe. De la même façon, il apparaît indispensable de prévoir explicitement des mécanismes clairs permettant de prévenir les conflits d'intérêts. Ces mécanismes ne sont pas suffisamment précisés dans le projet proposé.

L'essentiel des préoccupations de la CGT concerne le chapitre III intitulé « *Rôle des différentes parties prenantes dans le gouvernement d'entreprise* ». Alors que le chapitre I consacré aux actionnaires parle de Droits de ceux-ci et proposent quelques nouveautés en la matière, les parties prenantes elles non qu'un « rôle » et leurs droits sont strictement limités à l'existant (« *il convient de respecter les droits des différentes parties prenantes qui sont protégés par la loi* » [Principe III.A]. Pour la CGT, ceci n'est pas satisfaisant. En conséquence, il est indispensable de rééquilibrer les chapitres et de faire des propositions pour accroître les droits d'intervention et de représentation des salariés. Ainsi, la CGT soutient la demande des organisations syndicales internationales d'inclure dans les Principes un *Droit généralisé à la représentation des parties prenantes*. En l'état actuel, le texte proposé reste très en retrait de ce qui a cours en Europe en matière de principes d'organisation des entreprises et de représentation des salariés, éléments constitutifs du modèle social européen. Au surplus, le texte proposé va à l'encontre des directives européennes – pourtant déjà fort timides ! – sur les Comités de groupe européens.

Par ailleurs, le Principe III.C : « *Il convient d'autoriser les mécanismes de participation des salariés de nature à améliorer les performances* » entretient une grande confusion entre la représentation (notamment au sein des Conseils d'administration) des salariés actionnaires et les salariés « tout court ». Pour la CGT, le projet devrait être clarifié afin d'éviter une mise en concurrence de ces deux représentations et surtout de prévenir une éventuelle substitution de la représentation des salariés par celle des salariés actionnaires.

Enfin, pour la CGT il convient de clarifier la notion de parties prenantes. En effet, toutes ne sont pas de même nature et les salariés doivent être identifiés en tant que tels. Concrètement le chapitre 5 « *Responsabilités du Conseil d'administration* » devrait explicitement prévoir l'obligation pour le CA de rendre compte de son activité à l'ensemble des parties prenantes, en précisant pour chacune d'entre elles le contenu de cette obligation.

Dans cette contribution, la CGT ne reprend pas l'ensemble des remarques qui pourraient être adressées au projet proposé mais met en exergue les points clés sans lesquels la révision proposée resterait non seulement inopérante mais pourrait même par les choix qu'elle propose et/ou les confusions qu'elle génère aggraver la situation présente. Nous insistons donc pour que le groupe de direction de l'OCDE sur le gouvernement d'entreprise prenne au plus vite en compte les modifications proposées ainsi que celles issues de la consultation publique. La CGT encourage les participants au Conseil interministériel de l'OCDE, et en particulier le gouvernement français et les instances européennes, à agir en ce sens.

REUTERS

Reuters welcomes the importance the OECD places in its draft principles on disclosure and transparency. For over 150 years, Reuters has brought transparency to financial markets around the world through its realtime news and information services. Timely and trustworthy information is an essential part of financial decision making. Reuters reputation for speed, accuracy and freedom from bias means it plays a critical role in informing markets participants, especially as markets globalise.

We would like to comment on two areas of Section IV of the OECD principles that relate to disclosure and transparency: Section E on channels for disseminating information, and Section F on disclosure of interests by analysts, brokers, rating agencies and others.

E – Channels for disseminating information should provide for equal, timely and cost-efficient access to relevant information by users

We welcome the OECD's recognition that "the Internet and other information technologies…provide the opportunity for improving information dissemination" (page 32).

Electronic dissemination tools have in some markets already transformed the delivery of market moving information to investors by enabling cross-market realtime availability of price sensitive information (PSI). This "push" rather than "pull" model is essential for professional traders, who do not have time to continually monitor individual issuers' websites. Similarly, services such as the U.S. EDGAR system – while useful as a historical record – do not cater for the realtime needs of investment professionals. Furthermore, in global investment markets it is increasingly necessary to cater for the needs of investors resident outside an issuer's country of listing. Electronic "push" services provided by specialist companies such as Businesswire and PR Newswire are one means of satisfying this need.

Experience in the United States, Canada and certain European countries shows that competitive online information markets produce the most efficient and lowest priced PSI dissemination services for investors and markets professionals. The UK recently moved from a monopoly model for PSI dissemination operated by the London Stock Exchange, which was widely viewed as slow and inefficient, to a system where information companies, including the LSE, compete to provide the most efficient and cost effective dissemination service. In making this policy change, the FSA undertook extensive research reviewing companies news dissemination practices in Australia, Canada, the United States and certain other jurisdictions.[12] The UK model that was finally chosen is based on Canadian practice, itself a variant of U.S. practice. The result has been a marked increase in the efficiency of disclosure and reduced costs..

It would benefit investors and enhance markets transparency by improving the quality and timeliness of information dissemination if the OECD were to encourage other countries to move to similar competitive solutions.

F – Analysts, brokers, rating agencies and others who provide analysis or advice which is relevant for decisions by investors should disclose any material conflicts of interest that might compromise the integrity of their analysis or advice. They should also establish and disclose procedures for managing such conflicts.

[12] For further information see FSA Consultation Paper 92 (May 2001) and the follow up policy statement (November 2001), both available through http://www.fsa.gov.uk/pubs/policy/ps92. The section on international practices is contained in Chapter 4 of CP 92.

We welcome the focus the OECD places on the quality of markets relevant information.

However, in relation to financial journalism, the OECD should recognise the need not to stifle independent press comment by disproportionate or inappropriate regulation, including not adequately distinguishing between the different objectives and dynamics of the press as compared to investment firms by extending to journalists rules intended for markets professionals such as analysts and brokers. Ill-considered regulation risks impeding the vital role that the financial press plays in informing investors and markets professionals. Great care would have to be applied before making any such move.

Furthermore, the OECD should recognise the constitutional freedoms relating to the media and the important role of media self-regulation in many countries.

ACCA

ACCA is the largest and fastest-growing international accountancy body. Over 300,000 students and members in 160 countries are served by more than 70 staffed offices and other centres.

ACCA's mission is to work in the public interest to provide quality professional opportunities to people of ability and application, to promote the highest ethical and governance standards and to be a leader in the development of the accountancy profession.

Further information on ACCA is available on ACCA's website, www.accaglobal.com

Executive Summary

ACCA is pleased to comment on the draft revision of the OECD Principles of Corporate Governance. ACCA supports the existing Principles, which we believe are relevant to developed as well as developing countries. We agree that it is appropriate to review the Principles following recent corporate scandals.

People have commented that the existing Principles are at too high a level to facilitate local implementation. We note that the Principles are intended to assist governments to improve corporate governance and provide guidance to various other parties, such as stock exchanges and companies. At present no distinction is provided in the text on its application for the different parties. We suggest that the revised draft would be more useful, both for governments and for other parties, including companies, if it set out separately the Principles for governments and regulators to consider and the Principles for companies to apply. This would facilitate implementation of the Principles by governments, regulators and companies and facilitate assessment of companies' corporate governance by investors and other stakeholders.

We note with approval a number of additions to the Principles. However, we are disappointed that the section on disclosure does not provide more guidance on the importance of disclosure of corporate governance practice as well as corporate governance structure and policies. Disclosure of performance, as well as structure, with reference to an accepted governance code, can be an effective tool for enforcement of good governance. The importance of internal control and risk management has been underlined in each of the recent corporate scandals; we were therefore disappointed that little reference is made to this subject.

We recognise the importance of making reference to the role of institutional investors. We consider, however, that this complex subject requires more careful consideration of all the issues than has been given in the revised text.

General Comments

1. The revised draft follows the structure of the existing Principles and much of the text is identical. However, in many areas the revised draft is significantly expanded and addresses many of the recent well publicised corporate governance concerns.

Providing greater Clarity for addressees

2. The preamble states that the OECD Principles are intended 'to assist governments in efforts to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their countries, and to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in the process of developing good corporate governance'.

3. In many respects, however, much of the text of the Principles reads more like a country's corporate governance code, to be followed by individual companies. The Principles should be useful for such a purpose and many companies could advantageously improve their governance and their organisational effectiveness by applying them. Application of the Principles in Section V on responsibilities of the board, in particular, should be beneficial to companies in both developed and developing countries. We note, sadly, that few companies fully apply these Principles.

4. The existing Principles have been criticised for being at too high a level. We believe that the revised draft might be more useful, both for governments and for companies, if it set out separately the Principles for governments to consider and the Principles for companies to apply. For example, all of Section V is directly relevant to company boards, whereas most of Sections I and II are more relevant to governments and regulators. Sections III and IV contain sub-sections relevant both to governments, regulators and companies but few sub-sections are relevant to all of these parties.

The changes

5. We are pleased to note that greater attention is given in the new draft to protection of minority shareholders, related-party transactions, cross- border voting, communication of concerns regarding unethical practice, policy on and disclosure of board remuneration, board ethical standards, and board monitoring of ethical standards.

6. We are, however, disappointed that the OECD has not taken the opportunity further to develop Principles for disclosure of corporate governance practice. In particular, although disclosure is required on governance structure and policies, it is what companies and boards actually do rather than what they have as policy or structure which is important. The OECD Principles should give guidance on the disclosure of key corporate governance practices, such as how the board meets its responsibilities as set out in Section V, including the steps the board takes to satisfy itself that the accounts and other disclosures give a true and fair view, and on the processes for nominations and setting remuneration.

7. We are also disappointed that the revised draft does not explicitly address internal control. Weaknesses in internal control have, of course, been a major part of each of the recent highly publicised corporate failures.

Specific Comments on the Text

Ensuring an effective framework

8. Page 5. We welcome the fact that this introductory section highlights the need to articulate clearly the different responsibilities among different regulatory authorities within a jurisdiction.

Section 1 - The rights of shareholders

9. Page 6, Sub-section A implies that all shares in issue carry voting rights. Though the extent of the application of the Principles can be clarified in the appendices, we suggest that the Principles should not be misleading and should not imply that all shares carry the fundamental right to vote.

10. Page 7, Sub-section F says that the governance rights of institutional investors should be facilitated. If the guide wished to become stronger, it could say something like 'institutional investors should be encouraged to assume responsibility to exercise their ownership rights on behalf of the beneficial owners of the shares they hold'.

Section 2 - Equitable treatment of shareholders

11. Page 8, Section II C. The logic behind the changes regarding conflict of interests is not clear to us. There is now no need to disclose indirect interests of directors in transactions. This would appear to offer too wide a 'get out' for board members wishing to avoid disclosure.

Section 3 - the role of stakeholders

12. Page 9. The text implies that only stakeholders whose rights are established by law need to be taken into account by companies. This seems to be an overly narrow approach.

Section 4 - Disclosure and transparency

13. Page 10, Section IV A 4. We consider that the revised draft could better address the role and responsibility of independent directors. This issue is important in all countries but the nature and function of independent directors will vary significantly in different countries, depending upon share ownership structures and cultural factors.

14. A 10. As stated in our general comments above, the details in the text regarding A 4 (governance structure and policies) are weak. We suggest that Section A require companies to disclose how they have applied the OECD Principles as they apply to companies. We also therefore recommend that the sections applicable to companies be presented separately from those sections more applicable to governments or regulators.

15. In Sub-section C, we note that auditors should now be independent, competent and qualified. However, more should be said about the role of the board in ensuring an effective audit. This Sub-section also says that the audit exists to provide an assurance to the board [and shareholders]. Although we would agree that, in practice, the audit can be a valuable tool for management, technically, the assurance is given to the shareholders only, since it is they who appoint the auditor and it is they who are the addressees of the report. Unless the text contains some particular significance for the two-tier board, we suggest that the reference to the board be deleted.

16. Sub-section D is similar - auditors are not (certainly in the unitary board context) accountable to the board.

17. An additional point to make in this section might be that boards should be expected to co-operate with the auditor and do nothing to obstruct the exercise of his or her functions.

Section 5 - Responsibility of the board

18. Page 12, C. Nothing is said to define high ethical standards. This is a difficult area as there are many ways of assessing ethical behaviour and few principles which are globally applicable. Guidance in this area would be useful. Section C no longer requires compliance with applicable law, commitment alone is not enough, and we suggest that this is still relevant.

19. In Sub-section D7, the word 'including' should be deleted and replaced with 'and'. As drafted it suggests, wrongly, that the audit is part of the accounting and financial reporting system.

20. Sub-section E says that the board should be able to exercise objective judgement on corporate affairs independent of management and others. This point seems to have been drafted from the specific perspective of the supervisory board and should be redrafted so as to encompass both the unitary and two-tier systems. A possible wording would be 'the board should be able to exercise its decision-making powers independently of management, controlling shareholders and others who may be in a special position to influence the company'.

21. Page 13, E3. Commitment alone is not enough; board members should also be required to devote sufficient time. There is nothing which addresses specifically the need for board members to have the experience and competence to fulfil their responsibilities to their company.

Annotations

22. Page 15, Paragraph 4 implies that it is a bad thing for regulatory responsibilities to be delegated to non-public bodies. In the UK we have found that a system where non-public bodies, such as the Stock Exchange and now the Financial Reporting Council, are custodians of a voluntary code has worked well as an alternative or complement to regulation.

23. Page 18, D. The text should give a clear picture of the disclosure required where capital structures allow certain shareholders to have disproportionate control.

24. Page 19, F. We prefer the word 'involvement' after shareholder rather than 'activism'. This Section raises the issue of institutional investment. However, there are many important governance issues regarding institutional investors which are not mentioned. As this Section is applicable more to regulators rather than companies, we suggest that clearer guidance be given on how institutional investors should discharge their fiduciary responsibilities and in what way they should be accountable to their own investors. What protection should investors in institutions enjoy? The recent revelations regarding the mutual fund industry in the US have highlighted the importance of addressing these issues.

25. Page 38 E. The text, which is about independent board members, does not fit the heading about the board exercising objective judgement. All board members should be objective.

RICHARD FREDERICK

Introduction and Preamble

Page 2, paragraph 3: This paragraph describes the process of the revision. There is, however, no description of the results of the revision.

The reader should be informed early on in the document regarding the changes that have been introduced to the Principles. One important change appears to be a greater focus on implementation and enforcement. A second important change is the adaptation of the Principles to better reflect governance problems in companies with concentrated ownership. These should be noted up front.

In addition, the text should say that the revision has resulted in a new chapter (or principle, or whatever it is that you will eventually decide to call it) and more explanatory text that can be found in the annotations. (The staff should be congratulated on the latest revision of the annotations. They have gone from being rather opaque to quite good.)

The reader (especially those familiar with the old Principles) will appreciate being alerted to the changes. It will also help OECD clearly identify the "value added" of this revision effort.

Page 2, paragraph 4, sentence 3: "However to the extent they are deemed applicable, they might also be a useful tool to improve corporate governance in non-traded companies." This sentence is extremely cautious. Suggestion: strike the first part of the sentence: "They might also be a useful tool to improve corporate governance in non-traded companies."

Page 2, paragraph 5, sentence 2: Discusses protection of private savings for retirement. Is it possible to simply say "pensions"? Pensions may be privately funded, funded by companies themselves or by governments. Whatever the structure, they may all chose to invest in companies (both traded and non-traded). Thus, one might question the need for the word "private".

Page 3, paragraph 3, sentence 4: "…arrangements must be credible, well understood across borders and adhere to minimum standards of accepted principles." What is a "minimum standards of accepted principles"? It is clearer to say either "…adhere to minimum standards" or "adhere to accepted principles".

(The present phrasing may be inelegant because some countries don't want to refer to the OECD Principles as a "standard". This may be a valid concern. However, what you are saying in this paragraph is that markets function better with minimum standards, an undeniable truth.)

Page 3 paragraph 4, last sentence: "…and, most importantly, to market forces." It seems that market forces and the legislative framework contribute, at the very least, equally to corporate governance. Why are market forces considered "most important"? If you will excuse the sports metaphor, corporate governance can be compared to a football game. The legislative framework is like the football field, and the rules. The companies and investors are the players. One cannot exist without the other.

The primacy given to market forces in this phrase seems to undercut the importance of the OECD Principles, which focus on the legislative, regulatory and institutional framework. Furthermore, recent governance failures show that while the "players" or companies are always responsible for the action, market forces alone can hardly be considered the most important contributor to a sound governance framework. Suggestion: delete "most importantly".

Page 4, paragraph 1, sentence 2: When first written, I believe this phrase was included as a reference to Italy (and possibly Japan), which has structures, provided by company law, to oversee the board and the company. Similar structures exist in other countries including Brazil (*Conselhos Fiscais*) and the Russian Federation (Audit Commission) and other countries.

If this is what is being referred to, it is probably incorrect to refer to them as boards or even parts of boards. They are, at least in Brazil and Russia (and I believe in Italy as well) structures separate from the board that are accountable to the General Meeting.

As a consequence, the recommendations in section V of the Principles, on Boards of Directors, would either not apply, or apply only in part. Two alternatives for portraying these structures might be: 1) strike the sentence completely (no real loss to the Principles since the reference is relatively obscure anyway); 2) replace the current sentence with one that recognizes a variety of governance structures in different countries. For example: "A variety of additional structures may be permitted by company law in different countries, each of which may contribute to the governance of the enterprise."

Page 4, paragraph 2, sentence 1: This sentence can be read (incorrectly) to mean that the principles aim at a "detailed prescription… for particular objectives or outcomes". The meaning can be made clearer. Suggestion: Split the sentence in two pieces as follows: "The Principles are non-binding and do not aim at detailed prescriptions for national legislation. Rather, they seek to identify objectives and outcomes, and suggest various means for achieving them."

The Body of the Principles

Page 5: The positioning of this section is confusing. It does not appear to be a Principle (though it looks sufficiently similar to cause some confusion). In addition, it precedes all of the other Principles (so is it of greater importance than the others?)

My view is that this page is not a principle and should not be confused with one. It may warrant a separate section following the principles. Pulling the existing text under this section out of the annotations and pasting it behind the principles under the rubric of "Ensuring an Effective Framework" would clarify the structure and also do justice to the various black lined recommendations which are difficult to understand on their own and considerably strengthened by the discussion.

In any event, the reader should be alerted somewhere in the preamble that this is a major new addition to the principles. It would also be useful to explain the reason for inclusion and the impact.

I: Is it too early to speak of the responsibilities of ownership in the title as opposed to the less clear "ownership functions"? Anyway, there is little discussion of what these key functions are.

I.B.3: "transfer of assets that, in effect result in either the sale of the company's business or an impairment of shareholder capital". A lower threshold should be set for transfers of assets. The current wording could be interpreted to allow the sale of a major portion of a business without shareholder approval.

Also, an explanation in the annotations of what "impairment of shareholder capital" means would be useful. A common financial definition is: total capital that is less than the stated or par value of the company's capital stock. If this definition does not help, then one should ask oneself if the concept of impairment adds anything to the Principle.

I.C.3, last line: "The equity component… should be subject to shareholder approval." This logically falls under I. B. which outlines what rights shareholders have: "Shareholder have the right to participate in…".

I.D. "Capital structures that enable… shareholders to obtain … control disproportionate to their equity… should be disclosed".

Suggestion: "are discouraged and should at a minimum be disclosed." This issue will likely have been debated by the Steering Committee. Is it time to take stronger stance on disproportionate control?

I.F. "The exercise of ownership rights… should be facilitated." This is a disappointing step away from the recognition that the investor is ultimately the lynchpin in the corporate governance equation. This is very weak language, indeed, and does not seem to correspond with the international current.

Would it be possible to at least "encourage" investors to exercise their ownership rights?

I.G. "Shareholders … should be allowed to consult… on…basic shareholder rights… subject to some possible exceptions regarding… collusion." Is there a need to limit shareholder communications to "basic rights" as listed in the Principles? Is it not close to impossible to predict what minor unlisted right may become of overriding interest to an investor?

Suggestion: "shareholders… should be allowed to consult with each other … subject to some possible exceptions… collusion." The concern regarding collusion would appear to be a sufficient limitation. Limiting communications to the rights on this page would seem to be overly detailed and prescriptive.

II.A.2: "Minority shareholders should be protected from abusive action by…controlling shareholders." The sentence can be (incorrectly) read to suggest, "minority shareholders should be protected… by controlling shareholders." Suggestion: "Minority shareholders should be protected from the abusive actions of, and abusive actions in the interest of controlling shareholders and should have effective means of redress."

II.A.4. Bravo.

II.C. The change from the original obligation to "disclose" material interests to a recommendation to "inform the board" represents a considerable weakening of the Principle. Recent scandals demonstrate clearly that the board alone is an insufficient check against improper related party transactions. The markets, and not just the board, need to know.

Shouldn't controlling shareholders disclose their material interests in transactions?

How is "material" defined in the context of a conflict of interest? The definitions for materiality included in Principle IV on disclosure (an impact on the investment decision) would appear to place far too high of a threshold on disclosure. What is material for an individual is not likely to be material for a company. Managers and directors could engage in all manner of low-level, "non-material", related party transactions and pilfer away the assets of the company.

Should not all conflicts of interest be disclosed, pure and simple?

III.E: "Stakeholders… should be able to …communicate …about illegal … practices to the company board…and their rights should not be compromised." It is not sufficient to say that stakeholder's legal "rights" not be compromised. It is not much of a recommendation to suggest that companies not break the law.

The problem of protecting whistle blowers is different. Individuals in positions of power within a company can engage in any number of tactics to punish whistleblowers. They can exclude employees from key meetings, they can pass people up for a promotion, they can reduce the normal salary raise or a bonus. They may malign an individual behind their back. In short, they can make life for a whistle-blower difficult even without directly impinging upon his rights. The Principles would be better off saying that whistle-blowers should not be penalized in any way.

It may be useful to add (in the annotations) a comment that states that the achievement of this goal can be helped by having a company policy on whistle-blowers and procedures.

On an editorial level, there is no need to say "company" board. The simple term "board" seems to be used throughout the Principles.

IV.A. Editorial comment: The current text says: "Disclosure should include… material information on: 6 Material foreseeable risk… 7. Material issues regarding…." The phrasing is redundant. Material…material. Suggestion: delete the repeated "material" from the beginning of bullets 6 and 7.

IV.B. Bravo. I fully support the new mention of "internationally recognized".

IV.C and IV.D: There are fundamental problems with the discussion of audit. Both principles IV.C and IV.D discuss the role of the auditor. While there is nothing factually wrong with either of these principles, the OECD would be gravely remiss in not building in stronger language after the catastrophic audit failures of the past few years. The Principles also seem to ignore the trend towards greater public sector oversight of the audit profession and increased attention that regulators are giving to the external audit function.

New language should encourage greater independence of auditors and greater professionalism. Other suggestions to the audit profession would be heightened testing for fraudulent activity, and much stronger and more direct accountability to shareholders.

In this context, the ordering of the recommendations in IV.D is reversed. The auditor is first accountable to shareholders and the board, and subsequently owes a duty of care to the company.

The current text does not adequately underscore accountability to shareholders or evoke the dangers of the unholy alliance between auditors and the mangers who pay their fees.

A comment in the annotations should also discuss the famous expectations between what auditors deliver and what the public expects of them.

V.C: "The board should apply high ethical standards…." While this is, of course, laudable this recommendation seems to be directed at curing the doctor and not the patient. The ethics abuses that corporate governance is concerned with would seem to reside within the company.

Suggestion: One could recommend that the board ensure that the company has an ethics policy and systems that encourage ethical behavior.

Annotations:

Unfortunately, time constraints do not permit me to comment on the annotations at any length. Overall, they are a vast improvement over the last intermediate draft in terms of clarity. The multiple mentions of the importance and role of the internal auditor are excellent.

G. paragraph 2: You might as well call the "free rider" problem what it is. A sufficient number of readers will recognize what you are talking about. Keep the current explanation (which is simple and clear) for those who are unfamiliar with the concept.

II.A.2 paragraph 3 last line: The sentence: "With the common aim to improve market credibility, the choice and ultimate design of different provisions… necessarily depends on the overall regulatory framework and the national legal system." seems self-evident. It has already been stated that governance takes place within a national regulatory and legal context.

II.A.5, second paragraph, last sentence: Why just encourage electronic voting? There are plenty of examples of electronic participation in shareholder meetings.

INSTITUTE OF INTERNAL AUDITORS (IIA) - US

The Institute of Internal Auditors (IIA) is very interested in and supportive of the Organisation for Economic Co-operation and Development's (OECD) efforts to improve corporate governance. The IIA recognizes the sizeable investment of time and resources in revising the principles.

Established in 1941, The IIA is an international professional organization of 90,000 members worldwide in internal auditing, governance, internal control, information technology audit, risk management and security. The IIA, with representation in more than 120 countries, is the acknowledged global leader in standards, certification, education, research, and technology guidance for the internal auditing profession.

The IIA believes that good governance and accurate financial reporting emanate from the coordinated interaction of the board/audit committee, management, internal auditors and external auditors. When all of these entities work together effectively with healthy interdependence then internal controls are strong, reporting is accurate, ethics are maintained, oversight is effective, risks are mitigated, and investments are protected. The IIA is well positioned to offer unique insights into issues related to improving corporate governance, risk management, and control processes. In December 1999, The IIA adopted the following definition internal auditing that acknowledges the role of internal auditing in corporate governance:

"Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations. It helps an organization accomplish its objectives by bringing a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes."

The Institute of Internal Auditors

Since the adoption of this definition, The IIA has intensified its efforts to contribute to the reform of governance practices around the world. The IIA has stated that all publicly held companies should be required to establish and maintain an independent, adequately resourced, and competently staffed internal auditing function to provide management and the audit committee with ongoing assessments of the organization's risk management processes and the accompanying system of internal control. If an internal auditing function is not present, the board of directors should be required to disclose in the company's annual report why the function is not in place. In 2003, the New York Stock Exchange enacted a requirement, based upon our earlier recommendation, that companies listed on its exchange have an internal audit function. This recommendation has also been made to the U.S. Securities and Exchange Commission, the National Association of Securities Dealers, and the Securities Exchange Commissions in Canada. We note that internal audit is referenced in the annotations to the proposed OECD principles and that it is recognized that it should have access to the board to ensure the integrity of reporting and monitoring systems. We would like to see this acknowledgement strengthened.

Therefore, we recommend that OECD's principles encourage all public companies to maintain an effective, full-time internal audit function that reports directly to the audit committee. A lack of an internal audit function should be considered a weakness in an organization's internal control system. In addition, internal auditing should be conducted in accordance with the globally recognized IIA *International Standards for the Professional Practice of Internal Auditing (Standards)*, which have been translated into 20 languages. All individuals who provide internal audit services are required to adhere with The IIA's *Standards* and *Code of Ethics* to ensure that internal audit work is performed by competent professionals and complies with professional guidance and rules of conduct requiring objectivity, due professional care, and period quality assessments.

Internal auditors and audit committees are mutually supportive. Consideration of the work of internal auditors is essential for the audit committee to gain a complete understanding of an organization's operations. Contemporary internal auditing is based on the identification of strategic, operational, and financial risks facing the enterprise and the assessment of controls put in place by management to mitigate those risks within dynamically changing contexts. Included in the identification of these risks are issues such as: related-party transactions, joint ventures and partnerships; restructurings, including mergers and acquisitions; new businesses, products, and systems; vulnerability to interest rate changes or changes in cash flow; information systems risk; and reputation risk. A process that includes the identification, understanding, and control of such risks and an assessment of the effectiveness of controls should help ensure consideration of the very items underlying recent governance and quality of earnings problems. This type of work, as performed by internal audit, should be more prominently recognized as part of the Board's responsibility for governance.

Based on The IIA's experience in researching and promoting good governance, we offer additional recommendations as follows.

<u>The Role of Internal Auditing in Corporate Governance</u>

Section - *Preamble*, page 2

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Currently, corporate governance is described as involving a set of relationships between a company's management, its board, its shareholders and other stakeholders. An essential component within that relationship – audit, both internal and external – should be included.

Section – *V. The Responsibilities of the Board*, page 12

Insert the wording "internal auditing" in the following sentence as the function is part of an organization's system of internal control: "Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, *internal auditing*, systems for risk management, financial and operational control, and compliance with the law and relevant standards. Internal audit is part of an appropriate system of control, as included in the annotations, and therefore should be explicitly referenced in the principles.

The Adoption of Key Governance Principles

The exposure draft does not discuss principles for certain topics that The IIA advocates in support of strengthened governance. They are:

- Independence. Directors should be independent of the company for which they govern. While OECD encourages transparency on the part of nominating, voting on and remunerating board members, there is no requirement that they be independent. Rather it is suggested that the company determine whether they are independent and disclose such to the public. Given recent corporate failures, e.g. Parmalat, there is increasing evidence that independent directors are vital to improved oversight of executive management and their operations. We recommend that OECD be more direct in its expectation that all directors be independent of the company for which they are providing board governance.

- Expertise. Board members should possess relevant industry company, functional area and governance expertise in order to fulfill their responsibilities. The OECD principles suggest such by recommending that board members' qualifications be disclosed to investors. While this is a good beginning, there should also be an expectation that board members acquire specific knowledge about the company for which they govern and that this process be ongoing during the length of their oversight role.

- Committees. While not specifically mentioned in the OECD principles, we recommend that it explicitly be stated that the nominating, compensation, and audit committees of the board be comprised of independent directors.

Management's Responsibility for Governance, Adequacy of Internal Controls and Financial Reporting

The exposed principles do not clearly convey that management has significant responsibility for good governance. The proposed principles currently state that stakeholders should have certain rights, one of which is timely and accurate disclosure of all material matters regarding the corporation, including the financial situation, performance, ownership and governance of the company. But given the history of recent corporate failures, we recommend that it be specifically stated that management is responsible for governance, adequacy of internal controls and financial reporting. The Committee of Sponsoring Organizations of the Treadway Commission (COSO), of which IIA is a sponsoring organization, has stated in its *Internal Control – Integrated Framework* that internal controls are management's responsibility and require the participation of all persons within an organization to be effective. There are several control models throughout the world, but most would support this same premise.

Concluding Remarks:

We value the work of the OECD in promulgating principles to improve governance and appreciate the opportunity to express our views. We welcome the opportunity to discuss any and all issues with you.

PROFESSOR JAMES R. REPETTI, BOSTON COLLEGE LAW SCHOOL

Thank you for the opportunity to comment on *OECD Principles of Corporate Governance* (Draft, January, 2004) (hereinafter "*Principles*"). *Principles* is a very thoughtful and thorough discussion of the issues addressed therein. My comments pertain to a topic not discussed in *Principles*, the effect of taxation on corporate governance. Because of the major impact that taxation can have on corporate governance, I respectfully suggest that the OECD consider adding an analysis of this important topic to *Principles*. In the remainder of this paper, I discuss a few of the many areas in which taxation impacts corporate governance. I would be happy to expand this discussion at a future date, if you wish.

As *Principles* notes, sound corporate governance is important to insure that corporations use resources efficiently. One of the problems that arises from the separation of ownership from control in corporations is the tendency of management to favor the inefficient retention of corporate earnings. Management favors the excessive retention of earnings because their salaries are often more closely related to the size of the corporation, not its profitability.[13] Moreover, using retained earnings to finance growth can help shield management from the scrutiny that a third party, such as a lender, might apply to the use of funds provided by it to the corporation.[14]

Taxation can have a major impact on the ability of management to inefficiently retain earnings. If a nation uses a classical tax system that taxes income at the corporate level and taxes that income again when it is distributed to stockholders, the tax system will subsidize the corporation's inefficient retention of earnings if gains on the sale of corporate stock are taxed at rates lower than dividend income.[15] For example, consider a situation in which dividend income is taxed at a rate of 30 percent and gains from the sale of stock are not taxed. If a corporation has 100 of income, a stockholder will be indifferent to the corporation distributing the 100 of income or inefficiently retaining it so long as the value of the corporation increases by at least 70 as a result of the inefficient retention.[16]

The tax subsidy illustrated in the foregoing example, not only encourages inefficient retentions, but it may also exacerbate the tendency of stockholders to avoid incurring costs to monitor management. As you know, stockholders often have a disincentive to incur monitoring costs because of the "free rider" problem. Costs incurred by a few stockholders to monitor management provide a benefit to all stockholders. As a result, stockholders will often delay or avoid incurring monitoring costs in the hope that another will incur

[13] See e.g. Kevin Murphy, *Corporate Performance and Managerial Remuneration: An Empirical Analysis*, 7 J. Acct. & Econ. 11, 11-12 (1985).

[14] See e.g. Frank Easterbrook, *Two Agency-Cost Explanations of Dividends*, 74 Am. Econ. Rev. 650, 655 (1984).

[15] See e.g., James Repetti, *Long-Term Capital Gains, The Long-Term Investment Perspective and Corporate Productivity*, 49 Tax Notes 85 (1990); James Repetti, *Corporate Governance and Stockholder Abdication: Missing Factors in Tax Policy Analysis*, 67 Notre Dame L. Rev. 971, 999-1010 (1992).

[16] Conversely, a tax system that integrates the corporate tax can create an incentive to distribute corporate income when the income should be retained if the system taxes capital gains without providing an adjustment to the stockholder's tax basis for retained earnings.

such costs. By subsidizing harmful behavior of management, the tax subsidy further discourages stockholders from incurring monitoring costs.[17]

Another example of the impact that tax can have on corporate governance is the use of tax incentives to encourage management to own stock in an attempt to align the interests of management with stockholders. Studies in the U.S. suggest that such attempts have not worked and may also merely subsidize harmful behavior by management.[18] For example, some have suggested that increased stock ownership by management increases the propensity to retain earnings in the classical tax system discussed above.[19] This tendency has clear implications for a number of governance issues, including, for example, the effect of corporate stock options which have received so much attention recently.

Another set of governance issues involves the responsibility of directors to set and supervise the overall tax approach of the corporation, dealing with the risk, both financial and representational, of too aggressive a tax posture and the ethical issues involved.

There are numerous other situations where tax can affect corporate governance. If you have any questions or wish for additional examples about the impact of tax on corporate governance, please do not hesitate to contact me.

THE EUROPEAN CENTRE FOR EMPLOYEE OWNERSHIP

The ECEO agrees that the principles should be non-binding, but could form the basis of widely publicised benchmarks under the various heads for governments to propagate through related govt departments AND the various national regulatory/supervisory and representative bodies, such as in the case of the UK - the Association of British Insurers, the UK (Stock Market) Listing Authority, the NAPF and the Confederation of British Industry etc.

The OECD paper is right to stress the need for more comprehensively defined rights of shareholders - and for employee shareholders in particular, which is the interest of the ECEO. While clearly a board of directors cannot spend all of its time trying to placate shareholder concerns (otherwise the company would go bust) a balance has to be struck so that shareholder concerns are not something talked about by the senior management only once a year when the AGM hoves into view. Corporates should be talked into establishing clearer channels for two-way communication of such concerns and not necessarily solely through the 'narrow' focus of the ABIs of this world either-

As the OECD paper suggests, transparency is the key to effective corporate governance and that means FULL disclosure in annual reports and the like of senior executive remuneration policy (for example whether executive failure is to be rewarded or not and whether First Quartile or merely

[17] Repetti, 67 Notre Dame L. Rev. at 1007-1010.

[18] See James Repetti, *The Misuse of Tax Incentives To Align Management-Shareholder Interests*, 19 Cardozo L. Rev. 697, 701-702 (1997) (summarizing studies).

[19] Warren Buffett, *The Essays of Warren Buffett: Lessons for Corporate America*, 19 Cardozo L. Rev. 1, 56 (Lawrence Cunningham ed., 1997)

average performance targets - when measured against peer groups - are to be established before generous stock option awards can be vested) and shareholder voting rights distribution etc .

The ECEO is concerned that public and institutional investor confidence in equity markets cannot really recover until reasonably demanding corporate governance standards - such as outlined by the OECD - are adopted as a matter of urgency by the corporate sector throughout the developed world. Until this confidence is recovered, the savings 'gap' in western society will continue to grow, disturbingly so, as many, disbelieving and suspicious in the wake of Enron, WorldCom, Marconi and now Parmalat, turn their backs against pension and other equity fund contributions and indeed even other forms of saving for their futures. It looks as though corporate governance has caught the tide as, for example, we see the growth of 'ethically based' funds in the market itself - funds which, though still in their infancy, are attracting considerable interest and investment by the public and by certain institutions.

AIMR GLOBAL CORPORATE GOVERNANCE TASK FORCE

The AIMR Global Corporate Governance Task Force ("Task Force") of the Association for Investment Management and Research ("AIMR")[20] is pleased to comment on the Organisation for Economic Cooperation and Development ("OECD") proposed revisions to the OECD Corporate Governance Principles (the "Principles" or the "Proposal"). The Task Force is charged with developing best practice guidelines relating to corporate governance, and has 15 volunteer investment professionals, representing 12 different countries, who provide a variety of viewpoints based on their market experience and expertise, and draw upon the collective knowledge of AIMR's global network of investment professionals.

General Comments

The Task Force commends the OECD for their work and strongly supports the Proposal, except where noted below. AIMR has long been an advocate for investors and the Task Force notes that many of the OECD revisions strengthen shareholder rights.

The Task Force believes that corporate directors have a fiduciary duty to shareholders – that is, they have a duty of loyalty to shareholders and must work for their best interests. Directors do not work for the company or for the company's management – they work for the shareholders and are their representatives charged with overseeing management. Directors are stewards of the corporate assets and are responsible for overseeing management's allocation of those assets so as to maximize shareholder value.

The Task Force believes that this priority of director's responsibility to shareholders is not communicated clearly in some cases in the Proposal, as indicated below. In addition, while the Task Force is generally supportive of the Principles, there are occasions where the Principles reach beyond corporate governance and address governance of third parties (e.g., analysts) or legal issues. The Task Force believes

[20] With headquarters in Charlottesville, VA and regional offices in Hong Kong and London, the Association for Investment Management and Research is a global, non-profit organization of more than 68,300 financial analysts, portfolio managers, and other investment professionals in 116 countries of which 56,000 are holders of the Chartered Financial Analyst® (CFA®) designation. AIMR's membership also includes 127 Member Societies and Chapters in 46 countries.

that it is important to distinguish between the responsibilities of corporate management and directors, and those of other parties (e.g., shareholders, analysts, institutional researchers and money managers, and other stakeholders). We believe that it might add greater clarity to the proposals if the responsibilities of the different stakeholders were separated into different sections or even different chapters within the document.

The Task Force also strongly supports the additions related to disclosure of potential conflicts of interest. Such disclosure is consistent with AIMR's Code of Ethics and Standards of Professional Conduct and the AIMR Research Objectivity Standards, all of which are attached. Investors and other parties must be informed of potential conflicts of interest so that they can make fully informed decisions and better understand and interpret the information that is provided to them.

Finally, the Task Force requests that the OECD produce a summary of the changes to the Principles (and annotations) that are made so that interested parties can easily identify and understand the changes.

Specific Comments

Principle I. The Rights of Shareholders and Key Ownership Functions

The Task Force recommends that the text in the Annotation at the beginning of Principle I include a discussion of the need for governments to ensure that the proxy voting processes in their countries allow for the efficient and effective voting of proxies and does not carry any associated penalties or trading restrictions. The voting process should be made as easy as possible in order to encourage maximum shareholder participation.

Principle I.C.3. The Task Force believes that the second sentence of Principle I.C.3. also should cover key executives. In this regard, the Task Force recommends that the OECD rephrase the second sentence to read, "Shareholders should be able to make their own views known on the remuneration policy for board members *and key executives*."

In addition, the Task Force recommends that the remuneration policy governing compensation for board members and executives also be subject to separate shareholder approval. The Task Force further recommends that executive remuneration be explicitly linked to the company's long-term fundamental performance. This will serve to better align executive and shareholder interests.

Moreover, the Task Force believes that the granting of compensation to corporate executives and directors poses a significant conflict of interest if it is not subject to review and approval by those whose wealth will be most directly affected by the granting of that compensation (i.e., the shareholders). Indeed, academic research has repeatedly demonstrated a negative correlation between the amount of compensation granted to senior executives and directors, and the performance of the company.

Principle I.D. The Task Force also believes that Principle I.D. should be modified as follows: "Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be *discouraged. In those situations where such arrangements are legally permitted, companies should disclose not only the existence of such arrangements, but also describe in what situations those arrangements may affect other shareholders, and the manner and extent to which those arrangements will affect other shareholders."*

The Task Force recognizes that certain classes of shares may have limited voting rights (or none at all), and this is reflected in the share price. Nonetheless, the Task Force is concerned about situations where certain classes of shares (so called "super shares") have voting rights that are greater than those of the common shareholders (i.e., more than "one share, one vote"). These arrangements should be

discouraged because of the potential for a minority shareholder(s) to override the majority of shareholders. In cases where these arrangements do exist, they must, at a minimum, be disclosed. Accordingly, the Task Force also recommends that the deleted sentence ("Given the capacity of these mechanisms to redistribute the influence of shareholders on company policy, shareholders can reasonably expect that all such capital structures and arrangements be disclosed.") in the Annotations section to Principle I.D. remain in the document.

Principles I.F.1. and I.F.2. These principles do not seem to support the general intention of Principle I.F, which is to facilitate the exercise of ownership rights by all shareholders. Specifically, subparagraphs 1 and 2 relate to requiring institutional investors to disclose their voting policies or records, an issue that is beyond the control of all but the board of directors of the institutional investor and its shareholders and clients. While the Task Force does not necessarily disagree with these concepts, they seem out of place as currently worded.

Principle I.G. The Task Force requests further explanation of this Principle with regard to the phrase "inappropriate collusion." Please provide additional information regarding what the OECD believes is appropriate versus inappropriate collusion, perhaps indicating by example what precisely is intended by the expression.

Principle III. The Role of Stakeholders in Corporate Governance

The Task Force suggests adding the following to the text in italics at the beginning of Principle III.: "*Laws protecting the interests of stakeholders or other state activity should not be devised in a way that deprives the company of free enterprise of its substance, or handicap its proper operation, thus preserving the interest of society at large in retaining a free market economy.*"

Principle III.C. While non-shareholder employee participation on boards may be permitted in some countries, the Task Force does not believe this represents best practice and recommends changing the Principle to read: "Mechanisms for *non-shareholder* employee participation *on the board* should be *discouraged*."

Principle III. F. This Principle is a legal or regulatory issue and, consequently, the Task Force believes it is better suited for a different section of the document. The Task Force also believes that the OECD should state that companies should adhere to all laws and regulations seeking to protect shareholders' rights.

Principle IV. Disclosure and Transparency

The Task Force recommends moving Principle IV.F. to a section that discusses responsibilities of related parties. Analysts, brokers, and rating agencies are outside of the control of the company, and it may be confusing to combine the responsibilities of the company with those of other parties in this Principle.

Principle V. The Responsibilities of the Board

As stated in "General Comments" above, the Task Force believes boards of directors must first work in the best interests of the shareholders. In certain circumstances, the best interests of the company may not be the same as the best interests of the shareholders, as in cases where shareholders may wish to pursue a higher-growth strategy than is in the best interests of bondholders. In these cases, the board must continue to consider alternatives that are best for shareholders. Accordingly, the Task Force strongly recommends revising Principle V.A. to read "…with due diligence and care, and in the best interests of the shareholders."

Principle V.C. The Task Force also recommends keeping the text that was deleted in this Principle which read "…ensure compliance with applicable law and…" as this is a key role of the board.

Principle V.D. The Task Force recommends revising this Principle to read "The board *members* should fulfill…" This change emphasizes the individual responsibility of each board member to ensure that the board properly fulfills its responsibilities. The Task Force also recommends adding a Principle that states that in order to fulfill their duties, board members must be granted access to the necessary relevant information.

Finally, we believe independent, high quality research makes an essential contribution to securities markets. It is the responsibility of all market participants to foster an environment in which research can thrive. High quality research can only be produced when analysts are free from pressures to bias their work, whether positively or negatively. Corporate actions retaliating against analysts for negative research do not serve the interests of investors or encourage independence and objectivity by analysts.

Fear of lawsuits, of being denied access to management of the companies being covered, of job loss, etc., does not create a climate where independence of thought can thrive. Rather, fear of such actions may deter investment professionals from entering or staying in the securities research profession and cause analysts to have second thoughts about stating their true conclusions if those conclusions would not satisfy a company. Ultimately, this is bad for analysts and their research, and disadvantages all investors.

Therefore, the Task Force recommends that the OECD include requirements for the board to ensure that the company does not retaliate, or threaten to retaliate, against analysts for negative research, opinions, or recommendations. Companies must not attempt to influence the research or recommendations by exerting pressure through other business relationships (e.g., investment banking). These types of pressures serve to bias research and inevitably harm investors. In addition, when disclosing information or granting access to corporate management, companies should not discriminate among different analysts or investors based on their prior research, opinions, or recommendations.

Closing Remarks

The Task Force appreciates the opportunity to comment on the proposed revisions to the OECD Corporate Governance Principles. AIMR Code of Ethics and Standards of Professional Conduct can be found at http://www.aimr.org/pdf/standards/english_code.pdf , and the Research Objectivity Standards at: http://www.aimr.org/pdf/standards/sellside_ROS.pdf

PABLO G. COLLAZZO

I am a PhD Candidate at ESADE (Spain) conducting research on corporate governance, more specifically on indexed stock options.

After having reviewed the revised version of the Principles, I would like to make a comment on remuneration plans as a relevant means to enhance corporate governance.

To further develop general principles like those stated in Section V.D.3 & 4, I believe including an annotation on performance-based remuneration plans -such as indexed stock options- would be a meaningful signal for regulators to promote and companies to engage in such interest-aligning practices.

WORLD COUNCIL OF CREDIT UNIONS, INC. (WOCCU)

OECD's review of the *Principles of Corporate Governance* is welcomed by the World Council of Credit Unions, Inc. (WOCCU) as the international trade association, development agency and lead advocate for the international credit union system. The focus of the *Principles* is on publicly traded companies, both financial and non-financial. We believe the *Principles* are largely applicable to credit unions as not-for-profit financial cooperatives. However, there are a handful of recommendations within the *Principles* that are not suited to the not-for-profit cooperative structure of credit unions. In this submission, WOCCU suggests the *Principles* be enhanced with the addition of recommendations that reflect the not-for-profit structure in addition to the for-profit structure.

Credit unions in the financial market

A credit union is a financial cooperative acting as a depository and credit institution. Credit unions exist within the retail banking systems of more than 79 countries throughout the world. As not-for-profit financial institutions over 40,000 credit unions are providing more than 118 million people with access to affordable savings, loans and associated financial services. Collectively credit unions hold assets of more than $676 billion world wide. Credit unions serve people of limited incomes not reached by commercial banks, and extend credit to micro-entrepreneurs who otherwise might not be able to secure financing.

Media reporting of examples of poor corporate governance impact consumer confidence and lead consumers to call into question the integrity of the financial system. At such times it is important that there are financial providers with varying legal and operating structures providing consumer choice and thereby maintaining consumer confidence in the wider financial system. WOCCU believes member-owned not-for-profit credit unions can play a valuable role in providing consumers with a financial choice which is different from a for-profit institution. For a consumer, choice that is driven by service rather than maximization of profits can be preferable when motivation of for-profit organizations is called into question.

WOCCU has reviewed each of the OECD Principles. Our detailed comments on the *Principles* are provided below.

OECD Principles of corporate governance and credit unions

OECD Principle I – The rights of shareholders and key ownership functions

"The corporate governance framework should protect and facilitate the exercise of shareholders' rights"

OECD Principle III – The role of stakeholders

"The corporate governance framework should recognize the rights of stakeholders as established by law and encourage active cooperation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises."

Principles I and *III* on the rights of shareholders and role of stakeholders provide the first significant area of difference between credit unions and for-profit institutions. A credit union shareholder and stakeholder is always the same person – a credit union member. There is no separation between the role of shareholder and stakeholder. A credit union member subscribes for a single share in the credit union. This shareholding entitles the shareholder to one vote on motions and elections of the credit union. As a member they are also an important stakeholder as a recipient of financial services provided by the credit union. This duality of roles means that credit unions do not experience the same competing financial interests between satisfying the needs of shareholders and stakeholders. Within a for-profit structure there is a balance between the provision of services to consumers (stakeholders) and the maximization of profits returned to shareholders. In a credit union, a shareholder will always also be a stakeholder in receipt of the credit union's services. The credit union shareholder has a vested interest in the cost and quality of the services provided.

Similar to for-profit shareholders, a credit union shareholder can exert pressure through participation in key corporate governance issues such as nominating and electing directors and voting on specific issues. The extent of influence exerted by shareholders and stakeholders in holding an elected board accountable for their control of the business is crucial. However, in their dual role as shareholder-stakeholder they can also exert market force and cease to use the services provided by the credit union. While it is not always true, the duality of roles of shareholder/stakeholder can also exist in for-profit structures: a shareholder of a company may also be a consumer of that company's services. We recommend that the *Principle*s recognize the potential for the existence of this dual relationship.

OECD Principle II – The equitable treatment of shareholders

"The corporate governance framework should ensure the equitable treatment of all shareholders, including minority and foreign shareholders. All shareholders should have the opportunity to obtain effective redress for violation of their rights"

Credit union members are equal and entitled to only one vote, regardless of size of shareholdings. This equality of shareholders enables all recommendations within the first two *Principles* concerning shareholder rights and the equitable treatment of shareholders to be applied to credit unions, except the following two recommendations:

- Capital structures and arrangements that enable certain shareholders to obtain a degree of control disproportionate to their equity ownership should be disclosed (Principle I).

- Minority shareholders should be protected from abusive actions by, or in the interest of, controlling shareholders and should have effective means of redress (Principle II).

These two recommendations are not applicable to credit unions. As a result of the credit union structure which utilizes a "one member one vote" voting system, credit union members are only able to exert the same level of control as any other member within the credit union: preferential shares and minority shareholders do not exist in a credit union as it operates as a cooperative.

OECD Principle IV - Disclosure and transparency

"The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership and governance of the company"

The recommendations in Principle IV are applicable in full to credit unions (except see comment under Principle V on board remuneration). WOCCU also advocates that credit unions should provide transparent and accurate financial disclosure using internationally accepted accounting standards.

The *Survey of Corporate Governance Developments in OECD Countries* highlights the need for improved accounting standards in member countries as one of the problems in fulfilling the *Principles.* WOCCU has represented credit union interests to the International Accounting Standards Board during its development of accounting standards impacting credit unions. In respect of accounting standards, one size does not fit all and different structures of not-for-profits, mutuals and cooperatives often require different accounting approaches than for-profit institutions. This is particularly true in the accounting standard used for the combination or merger of two mutual entities.

OECD Principle V - The responsibilities of the board

"The corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability and loyalty to the company and the shareholders"

The recommendations on board remuneration are not applicable for the majority of credit unions, because the majority of credit union board members serve as volunteers without remuneration. In most countries the utilization of unpaid volunteers on the board and committees of a credit union is an important precept. As volunteers the board serves because of its commitment to the services provided by the credit union to other shareholders and stakeholders not in return for a financial consideration. As volunteers they also help the credit union to maintain low governance and operating costs and thus provide financial services at attractive rates.

The *Survey* reveals that the quality of boards is an issue in achieving good governance. The *Principles* recommend that consideration is given to enhancing the board's capacity through assigning non-executive and independent directors to the board. Credit unions cannot introduce independent directors on to their boards. Credit union directors are elected by the membership, from the membership: board quality is limited to the pool of members from which a credit union can elect directors. From this limited pool, a credit union is also faced with the challenge of finding people willing to give their time without financial compensation.

While credit union boards serve as volunteers, they employ and remunerate professional management and other employees. A governance structure that includes unremunerated volunteers and professional remunerated employees can provide different challenges than exist within a for-profit structure where all are remunerated. We believe the *Principles* should recognize the existence of a voluntary board structure.

Compliance and safeguards

In the *Survey of Corporate Governance Developments in OECD Countries* it is recognized that the levels of low compliance with the existing *Principles of Corporate Governance* can be attributed to some extent to the lack of applicability of such *Principles* to different structures (i.e., state or family ownership or large shareholders holding control). WOCCU recommends that cooperative, mutual and other not-for-profit legal structures are also included within this group.

The distinctive legal structure of credit unions as financial cooperatives means that there are areas within the revised OECD principles that cannot be directly applied to credit unions. In summary, these areas are:

- Protection of minority shareholders;
- Controls on large shareholders;
- Board remuneration; and
- Independent non-executive directors.

In addition, accounting standards that are not responsive to the cooperative legal structure and excessive non-meaningful disclosure requirements that result in increased compliance costs may also hamper credit union compliance with the OECD *Principles*.

In conclusion, the revision to *OECD Principles of Corporate Governance* is welcomed by WOCCU. The *Principles* provide an important and significant reference point for credit unions as not-for-profit financial cooperatives. At present, the legal structure of credit unions means that while they may wish to, they cannot fully comply with the *Principles.* It is recommended that the Principles be expanded to recognize not-for-profit structures. I hope that this letter has helped to highlight some of the key areas of difference between the for-profit and not-for-profit structures in achieving compliance with the Principles. WOCCU shall continue to observe the OECD's review of the *Principles*.

JAPAN SECURITIES INVESTMENT ADVISERS ASSOCIATION

1. General Comment

We acknowledge that the reinforcement of corporate governance has become an important issue indispensable to the development of the international society. Therefore, we highly appreciate that the OECD Principles of Corporate Governance are greatly contributing to solve this key issue. We also acknowledge that timely revision and improvement of the contents of the Principles are important in order to adapt the ever-changing socio-economical environment that affects corporate activities and in this respect, the efforts of OECD to further improve the Principles and make them more suitable to the real world are significant, which is the key in maintaining the worldwide momentum for the reinforcement of the corporate governance. We would like to express our expectations and gratitude for the efforts made by all the participants engaging in revising the Principles.

However, since the subject Principles might be recognized as the reference for the internal legislation in each country and as the guideline for the activities of stock exchanges, investors, corporations, and all the other related entities ------ although they are non-binding -----, we believe that they should be limited to common underlying fundamentals in the good corporate governance, that is, the minimal requirements for the best practice that would enable each country to respond quickly and flexibly to its socio-economical environment. Accordingly, we strongly request that this should be taken into consideration when revising the Principles.

2. Particulars (Confirmation and Opinion)

(1) In the recommendation "I-F-1", pension funds, mutual investment schemes and some activities of insurance companies are exemplified as institutions acting in a fiduciary capacity. We would like to confirm that investment advisers who provide discretionary investment advisory services to their clients on one-on-one contract basis are not included in the institutions of such a category.

(2) If investment advisers are included in the category of the institutions acting in a fiduciary capacity, ***we urge the last part of the provision "I-F-1" in the draft revision: "The voting record of such investors should also be disclosed to the market on an annual basis" to be eliminated***. Because investment advisers, who provide discretionary investment advisory services to their clients based on one-on-one contract, owe the duty to protect privileged information to their clients, it should not be allowed for them to disclose the voting record to the public, not to their clients. Investment advisers should act only for the benefit of their clients; their duty is limited to disclose the voting record to their clients when requested.

We expect that the revision adopt our opinions and be widely accepted as the Principles of high quality by many participating bodies.

SERENA LILLYWHITE, BROTHERHOOD OF ST LAURENCE

Introduction

This submission to the OECD Steering Group on Corporate Governance is prepared by Serena Lillywhite, Manager, Ethical Business, Brotherhood of St Laurence, Australia. The Brotherhood of St Laurence (BSL) is an Australian welfare organisation that provides a range of services, research and advocacy to low income and vulnerable Australians. The BSL is actively involved in ethical business and corporate social responsibility, with an emphasis on responsible supply chain management in China. The BSL works closely with the Australian National Contact point to promote the OECD Guidelines for Multinational Enterprises and has presented at the OECD Roundtable on Corporate Social Responsibility in Paris, June, 2002 and the OECD Global Forum on International Investment in Shanghai, December 2002. Serena Lillywhite is a member of the OECD WATCH Consultative Committee.

This submission is prepared by Serena Lillywhite with initial contributions from Tricia Feeney, RAID, Rights and Accountability in Development, UK.

General Comments

The opportunity to revise the OECD Principles of Corporate Governance (the Principles), provides an opportunity to ensure the Principles have the broadest coverage and ensure synergy, where appropriate, with complimentary internationally recognised instruments. In particular, *The OECD Guidelines for Multinational Enterprises*, the *ILO Declaration on Fundamental Rights at Work* the *UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights* and the *Rio Declaration on Environment and Development*.

Currently, the draft text is focused on the core governance requirements concerning the Board of Directors and shareholders. This narrow focus limits the longevity of the Principles and is not consistent with current international thinking which places the corporate governance framework as part of a broader corporate social responsibility framework. The Principles would be enhanced by ensuring the broader responsibilities and obligations of directors and enterprises are listed. This would include:

- Responsibilities to local communities in both OECD and non OECD countries
- The human rights implications of business decisions
- The social and environmental implications of business decisions
- Responsibilities to stakeholders
- Role and responsibilities of financial intermediaries
- Greater disclosure on cross-boarder activities

The principles acknowledge that these issues are covered in other instruments. However, as a minimum these issues should at least be identified and documented in these Principles.

Revising the Principles provides an opportunity to acknowledge the vital role that the board of directors plays in strategic thinking and planning the enterprises operations. The Principles would be enhanced by encouraging proactive, innovative practices that go beyond the stated legislative requirements, and contribute to wealth creation benefits in the broadest sense. This can be seen as responding to 'aspirational' as well as 'community' expectations of the obligations of directors and shareholders. The principles should list the benefits that can be achieved, which include:

- Sustainable development
- Efficient use of capital, technology, human and natural resources
- Transfer of technology
- Development of human capital
- Greater coherence between the social, economic and environmental objectives
- Promotion of human rights

Documenting these benefits will encourage and promote the positive contributions that enterprises can make to economic, environmental and social progress, and minimise the difficulties to which activities may give rise.

The draft Principles do make reference to ethical practice. The Principles would be enhanced by strengthening the obligations to developing internal programmes, guidance and management systems that underpin a corporate culture that is committed to good corporate citizenship, ethical practices and good business and employee conduct. To support this, the Principles should go further with obligations concerning understanding, documenting and disclosing all cross-border activities and their impact. This is particularly important in non OECD countries and developing countries that may not have a strong institutional or regulatory framework.

The Preamble

Currently he Preamble in the draft text has a narrow focus and would be enhanced by documenting the broader obligations and responsibilities of directors and enterprises that promote responsible social and environmental practices that minimise any adverse impact on the natural environment, local communities and employees, including those in Non-OECD countries. The Principle does make reference to 'business ethics and corporate awareness' and the long term reputation of the firm (paragraph 3 of the preamble). However, this needs to be seen as an integral part of the governance framework and not an additional or secondary responsibility.

Paragraph 2 would be more complete with a final sentence on governance incentives. Suggested wording could be:

'Such incentives must promote business practices that minimise adverse impacts on the natural environment and local communities'.

Paragraph 4 would be improved by further documentation of the complimentary mechanisms. Suggested wording is:

'In addition, the Principles recognise that transnational corporations and other business enterprises, their offices and persons working for them are also obligated to respect the generally recognised responsibilities and norms contained in the UN treaties and other international instruments and mechanisms such as:

- UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights
- ILO Declaration on Fundamental Rights at Work
- Rio Declaration on Environment and Development

Paragraph 6 focuses on relationships among participants. It is recommended that an additional sentence is included to acknowledge the increasing influence of stakeholders, including trade unions, non-government organisations, representatives of civil society and consumers, on the corporate governance framework.

Paragraph 8 would be enhanced by reference to the OECD Guidelines for Multinational Enterprises in terms of their non-binding nature. In addition, a final sentence could be added, such as:

'More importantly, in conjunction with other recognised international instruments, the Principles can be used to meet director's broader social responsibility obligations'.

The final sentence in **Paragraph 9**, 'It is up to governments and market participants to decide how to apply the Principles…' should be removed as this effectively undermines the entire text.

An additional paragraph should be included which makes the links between sustainable foreign direct investment (sound macroeconomic policies and a stable regulatory environment) and corporate governance. In particular, additional reference should be made to cross border responsibilities with regard to transparent investment and capital flows and related trade and services, including supply chain management. This is applicable in both OECD and non-OECD countries.

Ensuring an effective corporate governance framework

This section briefly outlines the governance framework and as such needs an additional sentence:

'The corporate governance framework should be developed with a view to its overall impact on local communities, and must encompass social and environmental principles in accordance with recognised international mechanisms that promote corporate social responsibility and ethical business practices.'

Chapter 3, The role of stakeholders in corporate governance

This chapter is considered to be extremely important and can be improved by a greater recognition of the contribution of stakeholders to wealth creation and sustainable business practices. It is essential that this section be given further consideration by the Steering Group, and in particular, ensure the Principles look beyond the 'rights of stakeholders as established and protected by law'. All such references need to be removed. In its current form it does not recognise the responsibilities and obligations of directors and enterprises acting in both domestic and international environments where adequate laws may not exist, particularly developing countries.

In its current form it reduces the Principles capacity to go beyond the legislative requirements and be innovative, proactive and 'aspirational' in contributing to corporate social responsibility. The existing narrow view encourages a claims/compensation based approach to governance.

The existing principle should be redrafted to read:

'The corporate governance framework should recognise the rights of stakeholders and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound and socially responsible enterprises'.

An additional point should be added:

'Mechanisms and incentives should be developed that encourage the Bord to go beyond their legal requirements'.

Additional commentary could capture the strategic capacity of directors to work with, and be considerate of, all stakeholders. In addition, it is appropriate to make reference here to the OECD Guidelines for Multinational Enterprises. These Guidelines have an implementation mechanism that provides opportunities for stakeholders to raise specific instances that may be at odds with the Guidelines for investigation and comment by the appropriate National Contact Point. Both the principles and annotations should make reference to these implementation mechanisms.

Stakeholders need to be recognised as potential whistleblowers and as such need consideration as part of a governance framework that ensures appropriate protection and scope for concerns to be raised.

Chapter 4, Disclosure and transparency

This chapter would be enhanced by stronger references to stakeholders, and not just limited to shareholders.

The principle could be altered slightly to read:

'The corporate governance framework should ensure that timely and accurate disclosure is made to all shareholders and stakeholders on all matters regarding the corporation, including the financial situation, performance, ownership, social, environmental and human rights governance of the company'.

Disclosure should be consistent with the OECD Guidelines for Multinational Enterprises. Under section A, three additional points should be included as part of the minimum disclosure requirements:

- Environmental, social and human rights impact of Board decisions and enterprise activity
- Cross border financial and trade related activities, including intermediary 'chains' and production and supply networks.
- Industrial disputes, grievances and dispute resolution processes and complaints.
- Payments to and from governments and their agencies, where lack of such disclosure could pose reputation risks to the company.

Chapter 5, Responsibilities of the board

This chapter can be enhanced by again adopting a broader view that goes beyond the legal requirements. In particular, greater reference can be made to the responsibilities of the board in creating an ethical business culture.

Commentary is required on the board's accountability beyond the company's auditors and shareholders, but to stakeholders and communities affected by the company's activities in which it operates.

The principle could be altered to read:

'The corporate governance framework should ensure the social responsibility and strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability and loyalty to the company, the shareholders, stakeholders and communities affected by the companies activities in which it operates'.

Section C could be enhanced:

'The board should apply high ethical standards and act with due diligence and care. It should take into account the interests of stakeholders, communities and individuals upon which business decisions impact'.

Section D requires two additional points:

Developing a corporate culture that goes beyond legal and fiduciary duties and promotes corporate social responsibility, ethical business practices and corporate citizenship.

Ensuring the activities of the enterprise is consistent with international instruments and mechanisms that promote corporate social responsibility.

SCGOP

With great interest we have studied your Draft Revised Text of the OECD Principles on Corporate Governance (of January 2004). The OECD Principles have played an important role in the governance debate since its first publication and will most likely continue to do so in the future. We therefore appreciate that you have chosen to update and strengthen the Principles. On a great number of accounts important improvements have been made, such as on the fiduciary responsibilities of institutional investors (Section I.F), cross border voting (Section II.A.4 en 5), selective disclosure equal disclosure (Section IV.E) and the role of analists, brokers and rating agencies (Section IV.F).

On a few issues we have some suggestions. We would appreciate if you could take these into account in your further delaborations:

1. We applaud that the Principles remain by their general statement in Section I that shareholders need to have certain basic rights, including the right to elect and remove members of the board. To often however we see that this principle is lived up to only by the letter, and not the spirit. A typical example is the company in which shareholders formally have the right to elect and remove board members, but that the requirements for taking these decisions are so firm, that in practice it is the board itself that determines its composition. We therefor suggest that you add a side remark saying that the relevant principles should not be watered down by unrealistic requirements.

2. In this respect we also feel that ensuring a "right to participate in decisions concerning fundamental corporate changes" as mentioned in Section I.B gives too much room to marginalisation of shareholder influence in practice. We would suggest a stronger language, preferrably "the right to authorize". Given the impact such fundamental changes can have on the risk-return-profile of a company, this is not inappropriate. Shareholders determine their investment decisions on this profile and should not be confronted with a change they cannot control. Furthermore, adequate information is of crucial importance here. At least the annortations to the principles, but preferably the principles themselves should in our mind emphasize that full concisive and timely information is provided which allows shareholders to adequately judge the consequences of the proposed changes.

3. We very much welcome the addition which is now adopted in Section I.C.3. that "the equity component of compensation schemes" should be subject to shareholder approval. We are of the opinion however that this should be extended to the remuneration policy as a whole, whereas also other elements than the equity component can be of great influence on the incentive structure.

4. We regret that on Section I.D there is no general remark promoting the one-share-one-vote principle, adding that each deviation therefrom should be adequately disclosed and cleary justified. For a system of checks and balances to work properly, we feel an efficient market for corporate control is needed. However, the other instruments to achieve that are as important. A transparent company structure in which shareholders can play a meaningful role presupposes in this respect full acceptance of the one share one vote principle. Anti-takeover devices are in our view generally undesirable, but in any case they should inflict as little damage as possible on the regular process of decision making in "peace time".

The same issue comes back at Section II.A.1. We do not agree with the assement you make that sufficient information on the rights attached to shares should protect investors. Investors often have no choice but to invest (e.g. as a result of index-tracking). The downside of the lack of checks and balances as

a result of that is furthermore not always adequately reflected in the stock price, let alone such a lack of checks and balances is no situation which is in anybodies interest to maintain.

5. The new Sections I.F and I.G on the responsibilities of institutional shareholders will be of paramount importance for the development of governance enhancements in the years to come. The OECD is rightfully making a strong statement here and we fully endorse it, albeit that we feel the fiduciary responsibility of institutions is to their own benefeciaries only, and not – as the last sentence of F.1 could be taken to suggest – to the wider public. It would be good to clarify this.

6. Furthermore we take it that the last sentence of the annotation to I.G refers to co-operations which *do* involve issues of corporate control, etcetera as metioned in the preceding sentence rather than the sort of co-operation of shareholders that should – as you rightfully state – be encouraged. To prevent misunderstandings, we suggest that you clarify this.

7. In the annotation to Section IV.D you make the remark that the practice of external auditors being appointed by the audit committee *or* the shareholders´ meeting can be regarded as good practice. We would suggest to add that appointment by the shareholders´ meeting is preferred because it underlines even more the necessity of him being independent from management.

8. Key to a well functioning system of checks & balances is the existence of a sufficient numer of independent non-executives or supervisory directors. We fully support the emphasis you put on this subject I section V.E. It is also a subject companies need guidance on, in our view. It would in that respect be very welcome if you would be more specific in the requirements for having an independent Board. The suggestions of the Report of the EU High Level Group of Experts of november 2002 could in that respect serve as an example. Most importantly it should in our mind be recognized that Board-members with so-called interlocking directorships can also not be regarded as independent.

Overall, we commend the efforts of the OECD in structuring principles that will guide financial markets around the world to live up to the enormous task ahead, and we sincerely hope that our suggestions can assist you in the further process.

PUBLIC SERVICES INTERNATIONAL

Public Services International (PSI) is the Global Union Federation which represents 20 million public sector trade unionists around the world. It has 627 affiliates in 149 countries. PSI is an autonomous body, which works in association with Federations covering other sectors of the workforce and with TUAC at the OECD and the International Confederation of Free Trade Unions (ICFTU). PSI is an officially recognised non-government organisation for the public sector within the International Labour Organisation and has consultative status with ECOSOC and observer status with other UN bodies such as the UNCTAD and UNESCO.

We have followed the process of the redrafting of the Principles of Corporate Governance as closely as we can. We remain to be convinced that there is a real determination to subject corporate behaviour to anything like the scrutiny and control which many OECD member states apply to trade unions - instructions in law as to how unions are structured, on what roles they can play, on what they can

negotiate, on how they must conduct internal elections, on how they decide issues such as whether to engage in industrial action. No talk of 'voluntary' initiatives in many cases - just an outright application of rigid laws. We do not support such control and rigidity but we looked to these draft Principles in the expectation that corporate leaders were to be held to tough legal standards in some sense of balance. Our expectations are not being met in these draft guidelines, even if they are an honest attempt to do something about a group of legal persons whose behaviour has wiped out the life savings of millions of workers in OECD member states. Of course, PSI writes somewhat more passionately on this issue in view of the much harsher conditions applied to public sector workers in respect of trade union rights in some OECD member states: we obviously reject these restrictions on workers and unions. We note also our additional comments on chapter II below.

Our comments on the draft should be seen as public comments: we are quite happy for them to be made available to member states and/or to the general public in whatever the OECD sees as appropriate.

We have seen the comments supplied to you by TUAC, the ICFTU, UNI and the International Union of Foodworkers. There are none with which we would disagree. In what follows, we have tried not to repeat those comments: the fact that we do not mention them in our own views should not be taken as other than complete endorsement of them.

From the outset, on page 5, where the Principles are outlined, there is a clear distinction between the objectives of the first and third principles: the first talks only of the incentives for market participants and the promotion of efficient markets - no comments about the social responsibility of the market participants; the third principle places the responsibilities for serving the public interest only on regulatory bodies. Surely, the public interest should be a requirement of all elements of good governance.

In the Annotations (page 14 - 15), the paragraph (The legal and regulatory requirements...) might profitably suggest that policy measures comply with the regulatory quality principles on which the OECD bases its work on regulatory management. Those principles reflect the OECD's commitment to the triple pillars of social, environmental and economic concerns and objectives.

In I C 2. it might be worth considering the obligations which should be placed on a company to ensure that shareholders are enabled to identify one another, especially if the Guidelines' recommendations that some restrictions be placed on who can propose shareholder resolutions are to be maintained.

In I C 4. the final sentence of the first paragraph is deficient. The proxy holders for company pension funds should not merely disclose voting intentions: surely they must do so in sufficient time and in such a manner which enables this intention to be disputed.

In II, at the third substantive paragraph, there is a good example of the distinction we drew earlier about the disparity between the 'safe harbour' for companies and their executives and the manner in which union leaders and the assets of unions can be subject to litigation if they fall foul of the much more rigid controls placed on union behaviour. While we might agree that the more lenient approach adopted in these guidelines is more sensible, it would not be amiss for the OECD to note the disparity.

In II A 5., it might be pertinent to suggest that member states should require that the rules which apply to union activities should apply to company behaviour: several member states outline the specific steps unions must take for the conduct of meetings or for ballots for strike action. It is surely not beyond the capacity of companies to abide by the same rules. We do not endorse all of these restrictions applied by member states but there must be some sense in which the OECD calls for some consistency.

In II C the final sentence is far too weak. It is insufficient to state simply that 'it is usual for that person not to be involved...' The OECD should be calling for a requirement that makes this obligatory.

In III A, we support the TUAC comments already submitted but would add that the rights of worker stakeholders are established not just by domestic law but by international conventions, including those of the ILO.

In III E and also at V D 6., it is important to note that whistleblowing is not something that is always effective if there is only an internal right to expose wrong-doing. It is now legal in several OECD member states for an employee to blow the whistle externally under certain circumstances, chief amongst which is that an internal; exposure has been ignored. Such actions have been crucial to some of the more high profile cases in the US on recent years. In the case of III E, this would require a change to the substantive heading such that at the end, after ' for doing this' is added ' but member states should provide legal protection to employees or others who, under appropriate conditions, expose such wrong-doing to some external body (including the news media in relevant circumstances) in cases where no or insufficient action is taken by a company after an internal complaint.'

In IV A 4., it is worth considering whether it is sufficient to suggest that independent board members be appointed (and that information on selection processes be provided). Additionally, it would be useful to require a company that did not appoint such board members to explain why it did not consider that necessary.

In IV 7., we endorse the TUAC suggestions and would underline the need for company performance reports to include full accounting for all economic, environmental and social impacts, especially their sustainability impacts.

In IV E, it should be noted that 'cost-efficient access' to company information is not the same as easy or affordable access: the latter should be the aim.

THE INSTITUTE OF CHARTERED SECRETARIES AND ADMINISTRATORS (ICSA)

The Institute of Chartered Secretaries and Administrators (ICSA) has studied the draft revised OECD Principles of Corporate Governance and welcomes the opportunity to contribute to the consultation process.

ICSA is the professional body for Chartered Secretaries. With 44,000 members and 28,000 students in over 70 countries, the Institute promotes the importance of good corporate governance, qualifies Chartered Secretaries through its qualifying schemes, defines best practice, and supports the corporate, public and not for profit sectors with professional resources.

ICSA considers that the revised draft has, in the main, taken a practical view of corporate governance developments. The considerable additions to the Annotations have changed the nature of the document to one that is less prescriptive in how the Principles are to be used. This is specifically recognised in the second paragraph of the first Annotation, which refers to "the process of developing a corporate governance framework that will result in the outcomes that these Principles aspire to achieve". We welcome this move, which will encourage emerging markets to consider the overall desired result in their particular environment rather than attempting slavishly to implement a set of laid down requirements.

We are also pleased to see the proposed wording for a sensible level of involvement of shareholders in remuneration policies in section 1.C.3

We have considerable concern, however, with the new last sentence of the Annotations to Section 1.C.2 on Rights of Shareholders and Key Ownership Functions, which states that "Shareholder resolutions that are approved and within the competence of the shareholders meeting should be binding on the board". Whilst we can understand that this is trying to address the position in a wide variety of regulatory environments, there is considerable scope for problems with the existing wording. In the UK, for example, there is little restriction on the nature of resolutions that a minimum defined amount of shareholders can place on general meeting agendas. If a resolution was passed that was a direct interference in the directors' responsibilities for the operation of the company, it could well not be in the interests of the company for it to be binding on the board, indeed it might not be possible to carry out if it was contrary to law. Likewise in the UK the shareholders are asked to approve the remuneration policy. If they do not approve it, that does not mean that the whole policy and the contracts within that policy are void, it means that the board needs to re-think the policy. We would suggest that there should be more consideration given to the wording of this area.

We are also concerned that the Principles and Annotations rightly place considerable emphasis on shareholder rights, but do not make mention of shareholder responsibilities, particularly on the part of institutional shareholders. The International Corporate Governance Network has recognised the importance of shareholder responsibilities and has produced a proposed statement on the subject, which can be found in the Documents section of www.icgn.org.

We would make two further more minor points:

- The summary page immediately following the preamble refers to the need for legal and regulatory requirements that affect corporate governance practices in a jurisdiction to be transparent and enforceable. We would argue that it is equally important that the practices are not only enforceable but also enforced. There are many instances in emerging markets where the laws and codes are in place but are not enforced, for a variety of reasons.

- Section V. The responsibilities of the board.

Paragraph A states that the Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders. There is general agreement that the board should be acting in the interests of the company over the long, rather than the short, term. We would suggest that the words "long term" should be added before the word "interest".

We would be very happy to discuss any of these points that we have raised. The OECD and all concerned with the production of the revised draft are to be congratulated on producing a document that should be widely acceptable whilst moving forward.

CIMA

CIMA welcomes the opportunity to comment on the revised OECD Principles of Corporate Governance. CIMA is a global professional body, based in the United Kingdom. It represents financial

managers working in industry, commerce, not-for-profit and public sector organisations. CIMA is the voice of more than 80,000 students and 60,000 members in 154 countries. Its focus is to qualify students, to support both members and employers and to protect the public interest. CIMA is a member of both the International Federation of Accountants (IFAC) and the Fédération des Experts Comptables Européens (FEE).

CIMA has taken a keen interest in the corporate governance debate and has made formal submissions to the various reviews that have taken place in the United Kingdom, for example, the recent review of the role of non-executive directors, which culminated in the Higgs Report.

General comments

The existing 1999 principles have proved to be an invaluable and widely-recognised reference point for policy makers on the various aspects of corporate governance. However, as recent corporate scandals have shown, there is always scope for further development and strengthening of corporate governance. We believe that the revised OECD principles provide an effective means of promoting a high minimum standard of corporate governance across the world.

CIMA warmly welcomes the revised principles and is particularly pleased to see that the OECD has taken an evolutionary approach rather than a fundamental rewrite. We believe that the additions provide an excellent step forward in further strengthening corporate governance globally while maintaining the focus and clarity that has been the hallmark of the 1999 principles.

Specific comments

CIMA welcomes the new introduction to the principles (*Ensuring an effective corporate governance framework)* as it helps to put the rest of the principles into an overall context. We were particularly pleased to see the emphasis on developing a corporate governance framework with a view to its impact on overall economic performance and the promotion of transparent and efficient markets.

CIMA firmly believes that it is absolutely vital to improve standards of corporate governance. However, at the same time, organisations must ensure that they are paying sufficient attention to the issue of wealth creation and that they are pursuing the right strategies to achieve this. While bad governance can bring down a company, good governance on its own cannot make a company successful and there have been many examples of company difficulties that related to strategic rather than corporate governance failure. In essence, companies must balance "conformance" with "performance".

This is a fundamental component of what has been termed "enterprise governance". CIM A has been working with the Professional Accountants in Business Committee of IFAC (PAIB) to research the concept of enterprise governance further and to develop a "Strategic Scorecard" which would help to provide the directors of the company with a true and fair view of the company's strategic position. A report is to be published by IFAC and CIMA later this month and we would be very pleased to make this available to the OECD.

CIMA also welcomes the emphasis on transparency. There is no doubt that, post Enron, restoring credibility in financial reporting has been a priority and much progress has been made. However, there is still some way to go in ensuring that corporate disclosure provides investors with the information that they need to make meaningful valuations and decisions. In essence, this means the inclusion of forward-looking and non-financial information in addition to the "traditional" historical and backward-looking financial statements –without creating unnecessary complexity and information overload.

The new principles covering whistleblowers (III.E) and rating agencies (IV.F) are useful additions.

We also note the revised annotations to the main principles. These help to make the principles more user-friendly. In particular, the supporting material for chapter V (The responsibilities of the board) is invaluable. CIMA believes that this additional background reinforces the message that competent, well-trained and well-informed boards play a crucial role in ensuring good governance.

OPEN COMPLIANCE & ETHICS GROUP (OCEG)

The Open Compliance & Ethics Group (OCEG) is a nonprofit, multi-industry, multi-disciplinary coalition of business leaders assembled to develop and promote effective compliance and ethics program guidelines. These guidelines help an organization translate good compliance, ethics, and governance principles into the actual operations of the business.

OCEG supports the efforts of the OECD to help harmonize the manner in which corporate governance is approached in the international arena.

OCEG is primarily concerned with compliance and ethics management as it relates to the overall enterprise – including its relationship to good governance practices. OCEG believes that compliance and ethics management is a key element of governance; and that effective programs provide a tangible link between the principles of governance and the actual operations of the enterprise.

It is with this perspective that we respectfully submit the following comments on the January, 2004 *Draft Revised Text of the OECD Principles of Corporate Governance.*

Over 200 individuals from more than 100 organizations have contributed to the development and review of the OCEG Framework — with more joining every day. These individuals represent a diverse group of organizations and bring both practical "in-house" and outside expertise to the work product. They include:

- Board Members / Chief Executive Officers
- Chief Compliance Officers / Ethics Officers
- Chief Financial Officers / Risk Officers
- Internal Auditors / External Auditors
- Insurance Underwriters / Brokers
- Institutional Investors / Creditors
- Ratings Agencies / Research Firms
- Legal Experts

This diverse group of individuals has helped to ensure that the OCEG Framework is:

- Balanced
- Comprehensive
- Integrated with other business functions
- Customizable and extendable
- Scalable to large and small organizations

Comments

1) "Policies" do not necessarily equal "Performance"

a) Policies (§ V.C) are useful insofar as they help to succinctly state the organization's position and expectations about its governance, values, and ethics. Policies by themselves, however, can sometimes become the hallmark of a "paper program" that promotes form over substance without some form of linkage. Imagine if an organization used simply a policy of "Meet Sales Quota" to guide its sales force. Most organizations would recognize that more is required to motivate and enable behavior.

b) Recommendation

OCEG recommends that the OECD adopt language that specifically guides organizations to not only "inform," but also "enable" employees. The first step to enabling employees is some form of training. The board of directors should be included in training.

OCEG also recommends that the OECD include language that encourages organizations to evaluate employee and board performance with regard to their compliance and ethics responsibilities. Such evaluation should result in rewards, and where necessary, discipline related to ethical conduct and compliance. This helps to ensure that working in a manner consistent with the code of conduct/ethics becomes part of everyone's day-to-day job.

2) Issue management requires awareness and training.

a) The "whistle blowing" and "hotline" provisions in §III.B and III.E are necessities. Many of the most visible corporate scandals in the United States may have been avoided if these mechanisms were used. The key, of course, is that stakeholders are aware of the mechanism and enabled to use it without fear of retribution.

b) Recommendation

OCEG recommends that §III.B and III.E should be strengthened by requiring that stakeholders are not only "able" to freely communicate concerns, but are also "enabled" with the appropriate communications and training. In some organizations, employee awareness of a "hotline" is extremely low despite its presence. Stakeholders must understand what constitutes "illegal or unethical practices" in order to best report such issues. In order to effectively implement whistle blowing provisions, stakeholders (especially employees) must be trained on their existence and encouraged to use them when appropriate.

3) Formal mechanisms are not enough.

a) Recommending that the board of directors put in place formal codes of conduct or codes of ethics (§ V.C) is a step in the right direction. The additional formal mechanisms described in comment #1 and #2 help to enhance the impact of the code of conduct/ethics. That said, our research and experience indicates that, by themselves, these formal mechanisms do not necessarily modify employee behavior. This notion is supported by recent studies regarding the management of organizational ethics.[21]

b) Recommendation

OCEG recommends that the OECD include specific language to address both formal (e.g., code of conduct, code of ethics, etc.) and informal mechanisms for establishing and communicating compliance and ethics responsibilities. Informal mechanisms may include:

i) Visibly encourage ethical norms for thought and action by highlighting ethical behavior in everyday talk and practices of each work unit,

ii) Incorporate visible attention to ethics into the employee selection process and establish a socialization process so that new hires will know fully what will be expected of them,

[21] Managing Ethics in Business Organizations: Social Scientific Perspectives, Linda Klebe Trevino, Gary R. Weaver. In this work, the authors demonstrate that there is a weak correlation between the exclusive use of formal structures and positive employee behavior. The most noticeable factors that promote positive employee behavior are visible, yet informal attitudes and actions of senior executives – the "tone at the top."

iii) **Support an atmosphere of openness toward ethical discussion where raising ethical questions is seen as a loyal act,**

iv) **Identify the informal "heroes" of work units and the ethical standards they embody,**

v) **Identify and address norms of thinking and acting that support or undermine ethical behavior in each work unit**

vi) **Senior executive Q&A session**

vii) **Funding of organizational activities that support the values**

viii) **Inclusion of compliance and ethics responsibilities in corporate presentations**

4) Scope of compliance and ethics responsibilities is narrow.

a) Several provisions in the document address the need for solid values and ethics (§ II.B; II.C; V.C; V.D.6). Most of these provisions are specific to conflicts of interest, anti-corruption and financial matters.

b) Recommendation
OCEG recommends that the OECD include language that helps organizations understand the full scope of compliance and ethics issues. While financial assurance-related issues appear often in the media today, there are several areas that may be "sleeping giants." The following list, while not exhaustive, may provide a basis for expanding the scope of compliance and ethics issues.

i) **General Ethics (e.g., conflicts, self-dealings, etc.)**

ii) **Anti-Corruption**

iii) **Financial Assurance**

iv) **Employment / Labor**

v) **Information Management (including privacy and security)**

vi) **Environmental**

vii) **Intellectual Property**

viii) **International Transactions (import and exports)**

ix) **Product Quality / Safety**

x) **Selling / Advertising / Marketing / Other Competitive Practices**

xi) **Workplace Health / Safety**

xii) **Government / Political Dealings**

5) Monitoring and evaluation are critical – including the evaluation of perceptions.

a) We concur with OECD regarding the need to monitor and periodically evaluate controls established by management. There are other factors that should be monitored and evaluated as well.

b) Recommendation
OCEG recommends that the OECD include language that requires organizations to periodically evaluate the attitudes and perceptions of its stakeholders, especially employees related to the controls implemented by management. Too often, good governance, compliance and ethics programs are undermined by inconsistent or even contrary reinforcement in other organizational processes (e.g., compensation systems that reward bad actors). An effective tool to understand where problems exist is the use of surveys that aim to determine to what extent stakeholders are "convinced" that the compliance and ethics program is a priority for the organization.

Background Information: Over 200 individuals from more than 100 organizations have contributed to the development and review of the OCEG Framework — with more joining every day. These individuals represent a diverse group of organizations and bring both practical "in-house" and outside expertise to the work product. They include: Board Members / Chief Executive Officers, Chief Compliance Officers / Ethics Officers, Chief Financial Officers / Risk Officers, Internal Auditors / External Auditors, Insurance Underwriters / Brokers, Institutional Investors / Creditors, Ratings Agencies / Research Firms, Legal Experts.

This diverse group of individuals has helped to ensure that the OCEG Framework is: Balanced, Comprehensive, Integrated with other business functions, Customizable and extendable, Scalable to large and small organizations.

OCEG Background: http://www.oceg.org/docs/01.%20OCEG%20Brochure%20(DRAFT).pdf,

OCEG Advisory Board: http://www.oceg.org/docs/00.%20OCEG%20Advisory%20Panel%20(2003-11-20.01).pdf

ANONYMOUS

Thank you for the recent publication of the OECD Principles of Corporate Governance on your website. I have studied your document with great interest and find that the principles have the merit of being broad-based, while also clear and concise. I was also pleased to note your recognition of the important role played by stakeholders in corporate governance.

May I take this opportunity, however, to make a few suggestions on some points, which I believe would merit further precision, particularly with respect to section II on the equitable treatment of shareholders, and more specifically regarding item C, on the material interests in transactions affecting the corporation. I believe it would be worth going further by recommending that the corporate top management be prohibited from having their assets managed by brokers with business ties to their company. As for board members I believe transparency in the matter would suffice. As such, details regarding the brokers or banks managing their assets should also be disclosed.

GENERAL COUNSEL OF SIEMENS AG

Thank you for the latest draft of the Principles of Corporate Governance and for your kind words about my prior contribution. Over the years, this dynamic project has helped stimulate reforms in OECD countries (and prompted serious discussion elsewhere).

While the Principles have consistently recognized the varied corporate governance systems implemented amongst the OECD nations (especially the significant differences between the dual board and single board frameworks), the revised draft is specially noteworthy in that it maintains its characteristic flexibility and suggests potential improvements to possible weaknesses in each system, notwithstanding a climate of considerable ongoing governance analysis and overhaul.

As a stock corporation listed in Germany, London, Switzerland and New York, Siemens AG is subject to a variety of overlapping (domestic and foreign) laws and governance standards, including Germany's Stock Corporation Act, the U.S. Sarbanes-Oxley Act of 2002, the NYSE Corporate Governance Rules, the UK Combined Code and, in particular, the German Corporate Governance Code ("Kodex"). As you know, the mandatory governance reporting regime implemented by the Kodex, which covers many of the issues addressed by the Principles, has prompted considerable (and ongoing) dialogue and reform within Germany.

I'd like to take this opportunity to single out just a couple of the more laudable provisions of the Principles that we believe should be more widely adopted or debated. We agree that institutional investors should not only disclose their corporate governance and voting policies with respect to investment, but – when acting in fiduciary capacities – should also disclose their actual voting records. We believe that such requirements would not only better protect and serve the rights of the beneficial security-holders, but would also further enhance voter participation on matters subject to shareholder consideration. Perhaps not surprisingly, consistent with our belief that each share should have one vote, we believe that each share ought to vote (or be voted by the shareholder's institutional intermediary). As it has become more commonplace for individual shareholders to hold shares through institutions, we have noticed a diminishing presence of voting capital at annual shareholder meetings. This, of course, presents the risk that a shareholder vote will not accurately reflect the true position of the outstanding voting capital with respect to the issue. We believe that, just as companies have a duty to implement sound corporate governance systems, investors have a noble duty to participate in the governance of companies by voting their capital.

We also agree that legal systems should provide shareholders (including, of course, minority shareholders) with effective, practical avenues of redress. And we could not agree more with the Principles' position that a critical balance must be struck between providing shareholder redress of injuries and unnecessarily facilitating the disruptive and wasteful consequences of abusive shareholder litigations with more questionable merits.

At the same time, there are a number of aspects of our system that depart from the framework encouraged by the Principles (or the related annotations and commentary). However, virtually all of these departures arise, at least in part, when the Principles do not fully account for the nature and legal duties of the supervisory board in two-tier systems. For example, we are confident that a supervisory board evaluates equity compensation programs and the compensation of key management much more rigorously and in considerably more detail than is possible by shareholder consideration of the same issues.

In fact, our Supervisory Board invests substantial time and effort evaluating compensation issues and provides our shareholders with a detailed compensation report in connection with our Annual Stockholders

Meeting. That said, we agree with the Principles that company disclosure about key executive and board members should not be limited to compensation. In any event and in our experience, among systems currently in use, the German corporate governance system (especially as implemented by companies such as Siemens) has proven to be transparent, effective and respectful of the rights of shareholders and stakeholders.

Actually having recently completed our Annual General Meeting of Shareholders and having previously observed shareholder meetings in other jurisdictions, I can observe that few (if any) other governance frameworks offer shareholders such a meaningful level of access and opportunity not only to be heard, but to also bring issues to shareholder vote. At the same time, however, we do not believe that direct shareholder questioning of a company's independent auditors would meaningfully improve either shareholder decision-making or auditor accountability. In fact, any potential marginal shareholder benefit from such questioning could be outweighed by the attendant distraction and confusion. You might consider additional analysis of the likely practical consequences of such a shareholder right before inclusion of such a provision in the Principles, which are so often looked to as a reliable source of best-practice. Again, at least within our two-tier framework, we believe that the shareholders' interests are strongly represented and protected by the Supervisory Board in connection with its interaction with the company's independent auditor.

Thank you again for the opportunity to be involved in the crafting of the Principles, I look forward to our continued cooperation.

INTERNATIONAL BAR ASSOCIATION'S SECTION ON BUSINESS LAW

The International Bar Association's (the "IBA")[22] Section on Business Law appreciates this opportunity to contribute to the current consultations over the Draft Revision of the OECD Corporate Governance Principles (the "OECD Principles") and supports the OECD's efforts to improve the legal framework for corporate governance in OECD and non-OECD countries. These efforts certainly provide valuable guidelines and suggestions for good corporate governance initiatives around the world.

We acknowledge that the OECD Principles of Corporate Governance agreed in 1999 have gained wide acceptance, as they have come to form the basis for governance initiatives in both OECD and non-OECD countries and have been adopted as one of the Twelve Key Standards for Sound Financial Systems by the Financial Stability Forum.

As for the Draft Principles, they are the fruit of consultations over the past year with governments as well as representatives of business, professional groups, labour and civil society in both OECD and non-OECD countries.

[22] The IBA is a dual membership organisation, comprising 16,000 individual lawyers and over 190 Bar Associations and Law Societies, that promotes the development of international law reform and shapes the future of the legal profession. The IBA's Section on Business Law (the "SBL") represents the interests of 14,000 business lawyers from countries around the world. The opinions expressed herein are those of this *ad hoc* working group and do not reflect the official position of the SBL or the International Bar Association.

Nonetheless, there is always a risk, when laying down non-binding principles which are intended to form a reference point to a large number of governments and institutions, that they are either too general to ever become an efficient tool or too detailed to be accepted and applied by more than a small number of countries. However, it is our opinion that the OECD has managed to strike a balance, and we expect the OECD Principles of Corporate Governance to continue to form the basis for governance initiatives also after the adoption of the proposed amendments.

In the light of this background, our comments below to the Draft Principles are limited and, in general we welcome the proposed revisions and commend OECD's effort to target the issues that have been at the centre of recent corporate scandals.

Preamble

1. As a general remark, we note that the phenomenon of groups of companies is not specifically addressed even though references to the structure of the group or the chain of control are often present in the Principles or in the Annotations. We assume that this is a deliberate choice given the complexity of addressing the issue in terms of general principles; however, since this phenomenon is increasingly important especially in the area of accounting and conflicts of interest and played a key role in recent corporate scandals, it would be perhaps appropriate to account for and motivate such a choice.

2. In the sixth paragraph of the Preamble the importance of the role of creditors as external monitors over corporate performance is correctly pointed out. In this respect, we find worth highlighting that any such control is fully effective as long as creditors are actually "third parties" and, thus, the control is purely external. On the basis of this remark, we would suggest to add a reference to the fact that, especially in the UE, the issue of ensuring "separation" between banks (as creditors) and enterprises has been highly discussed, at least in terms of requiring the implementation of (i) substantial firewalls that separate the typical banking credit activities from the investment banking, (ii) disincentives or prohibitions to situations of interlocking directors, (iii) duties of banks to disclose their shareholdings in companies with which they have significant business relationships.

3. Paragraph seven of the Preamble specifies that, in case of a typical two-tier system, the term "board" in the OECD Principles shall be referred to the "supervisory board" while the term "key executives" shall be referred to the "management board". This clear-cut distinction, however, creates some confusion as to the interpretation of the Principles under Chapter V ("The responsibilities of the board"). In particular, it seems to us that in typical two-tier systems many of the Principles under Chapter V should apply not only to the supervisory board but also to the management board (see, for instance, the following Principles under V.A; V.D.5; V.E.).

In addition, the concept of "key executives" is difficult to match with the one of management board in two-tier systems: whereas key executives are usually understood as single directors with specific powers, members of the "management board" are usually key executives operating jointly in a collegiate board.

Annotation to OECD Principles of Corporate Governance

The Principles refer to the role of supervisory, regulatory and enforcement authorities. It would be important, in our view, to clarify that, whenever there is a division of responsibilities among different authorities, they should establish forms of effective co-operation and no confidentiality obligations could be invoked in order to prevent reciprocal disclosure. The same principles should be applied in the relationships between authorities of different countries specially whenever there are matters affecting multinational groups.

I . Rights of shareholders and key ownership functions

1. Paragraph I.A. should not only include the right to transfer and convey shares but also the right to pledge the same in an effective and simple way.

2. Paragraph I.C.2. correctly points out that shareholders should have the opportunity to place an item on the agenda of general meetings. We believe that the Principles should go further and allow shareholders holding a qualified percentage of shares to be also able to request to the board to convene ad hoc general meetings in a specified time frame to discuss items requested by the minority shareholders. As it already happens in some jurisdictions, the use of the company's website to publish notices of call for general meetings, the relative agenda and information as to the matters to be discussed (including motions or countermotions from the shareholders that have been brought to the attention of the company) should be recommended.

3. Paragraph I.C.3 refers to the *equity* component of compensation schemes for board members, providing that key executives and employees should be subject to shareholder approval. Given the fact that key executives and board members have proven to be rather inventive when it comes to designing compensation schemes, it may be desirable to make other components of compensation schemes subject to shareholder approval. In our opinion, any form of incentive scheme should form part of a well considered overall plan and be subject to shareholder approval. It may even be argued that *any* remuneration to board members should be subject to shareholder approval. In any event, as a minimum requirement all compensation schemes should have an upper limit, and such limit should be reasonable and disclosed to the shareholders.

Paragraph I.C.3. suggests that participation of shareholders in corporate governance decisions such as the nomination and election of board members should be facilitated. In this respect we suggest that the Principles could recommend that candidates for the election on the board shall be presented timely prior to the general meetings on the website of the company where voting results should also be published. Such advanced disclosures requirements would not only be in the interest of the private shareholders but also in the interest of (smaller) institutional investors who usually do not participate in general meetings. This could be a further tool to promote an active role of institutional investors without imposing on the same an obligation to vote their shares, as also discussed in point I.5. herein below.

4. Paragraph I. D. focuses on capital structures and arrangements that enable shareholders to gain a disproportionate level of control. We wonder whether mere disclosure would be an effective remedy. Several jurisdictions prohibit or limit recourse to cross shareholdings or shares with multiple voting rights. Shareholders' agreements are normally a very controversial issue and sometimes disclosure may not be a sufficient remedy. There are situations (e.g. tender offers) in which, also according to the E.U. Takeover Directive, shareholders' agreements should be automatically terminated or their effects suspended. On the other end, since the Principles shall also serve as a tool to improve corporate governance in other companies, such as privately held and state-owned enterprises where such provisions may be suitable or even necessary, the Principles should perhaps try to identify situations in which shareholders' agreements could be permissible, even though subject to certain limitations, as an appropriate instrument to protect the company's stability. Finally, shareholders' agreements containing provisions which address how decisions should be taken at the level of the board should be absolutely prohibited as a serious threat to directors' independence.

5. Paragraph I.F. calls on institutional investors to disclose their overall voting policies and how they manage material conflicts of interest that may affect the way they exercise key ownership functions, such as voting. We agree with the principle that institutional investors acting in a fiduciary capacity should disclose the overall corporate governance and voting policies with respect to their investments. We note that this principle does not require institutional investors to vote their share, and we appreciate that the OECD has not changed the principle to include a requirement for institutional investors to vote their share

or otherwise take an active role, as many smaller institutional investors would not have the possibility to comply with such an obligation.

II. The equitable treatment of shareholders

1. As to paragraph II.A.1, third line, we would suggest amending the wording "voting rights" into "rights". Indeed, it would seem fair to expressly provide for the (wider) principle that corporate decisions affecting any rights of a class of shareholders should be specifically approved by that class or the class should be at least consulted directly or through its representatives. This wider version of Principle II. A.1 would be particularly appropriate considering that special classes of shareholders have usually limited (or even no) voting rights

2. Section II.A.2. aims at strengthening the role of minority shareholders. We appreciate the additional protection granted to minority shareholders in the Draft Principles, but, in our view, the OECD could take a step further and state that sufficient and adequate rules for the protection of minority shareholders rights should be provided for by, e.g. laying down the principle that minority shareholders should have the right to appoint an (additional) external auditor to safeguard their interests. It is reasonable to require that, in order for an additional auditor to be appointed, such decision must be supported by shareholders holding a specified number of shares or votes (e.g. ten percent of the shares or votes).

III. The role of stakeholders in corporate governance

With reference to the OECD Principle III.F., it might be worth mentioning the recent trend in EU insolvency law of regulating the so-called "early warning" procedure, i.e. a special procedure aimed at monitoring the company prior to the official declaration of insolvency, during which qualified stakeholders play an important role. This could be an efficient way to provide incentives for internal supervisory and auditing boards, as well as external creditors and stakeholders, to control the level of corporate indebtedness.

Moreover, it might be appropriate to stress the importance of insolvency rules in the framework of (multinational) group companies, especially in those circumstances where the holding company or the main operating company(ies) become insolvent.

IV. Disclosure and transparency

1. In order to further highlight the importance of disclosing to the market financial and operating information pertaining to the whole group, where group companies are concerned, we would suggest to add to the initial sentence of the comment to the OECD Principle IV.A.1: "Audit financial statements showing the financial performance and the financial situation of the company (…)", the following wording "and the relevant group".

2. In paragraph IV.A. we would suggest adding a number 9 reading: "Relationships with auditors and regulatory and supervisory authorities".

3. As to the OECD Principle IV.C., it is worth mentioning that effective measures to ensure enhanced controls over the financial statements of companies incardinated in a group are either (i) requiring the appointment of one auditor for the whole group or at least (ii) providing for the liability of the principal auditor for the auditing activity carried out by the other auditors of the group. These measures are powerful tools for dealing with one of the major lapses evidenced after recent corporate scandals, i.e. the ability of auditors to successfully claim ignorance of doubtful accounting practises.

4. Paragraph IV.D. should, in our view, clearly state that external auditors should also be accountable to bondholders and, more in general, to the market. Although the liability of auditing companies has been recognized in some jurisdictions on the basis of civil law or common law general principles, some ad hoc rules would be beneficial.

5. As to the issue referred to under the OECD Principle IV.F, the conflict of interest for the rating agencies – differently from analysts, brokers and other advisors - calls for an additional specification relating to the circumstance that rating agencies rely on issuer fees for the vast majority of their revenues. Therefore, in our opinion, implementation of procedures to manage potential conflict of interests arising when the company pays for the rating should be stimulated.

Moreover, although already implicitly covered in the comment, we would suggest to expressly mention the additional difficulty, specifically related to rating agencies, arising from their growing involvement in structured transactions. In these operations, the rating agencies participate with originators in advising the best structure of the transactions in order to obtain the targeted rating, rather than merely issuing a rating in respect of an already defined transaction. This situation typically gives rise to conflicts of interest which cannot be solved by a mere disclosure rule. It rather calls for more stringent regulatory measures such as the implementation of firewalls, actually fit to separate rating services from other areas of business carried out by rating agencies.

Finally, another typical situation of conflicts of interests of rating agencies might arise should a rating be provided to issuers in which they have an interest (such as holding shares or being affiliated). We believe that this situation should be contrasted by prohibiting the rating of issuers by those rating agencies which have a financial interest in them.

V. The responsibilities of the board

1. In respect of paragraph V., we would like to stress again the importance of (i) clarifying that some of the OECD Principles (see, for instance, our comments to the Preamble) should apply, in two-tier systems, also to the management board, rather than only to the supervisory board and (ii) differentiating the concept and the role of single key executives from the concept and the role of the management board as a collegiate body. In this respect, it also seems important to stress that a delegation of managing powers to one or more individual directors shall not exempt the board from its main responsibilities (both from a civil and criminal law perspective).

2. Moreover, in the light of recent financial scandals, we would advise to add in the list of key functions set forth under the OECD Principle V.D.1, i.e. that of monitoring "*the level of indebtedness of the company and of other companies of the group*".

3. Section V.E. lays down the principle that the board should be able to exercise objective judgment on corporate affairs independent from management, controlling shareholders and others in a special position to influence the company.

This is indeed an important principle and, in our view, the OECD could take a step further and require that the board should contain independent board members that are not employed by the company or otherwise closely related to the company.

There should always be a clear division of responsibilities at the head of the company between the running of the board and the running of the company's business, and as an example of good corporate governance we believe worth mentioning the opportunity to separate the two roles of Chief Executive and Chairman. No one individual should have unfettered powers of decision.

Section V.E.1. of the Draft Principles states that boards should *consider* assigning a sufficient number of non-executive board members capable of exercising independent judgement to tasks where there is a potential for conflict of interest. Again, it is our opinion that the board should not only consider, but be required to assign a sufficient number of non-executive board members to such tasks.

These comments have been prepared with the help and support of the following Committees of the IBA's Section on Business Law: Q (Issues and Trading in Securities), G (Business Organisation) and E (Banking Law).

THE SHAREHOLDER ASSOCIATION FOR RESEARCH AND EDUCATION ("SHARE")

I am writing in response to your invitation to comment on the draft revisions to the OECD Principles of Corporate Governance. We welcome the OECD's decision to review the Principles at this time. The Shareholder Association for Research and Education ("SHARE") is a Canadian non-profit organization engaged in research, education and advocacy on issues related to the role of institutional investors, particularly pension funds. Institutions affiliated with SHARE hold assets of more than CDN$2 billion. Standards of corporate governance, such as the OECD Principles, are important to institutional investors because of their contribution to market confidence, as well as to issues of firm-specific risk. Additionally, corporate governance standards play a major role in establishing the economic, social and environmental conditions necessary for pension funds' long-term success.

Below is a letter SHARE sent to Mr. Gilles Gauthier of Industry Canada in response to a similar request for comments on the draft revisions. This letter contains our specific comments on the language in the current draft.

Many of the proposed changes in the current draft, from whistleblower protection to recognition of the external auditors' duty of care, are important improvements over the 1999 text. New principles related to shareholder communication, conflicts of interest of analysts and advisors, and disclosure of proxy voting policies and records add significantly to the text. However, given the impact on investors of continuing revelations of corporate malfeasance, it can be argued that these revisions fall short of what is needed.

We believe that there are several important opportunities to strengthen the current draft. SHARE endorses the recommendations contained in the Statement by the Trade Union Advisory Committee to the OECD (TUAC). The current draft will be strengthened by a clearer and stronger emphasis on best practices in board independence and accountability to shareholders, shareholder participation in the nomination and election of directors, corporate transparency and accountability on matters relating to social and environmental performance, and the rights and responsibilities of stakeholders.

Dear Mr. Gauthier:

Thank you for the invitation to comment on the draft revised text of the OECD Principles of Corporate Governance.

The Shareholder Association for Research and Education ("SHARE") is a national non-profit organization engaged in research, education and advocacy on issues related to investment, particularly those related to pension funds. Institutional investors affiliated with SHARE hold assets of more than

CDN$2 billion. Standards of corporate governance, such as the OECD Principles, are important to institutional investors because of their contribution to market confidence, as well as to issues of firm-specific risk. Additionally, corporate governance standards play a major role in establishing the economic, social and environmental conditions necessary for pension funds' long-term success.

Many of the proposed changes in the current draft, from whistleblower protection to recognition of the external auditors' duty of care, are important improvements over the 1999 text. However, given the impact on investors of continuing revelations of corporate malfeasance, it can be argued that these revisions fall short of what is needed.

Along with representatives of trade union organizations and the OECD Secretariat, SHARE has participated in a series of consultations related to the review of the Principles of Corporate Governance. Attached is the resulting Statement by the Trade Union Advisory Committee to the OECD (TUAC), which contains a detailed commentary on the proposed text, endorsed by SHARE. Below are comments on the draft Principles amplifying and adding to those contained in the TUAC document:

1. Part 1, title

The rights <u>and responsibilities</u> of shareholders and key ownership functions

Explanation: "Responsibilities" is a clearer description of the obligations of shareholders.

2. Part 1, C (3), annotation

… It is increasingly regarded as good practice in many countries for independent board members to have a key role in the committee <u>a majority of the members of this committee to be independent.</u>

Explanation: The text, which calls "for independent members to have a key role" falls short of current best practice. Investor guidelines have increased the threshold in recent years and many now recommend that either a substantial majority of the members on the nominating committee be independent, or that the committee be comprised entirely of independent directors.

3. Part 1, F (1) and (2)

Commentary: We strongly support the proposed new text regarding disclosure of proxy voting policies, proxy voting records, and conflicts of interest by institutional investors.

4. Part III, title

The role of <u>rights and responsibilities</u> of stakeholders in corporate governance

Explanation: Consistent with the suggested title for Part I, we suggest that the title of this section be broadened to include responsibilities.

5. Part III, introduction

The corporate governance framework should recognize the rights of stakeholders as established by law and encourage active co-operation …

Explanation: As currently written, the statement is limited to recommending only that corporations recognize rights established in law. A proper relationship with stakeholders entails corporations recognizing a far wider range of stakeholder interests.

6. Part III, A, annotation

The rights of stakeholders that are protected by law should must be respected.

Explanation: "Should" is too conditional to describe the obligation to protect rights as recognized in law.

7. Part IV, A (7)

Material issues and facts regarding employees and other stakeholders, including social, ethical and environmental factors.

Explanation: Material facts, as well as issues, should be disclosed to the marketplace. Social and environmental issues are increasingly important to the success of business operations. Relevant information and analysis should be disclosed to shareholders.

8. Part IV, F

Analysts, brokers, rating agencies and others who provide analysis or advice which is relevant for decisions by investors should disclose any material conflicts of interest that might compromise the integrity of their analysis or advice…

Explanation: The word "material" was removed from paragraph part IV, A. It should also be removed here. The text is clear about what kind of conflicts are to be disclosed without adding the hurdle of defining materiality.

9. Part V, C

C. The board should apply high ethical standards.

D. The board It should take into account the interests of stakeholders.

Explanation: Taking into account the interests of stakeholders may be, but often is not related to the application of "ethical standards". Both are important. These two sections should be treated separately and have corresponding annotations.

10. Part V, E

4. A director who is independent of management should act as chair.

Explanation: The role of chair of the board of directors is to oversee the board's supervision of management. An executive board chair is in a conflict of interest position.

INSTITUTIONAL SHAREHOLDER SERVICES

Institutional Shareholder Services (ISS), the leading provider of corporate governance advisory services to financial institutions worldwide, has acquired extensive experience in this field serving over 950 institutional and corporate clients worldwide, analyzing proxies, and issuing informed research and objective vote recommendations for shareholder meetings of more than 10,000 U.S. and 12,000 non-U.S. companies annually.

ISS supports the OECD's efforts to evaluate and improve the legal, institutional, and regulatory framework for corporate governance, and to provide guidance and suggestions for all parties involved in the process of developing good corporate governance practices.

In particular, ISS applauds the Steering Group's attention on a number of important issues that constitute fundamental elements for the development of good corporate governance practices. Among these, particularly worth noting in our opinion are references to:

- timely disclosure of information regarding general meetings and shareholder participation in the making of key corporate governance decisions such as board election (Section I, letter C)

- transparency and timely disclosure of information regarding board members and key executives as well as organizations and individuals providing services to investors, both with respect to their independence, integrity, and potential conflict of interests (Section IV)

- favoring efficient and transparent markets for corporate control such as in the case of the elimination of anti-takeover mechanisms in order to guarantee a stronger link between managerial decision making processes and accountability to stakeholders (Section I, letter E)

- appropriate protection of shareholder rights within classes of shares and in relation to different stakeholders of the companies (Section II, letter A)

Within this framework, ISS would like to contribute further to the discussion presenting a few suggestions that on the basis of our daily experience with corporate governance practices and their implications for institutional shareholders, could support the development of the final version of the Principles:

- Timely Disclosure – With respect to this element, we would propose to include a specific reference to a minimum four-week term for the disclosure of information connected to general meetings. To be more accurate, in our opinion disclosure of all information pertaining to shareholder meetings such as annual reports, meeting notices, and all other related documents, should be guaranteed at least 28 calendar days prior to meetings through technological means.

- Board Elections – ISS would like to propose a further extension of attention on this issue, especially considering that it is the first and foremost element through which good corporate governance practices can be implemented within company structures. Consequently, we would like to suggest including an indication of the following information as essential information regarding board elections:

  - Biographical information on the candidates (this includes information concerning academic background as well as the director's work history)

- Board committee memberships
- Any affiliations, either direct or indirect, with the company, management, founding family (if applicable), major shareholders, and/or any stakeholders.
- Services provided to the company, other than as a director (this would include consulting services provided directly to the company or any executive of the company)
- All remuneration paid to the directors broken down by category including fees, bonuses, options, pension benefits (if any) etc.
- Director shareholdings in the company
- Board appointment date
- Other board memberships

With respect to board elections, shareholders should also be given the opportunity of electing members of the board individually and on an annual basis since this would allow shareholders to maximize board members' accountability.

ISS believes that shareholders' ability to elect directors is the single-most important exercise of stock ownership rights. Accordingly, directors should be nominated and elected individually under separate voting items instead of being bundled under one resolution since this would allow shareholders to elect or oppose directors individually instead of having to elect or oppose the entire slate of directors

- Share blocking and Share registration – From a more technical point of view among the elements that contribute to challenging shareholder participation in the voting process of shareholder meetings are requirements connected to shares' registration procedures and share blocking terms.

  Share registration becomes an issue that complicates shareholder participation in general meetings whenever local legislation requires the re-registration of shares into the name of the beneficial owner.

  Share blocking, on the other hand, has implications with respect to share-liquidity. Eliminating the term for the blocking of shares would guarantee greater shareholder participation in general meetings by limiting fears connected with the possible effects on trading.

  In addition, since custodian institutions -processing intermediaries base their voting instructions deadlines on re-registration and blocking terms, a reduction in such terms could ultimately allow shareholders extra time to make informed decisions.

  These elements, even if technical in nature, could be included in our opinion where the Principles address shareholder voting rights since ultimately they influence the protection of shareholders interests.

- Voting by Proxy – ISS is pleased by the explicit reference that the Steering Group has included in the Principles with respect to the use of electronic means in voting procedures and to the need to account for proxies' exercise of their voting power. In addition to these two elements, ISS would like to propose to include a specific reference to the elimination of procedures that add further technical and often expensive incumbencies on shareholders in order to allow them to vote their

shares. The reference here is, for example, on the requirement of legal documents such as powers of attorney in order to vote.

- Voting outcomes – ISS would suggest including an open invitation to companies to disclose, either on their web-sites or through the stock exchange commission for example, a regular indication of shareholder meetings' participation in terms of capital representation and in terms of voting outcomes. This would contribute to transparency and information disclosure and to directors' accountability in the eyes of shareholders.

We hope that the contributions herewith presented may be usefully taken into consideration in drawing up the final draft of the OECD Principles and especially that the OECD's Steering Committee's work will be able to support the current developments taking place within this framework worldwide.

PUBLIC CONCERN AT WORK

This submission looks at the scope of the suggested provision for whistleblowing stakeholders (notably employees) contained in part E of the Third Principle (3E) of the draft revised OECD Principles of Corporate Governance:

Stakeholders, including individual employees, should be able to freely communicate their concerns about illegal or unethical practices to the company board and their rights should not be compromised for doing this.

Public Concern at Work welcomes this recognition in the revised draft Principles of the key role that employees can play in delivering effective corporate governance. However we are concerned that this provision is substantially more limited than the existing whistleblower provision in the OECD Guidelines on Multinational Enterprises which also recommends protection for employees who blow the whistle to regulators and law enforcement agencies. Apart from objecting to this limitation in principle, we can see no reason for it when since the Guidelines for MNEs a number of OECD members have introduced or proposed protection for whistleblowers who make disclosures to regualtors. For these reasons, we recommend that 3E be amended in order to maintain the OECD's commitment to good practice, its welcome steps in promoting whistleblower protection and also to reflect legal developments in member states in the area of corporate governance.

In order to explain our position, we set out below a brief background to the work of Public Concern at Work (PCaW).

PCaW is an independent public interest charity, popularly known as the whistleblowing charity, based in the United Kingdom. We have four main activities:

a) Providing free confidential legal advice to people who are unsure whether or how to raise a concern about wrongdoing in the workplace;

b) Training and supporting organisations on whistleblowing and accountability;

c) Educating the public that there are safe alternatives to silence; and

d) Informing public policy in areas of governance and regulation.

Further information about our work and approach can be found at ***www.whistleblowing.org.uk***

In 1997 the UK Government's White Paper on *Governance* described PCaW as 'the leading organisation in this field'. Now ten years old, PCaW has provided professional services and consultancy to numerous major employers in the private and public sectors. Our confidential helpline has handled over 4,000 whistleblowing concerns. We assisted in formulating, consulting on and promoting the Bill which became the Public Interest Disclosure Act 1998 (PIDA). For our work on PIDA, Lord Nolan commended us in Parliament 'for so skilfully achieving the essential but delicate balance between the public interest and the interests of employers'.

Internationally, PCaW has advised on whistleblowing – practice and law - in a number of OECD countries and elsewhere. As to our work in South Africa and Japan both have taken to the UK 's legislative approach. We were also special advisers to the European Commission and the OECD on whistleblowing and drafted the OECD's LMP report on this issue as part of the review of the Anti-Bribery Convention (the paper can be found through ***www.olis.oecd.org***, or more conveniently at ***www.pcaw.co.uk/policy_pub/oecdreport.html***. We also acted as special advisers to the Global Forum II in its preparations for a UN Convention. We are currently co-producing a book on comparative law and practice on whistleblowing around the world.

The OECD and Whistleblowing

We commend the OECD for recognising the role of whistleblowing in the OECD Principles of Corporate Governance. However, we are concerned that 3E does not appear to allow or condone an employee concerned about illegality or danger to raise their concerns with the appropriate authorities (i.e. regulators, inspectorates, or law enforcement agencies). Clearly encouraging internal disclosures is key to ensuring good corporate governance. In our view, protecting whistleblowers who make responsible disclosures to the appropriate authorities is a vital means to encourage employers to create a culture which is open to hear and address employee concerns about illegality and wrongdoing. Additionally, where a particular employer is not committed to good governance, such a provision provides a safe and effective means for employees to alert the authorities before any major scandal erupts. The good sense of this approach is recognised in the OECD Guidelines for Multinational Enterprises:

II General Policies

Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

9) Refrain from discriminatory or disciplinary action against employees who make bona fide *reports to management or, as appropriate, to the competent authorities, on practices that contravene the law, the* Guidelines *or the enterprise's policies.*[23]

The Regional Corporate Governance Roundtables, that informed the revision of the Principles, also recognised the value of the information whistleblowers can provide to regulatory authorities and law enforcement agencies:

Employees are usually the first ones to know about transactions and practices that violate the legal rights of shareholders and other stakeholders. "Whistleblowers" who reveal these abusive activities can

23. OECD, The OECD Guidelines for Multinational Enterprises, pg. 19, 2000.

be a critical sources of information and are in many cases essential in bringing the appropriate civil and criminal action[24].

The Roundtables not only emphasised the need for a level of protection for whistleblowers that is at least equal to that provided by the Guidelines for Multinational Enterprises, but indicated that greater protection would be welcome.

The Roundtables emphasised that countries should take action to protect whistleblowers, shielding them from liability, and in turn penalising employers who retaliate. In some jurisdictions, relevant authorities should also consider steps to protect the personal safety of whistleblowers.[25]

If the amendment we propose is accepted, then it can only help ensure that these views are fairly reflected in the revised Principles.

Legislation in OECD Member States

Several OECD member states protect whistleblowers who raise concerns with the appropriate authorities and we give the following examples.

In the United Kingdom, PIDA specifically protects disclosures regarding wrongdoing to appropriate regulatory authorities[26]. UK regulators have welcomed this as a means of facilitating their functions and, whilst encouraging employees to make disclosures to their employers in the first instance, have made it clear that employees can raise concerns directly with them. As noted in the OECD's Survey of Corporate Governance Developments in OECD Countries, the UK's Financial Services Authority:

... has established a telephone line and email address for employees to call the regulator about possible wrongdoing which has not been resolved internally.[27]

In addition, UK regulators have recognised that promoting whistleblowing can encourage good governance amongst those they regulate, thus allowing them to adopt a risk based approach to their audit and inspection work.

In the United States, the Sarbanes-Oxley Act 2002 has made it a criminal offence, punishable by a fine and/or up to ten years in prison, to take any action harmful to a person who provides truthful information about a federal offence to a law enforcement officer[28]. It further prohibits companies, their officers and agents from retaliating against an employee who provides information to:

*) a federal regulatory or law enforcement agency;

*) a member of Congress or a Congressional committee; or

*) their employer.

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24. OECD, Experiences from the Regional Corporate Governance Roundtables, para. 246, pg. 62, 2004.

25. Ibid., para. 247, pg. 62.

26. Employment Rights Act, s.43F.

27. OECD, Survey of Corporate Governance Developments in OECD Countries, para. 80, pg. 51, 2003.

28. Corporate and Criminal Fraud Accountability Act of 2002 (Sarbanes-Oxley Act), Public Law Number 107-204, s.1107.

Civil remedies including reinstatement, back pay and compensatory damages are also available to an employee who succeeds in showing a violation of these provisions in the Act.[29]

Japan has also recently published a draft law that will, we understand, protect employees who raise concerns about danger or illegality with their employer or the appropriate authorities in a way that is similar to the UK legislation.

Recommendation

We recommend that 3E of the OECD Principles of Corporate Governance be amended to recommend protection for external disclosures to regulatory authorities. While our particular remit is the role of whistleblowing employees, we see no reason why any other stakeholder should be penalised for communicating their concerns about illegal or unethical practices to the authorities.

We hope this submission gives you sufficient information to understand our position and to accept this recommendation. We are happy to discuss this submission and the role of whistleblowing in corporate governance with you should you consider this helpful.

CFDT (CONFÉDÉRATION FRANÇAISE DÉMOCRATIQUE DU TRAVAIL)

Affiliée à la Commission Syndicale Consultative auprès de l'OCDE (TUAC), la Confédération Française Démocratique du Travail (CFDT) participe activement à la réflexion que le mouvement syndical international conduit sur le gouvernement d'entreprise. En effet, les évolutions qui marquent le monde industriel et commercial à l'échelle de la planète montrent que les modes de gouvernance ont des conséquences très importantes sur l'emploi des salariés, qu'il s'agisse de faillite frauduleuse comme Enron, de d'échec de politique de développement comme Vivendi ou de fusion acquisitions.

Au sein de la délégation du TUAC, la CFDT participe aux négociations engagées dans le cadre de l'OCDE pour réviser les Principes relatifs au gouvernement d'entreprise. Nous adhérons fortement à l'analyse développée par le TUAC et à ses propositions auxquelles nous avons contribué.

Dans le cadre de cette consultation publique, nous souhaitons insister sur quelques points qui nous semblent cruciaux.

Nous partageons l'avis du TUAC selon lequel le texte révisé n'est pas à la hauteur des enjeux posés par les changements importants du contexte général dans lequel se situe cette révision. En effet, nous faisons face à une crise systémique non seulement du gouvernement d'entreprise, mais aussi de l'entreprise en tant que telle qui exige une révision en profondeur des principes relatifs au gouvernement d'entreprise.

Comme le TUAC, nous estimons que le projet de texte est particulièrement faible sur *« des enjeux essentiels comme par exemple, l'encadrement de la rémunération des mandataires sociaux, le pouvoir du PDG, l'assurance d'un actionnariat responsable, d'un conseil d'administration qui rende compte aux parties prenantes et de réels droits octroyés à toutes les parties prenantes »*.

29. Ibid., s.806.

Concernant le chapitre I sur les « droits des actionnaires et principales missions des détenteurs de capital », la rédaction proposée du principe I.C.3 ne nous semble pas assurer suffisamment clairement la nécessité de faire approuver formellement par les actionnaires et les représentants des parties prenantes membres du Conseil d'Administration, la totalité des rémunérations des administrateurs et des cadres dirigeants, alors même que les récents scandales ont conduit nombre d'entreprises des pays membres de l'OCDE à aller dans ce sens et à prévenir les éventuels conflits d'intérêts.

Le point essentiel qui attire l'attention de la CFDT concerne le Chapitre III et *« le rôle des différentes parties prenantes dans le gouvernement d'entreprise »*. A l'instar du TUAC, nous souhaitons que la rédaction du principe III.A prévoie d'*« inclure la représentation des parties prenantes dans le gouvernement d'entreprise »*. De ce point de vue, le projet de texte révisé ne nous semble pas prendre la mesure des réformes nécessaires en matière de gouvernement d'entreprise, si l'on veut véritablement répondre aux risques auxquels les entreprises vont être soumises de plus en plus fortement en matière de développement durable et de responsabilité sociale.

Ces risques, qui concernent tout autant la prise en compte de l'environnement, les respect des droits sociaux à l'échelle internationale par les filiales des entreprises mondiales ou bien encore la lutte contre la corruption, ne peuvent être écartés efficacement que si les entreprises évoluent vers un modèle participatif, fondé sur le partenariat avec l'ensemble des parties prenantes.

De ce point de vue, nous soulignons l'expression du TUAC concernant la nécessité de prendre en compte *« la tradition européenne de dialogue social qui s'exprime à travers les directives européennes sur les comités de groupe européens, sur l'information et la consultation des salariés, sur l'entreprise de statut européen et dernièrement à travers la directive sur les OPA qui inclut spécifiquement un modèle de consultation des salariés »*.

Parmi les parties prenantes, les salariés doivent être distingués, parce qu'ils font partie intégrante de l'entreprise et qu'il peuvent ainsi contribuer à une plus grande efficacité du contrôle des dirigeants au sein des instances de direction de l'entreprise. Dans cette perspective, nous pensons que « les mécanismes de participation des salariés de nature à améliorer les performances » évoqués par le principe III.C concernent les salariés actionnaires et ne peuvent constituer un véritable apport en matière de contrôle pluraliste.

Par cette contribution, la CFDT manifeste son accord avec les positions et propositions exprimées par le TUAC et exprime son souhait de voir apporter de nouveaux progrès à la rédaction des principes relatifs au gouvernement d'entreprise d'ici le prochain Conseil ministérielle de l'OCDE du mois de mai 2004.

IIA-AUSTRALIA

Section	Page No	Para-graph	Line No	Recommended Changes/Inclusions Suggested inclusions in red
GENERAL COMMENT				**Internal Audit is only briefly mentioned in this document, despite being an effective tool to assist the board and management in the achievement of**

Section	Page No	Para-graph	Line No	Recommended Changes/Inclusions Suggested inclusions in red
				effective corporate governance. Whilst espousing the benefits of IA is not the core objective of this document, the lack of acknowledgement of its benefits to the corporate governance process misses an ideal opportunity to educate the board and management of internal audit's potential. **The benefits of having an effective Audit Committee and the fact that its operation in large corporations is mandated could also be covered in more detail.** **Whilst I acknowledge the document addresses a global audience and that the principles are considered non-binding, I believe the document could be more forcefully worded. For example the use of should throughout the document could be reconsidered: "Insider trading and abusive self-dealing should be prohibited" - "Insider trading and abusive self-dealing is or must be prohibited".**
Preamble	3-4	5	8	"In systems where the unitary board is overseen by an **internal auditor's board**, the term "board" includes both." The use of the term **"an internal auditor's board"** is confusing and purports ownership by internal audit. If an **"internal auditor's board"** refers to an Audit Committee or similar, it is not clearly defined and risks incorrectly inferring ownership of certain corporate governance responsibilities to internal audit rather than management where they are correctly placed. Including the following may clarify this: "An audit committee is a committee of the board of directors and as such it assists the directors to discharge the board's responsibilities of oversight and corporate governance" (Audit Committees, Best Practice Guide, 2001, p.7).
Framework	5	5	1	"Supervisory, regulatory and enforcement authorities should have the authority, independence, integrity and resources to fulfil their duties in a professional and objective manner.
1.A.3 1.C.1 III.D	6 6 9	1 4 5	3 1 2	Obtain accurate, relevant and sufficient information. accurate, sufficient….. accurate, relevant and sufficient information……
IV.D	~~12~~ 10	13	2	Accountable to the board and shareholders in relation to the conduct, preparation and content of the audit report. Limit of accountability needs to be stated.

Section	Page No	Para-graph	Line No	Recommended Changes/Inclusions Suggested inclusions in red
IV.8	~~10~~ 11	10	1	Consider including a separate point on disclosure of the effectiveness of the corporations risk management and internal controls as recently recommended by the Australian Stock Exchange.
Annotation	15	5	1	"Supervisory, regulatory and enforcement authorities should have the authority, independence, integrity and resources to fulfil their duties in a professional and objective manner.
Annotation I.A.3	16			Obtain accurate, relevant and sufficient information.
Annotation 1.C.2	17	1	6	Shareholders should also be able to ask questions of the external auditor, who is answerable to them in relation to the conduct, preparation and content of the audit report.
III.D	26	6	2	accurate, relevant and sufficient information……
IV	28	7		Consider including: In some countries it is also considered best practice to require the chief executive officer and chief financial officer to state in writing to the board that "the company's financial reports present a true and fair view, in all material respects, of the companies financial condition and operational results are in accordance with relevant accounting standards" ASX Principles of Good Corporate Governance and Best Practice Recommendations, 2003, p.73.
				Provision of non- audit services by the external auditor to a company can significantly impair their independence and **might involve them auditing their own work.** This should not be permitted and is clearly a position where the auditor would have a conflict of interest. Examples of other provisions to underpin auditor independence include……requiring auditors to provide a declaration to the board that independence has been maintained; prohibiting external auditors from providing internal audit services for the same organisation.
V.D.2	36	4	10	Internal Audit could also provide assistance in the review of the company's corporate governance process.
V.D.6	37	5		'It is an important function of the board to establish internal control systems covering the use of corporate assets and to guard against abusive related party transactions. These two functions are often assigned to the internal auditor……."

Section	Page No	Para-graph	Line No	Recommended Changes/Inclusions Suggested inclusions in red
				This paragraph needs to be reworded. In its present form it is contradictory. Suggested change: Monitoring of these two functions are often assigned to the internal auditor who should maintain/be given direct access to the board. Where other corporate officers are responsible such as the general counsel, it is important they maintain similar reporting responsibilities and have the same direct access to the board as the internal auditor.
V.F.	40	6	1	accurate, relevant

Reference:

8. Audit Committee Best Practice Guide; published by IIA-Australia, Published by Australian Institute of Company Directors and Australian Accounting and Research Foundation. **www.iia.org.au**

9. ASX (Australian Stock Exchange), Principles of Good Corporate Governance and Best Practice Recommendations. **www.asx.com.au/corporategovernance**

10. For background on matters relating to Internal Audit, refer to *The International Standards for the Professional Practice of Internal Audit,* **www.theiia.org**

FEFSI

FEFSI[30] welcomes the revision of the OECD Principles as they aim to improve the institutional and regulatory framework for corporate governance, which is in the interest of asset and fund managers as well as their clients/unit holders. In many cases the proposed Principles concur with FEFSI's Best Practice Recommendations on Corporate Governance for Fund Managers (as shareholders), which were adopted in February 2002[31]. Consequently, we are grateful for this opportunity to comment on the proposed OECD draft text, and apologise for not having been able to react within the deadline given.

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30 FEFSI, the *Fédération Européenne des Fonds et Sociétés d'Investissement,* represents the interests of the European investment fund industry. Through its members, the national associations of the 15 EU member states, the Czech Rep., Hungary, Liechtenstein, Norway, Poland, the Slovak Rep. and Switzerland, FEFSI represents some 900 management companies and about 41,100 investment funds with EUR4.5 trillion in investment assets.

31 see www.fefsi.org under "FEFSI Standards" - http://www.fefsi.org/unrestricted_area/standards/Investment_Fund_Managers_as_shareholders.pdf

General remarks:

Whilst broadly supportive of the draft text, we believe that the OECD Principles in the draft revision are written with publicly listed corporations in mind, and FEFSI calls for restraint in any possible broad based conclusions that the same Principles could also find application to the European investment funds industry. Investment funds – even in a corporate form and where listed on regulated markets – are constructed around the fiduciary duty to serve their investing share/unitholders and some of the OECD Principles proposed might even lead to serious problems and conflicts of interests for the fund industry without fulfilling their aim. The fiduciary duty – for example – leads not only to prohibiting "abusive" self-dealing for fund managers but prohibiting it generally. Furthermore, disclosure and transparency issues must be seen very differently from the fund managers' point of view.

FEFSI underscores your statement that the OECD Principles represent broad features that the OECD considers essential for the development of good governance practice. They are not intended as substitutes for other – public or private - initiatives to develop more detailed or "sectoral" best practice in corporate governance.

The European investment funds industry does, however, fully accept the need for appropriate corporate governance within the industry and FEFSI is currently working on a European Code of Conduct to improve the existing practices further.

Lastly, we urge the OECD to not forget to coordinate closely with the on-going discussions at EU level, which are taking place in the context of the European Commission's Corporate Governance Action Plan.

Specific remarks:

Facilitating the exercise of ownership rights by institutional investors (OECD Section I.F.1 & 2)

We can only welcome the OECD's aim to strengthen shareholder democracy through the development of the facilities necessary to ensure that these existing rights can be effectively exercised.

The European investment funds industry has always supported this aim as testified in FEFSI's response to the European Commission's *Consultation Paper on Company Law* in October 1997, as well as more recently in its response to the public consultation on the European Commission's Communication on Modernising Company Law and Enhancing Corporate Governance in the EU of May 2003. In both cases, FEFSI underlined that the exercise of voting rights should be facilitated and access to information be improved.

Testimony to the importance FEFSI attaches to these features can also be found in its own Statement of Principles for investment fund managers as shareholders of February 2002, where FEFSI underlines that "*Fund managers acting as fiduciaries for their clients should act in the sole interest of their clients. In order to pursue this objective, fund managers should act responsibly as shareholders among others by making considered use of their voting rights…".*

Making use of voting rights across borders within the European Union and even within Member States, however, remains a difficult and costly undertaking. Due to the broad variety of regulation and practices that exist in EU Member States there are a number of legal obstacles in company laws and in the regulations of securities holding systems of Member States that complicate, and often render impossible, the exercise of voting rights across borders in the EU.

The disclosure of how voting rights have been used (OECD Section I.F.1 & 2)

FEFSI fully agrees with the OECD that investment funds and/or their managers should be required to disclose their investment policy and their policy with respect to the exercise of voting rights in companies in which they invest. Both obligations are already part of another set of principles adopted in April 2002[32].

On the disclosure of the investment policy, FEFSI states: "*The description of the investment objectives and policy in the fund prospectus must provide sufficient information to enable an investor to ascertain the fund's overall profile. The fund's prospectus should therefore clearly describe, at least the investment objective and the nature of the fund as well as the fund's policy for achieving those investment objectives, including ...*" .

Describing the investment policy is also a key feature in FEFSI's model for a Simplified Prospectus and the manual on how to draft it. The simplified prospectus aims to render the fund more transparent for its new and old clients.

The disclosure of the policy with respect to the exercise of voting rights in companies in which the fund invests is one of the core issues in FEFSI's Best Practice Recommendations for investment fund managers as shareholders. FEFSI underlines that "*Fund managers should disclose to their shareholders their policy towards their responsibilities as shareholders in the appropriate documentation, in particular in the annual reports as well as on their website*".

However, caution should be exercised in articulating this Principle as it cannot lead to a situation where investment funds are compelled to disclose to a fund's beneficial holder at his request how the voting right has been used in a particular case. This take the notion of disclosure beyond too far as the cost of putting in place mechanisms to deal with such requests would exceed any potential benefits. The example of over-reaction by the United States SEC in this regard should not be followed. It should be taken into account that investment funds in Europe are (on average) much smaller, and that within the United States cross-border voting does not carry with it comparable complexity.

Facilitation of unrestricted cross border voting: (OECD Section II.A.4 & 5)

The difficulty of cross-border voting within the European Union has already been highlighted above. Similar difficulties will also be encountered in the case of shareholdings beyond the borders of the European Union, and consideration could be given to an insertion in the OECD Principles of a reference to a more widespread facilitation of proxy voting or voting by electronic means.

Major share ownership and voting rights (OECD Section IV.A.3)

Investment funds and their managers constitute important investors in securities that are publicly traded on regulated markets in Europe and consequently have a keen interest in all relevant information regarding their investment objects. FEFSI supports enhanced disclosure and transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market, but notes that as fiduciary agents for beneficial owners the determination of what may constitute a major shareholdings is a key consideration. In all cases exaggerated aggregation should be avoided where independence from affiliated parties exists, for example by means of *firewalls/Chinese Walls.*

PIRC

Pensions & Investment Research Consultants Ltd (PIRC) is an independent adviser to institutional investors on issues of corporate governance and corporate responsibility.

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[32] see www.fefsi.org under "FEFSI Standards"

PIRC's clients have combined assets in excess of £400 billion and include some of the largest pension funds, investment management companies and insurance companies in the UK and overseas. Together, they comprise a diverse group of institutional investors with long term liabilities and broad fiduciary duties.

PIRC undertakes company research on corporate governance and corporate responsibility issues at public companies, and provides advice to clients on proxy voting strategies and other active shareholder initiatives. Our comments are based on 15 years of practical experience, which inform our views on the strengths and weaknesses of disclosures, governance structures, and the interaction of statute, regulation and codes of practice in the United Kingdom.

PIRC is also a member of European Corporate Governance Service (ECGS) Limited. ECGS comprises eight members from various EEA member states who are local market experts that have come together to provide corporate governance analysis and proxy voting advice for institutional investors in the largest listed European companies by market capitalisation.

Overview

PIRC welcomes the opportunity to comment on the draft revision of the OECD corporate governance principles, following on from the consultation meeting we attended in November 2003 to discuss the marked up OECD Principles released in September 2003.

Overall we consider the new draft has succeeded in substantially strengthening the guidelines, and we welcome the vast majority of the revisions. We restrict our comments to a number of key points attached to amendments from the old principles or from the marked-up text of September 2003, and on areas we consider the principles still require additional strengthening.

I. The rights of shareholders and key ownership functions

C.2. Shareholder resolutions : p16

We welcome the addition to the Principles supporting the rights of shareholders to propose resolutions at company meetings. We agree that rules setting down time limits or requiring certain shareholding limits are justified in protecting against frivolous, vexatious or repetitive matters. However, we consider that the Principles would be strengthened and better balanced through a reference to the effect that these rules should not be excessively restrictive, nor unreasonably subject to management discretion.

C.3. Remuneration: p17

Whilst we welcome the greater focus in the new Principles on remuneration disclosure, we are disappointed in the reduction of some shareholder powers in the draft text in comparison to that in the marked-up September 2003 version. The experience of the UK has shown that an advisory vote on remuneration policy is a very valuable way of holding the Board accountable, and in increasing the level of scrutiny given to executive pay. In the light of the UK experience, a number of other countries such as the Netherlands are now looking to bring forward similar rules. We consider that the OECD Principles should continue to use the words 'good practice' (marked-up version) to help encourage this development.

C.3. Voting on equity based schemes: p.17

In our view, all equity based schemes should be subject to shareholder approval, given the potential for dilution and abuse of shareholder rights. Furthermore, we consider shareholders should have the power to vote on the nature of equity based schemes, such as performance targets, maximum individual award

levels and takeover provisions, rather than simply the maximum number of shares which can be issued. Shareholders should be given sufficient information to determine for themselves the extent to which such schemes effectively link pay to performance.

F.1. Investor responsibilities : p.19

We welcome the extra addition to the Principles of the section on investor responsibilities. Institutional investors calling for openness and accountability from companies should, in turn, be open and accountable regarding their corporate governance activity. We support the publication by institutional investors of their corporate governance voting policies and their full voting records to their clients. In addition, we welcome the section in the new draft principles covering disclosure of potential conflicts of interest.

II. The equitable treatment of shareholders

A.1. 'One share one vote': p.22

We are disappointed that the Principles do not recognise the concept of 'one share one vote' as best practice, as this is increasingly the case in governance regimes around the world. While we appreciate that the intent of dual share structures may be to encourage long term investment, in too many cases the effect is simply to benefit one set of shareholders at the expense of others and to act as a deterrent to takeovers by entrenching management. In our view any benefits from dual share structures are outweighed by the potential for abuse as identified in the Principles in section A.2.

A.2. Pre-emption rights: p.23

We consider that the Principles should be more forthcoming in supporting the concept of pre-emption rights, which serve as a vital shareholder protection from abuses by corporate management or large shareholders.

A.4. Cross border voting: p.24

We strongly support the greater emphasis that the new draft of the Principles places on facilitating cross border voting. Beyond the legal and technical barriers, we concur that the very short notice period for general meetings and the failure in many markets for companies to provide adequate information prior to voting deadlines are major barriers to increased cross border voting. This is compounded by the truncated nature of the proxy season in which the majority of companies hold their annual general meetings in the largest markets. Companies holding general meetings in this relatively busy period should be encouraged to give the maximum possible notice and provision of information.

III. The role of stakeholders in corporate governance

Of all the revised sections of the Principles we are most disappointed with the section on the role of stakeholders. In our view the draft of this section is a missed opportunity to reflect the growing consensus around the world of the importance of corporate social responsibility and the contribution it makes to business success. Emphasis here should be on the desirability of companies going beyond the restrictive approach of legal compliance in addressing stakeholder issues. For example in point C. we consider the Principles should be more forthcoming in identifying good practice as allowing employees to participate more in the company's affairs and identifying the benefits this can produce (as included in the marked-up text from September 2003). We consider an explicit reference to the OECD Principles on Multinational companies would be appropriate in this section, as well as direct reference to the need for greater

disclosure from companies on business ethics, the environment and community issues (as on section A.2 p29 and A.7. p31).

E. ‘Whistle blowing’ provisions: p.27

We welcome the new provision relating to ‘whistle blowers’. The need for free communication of unethical practices in companies by employees to independent board members without fear of punishment has been clearly shown in a number of recent corporate scandals.

IV. Disclosure and transparency

C. Independence of auditors: p.32

We see no justifiable argument for companies not disclosing full details of non-audit fees paid to the auditor and consider the Principles should call for such disclosure.

D. Appointment of auditors: p.33

We strongly support the statement in the Principles that it is good practice for independent audit committees to be given the task of recommending the appointment of auditors. However, we consider this statement would be clearer put under point C, and that audit committees should consist entirely of independent non-executive directors.

V. Responsibilities of the board

D.2. Board and director appraisal: p.36

We welcome the reference to board and individual director appraisal. To ensure the worth of such processes we consider shareholders should be provided with sufficient information to be able to assess that appraisal procedures are independent and rigorous, and that the board is efficiently pursuing the long term interests of the company.

D.4 Independent remuneration committees: p.37

We advocate a more forceful statement on the importance of independent remuneration committees, as a means of avoiding conflicts of interest.

D.5 Nomination processes

We consider that the Principles should highlight the importance of independence in the nomination process, and that this is best achieved through the appointment of a fully independent nomination committee.

E. Board independence: p.38

We consider the Principles should be more positive in supporting the presence of a significant number of independent directors. As previously noted we consider independent audit, remuneration and nomination committees to be a fundamental element of good corporate governance and that the Principles should more explicitly recognise this. We agree that independence in this sense is not by itself a guarantee of effective independence, and we advocate extensive disclosure to shareholders on the biographical details of directors to help shareholders form their own view on this issue.

E. Separation of roles: p.39

We strongly support the clear statement in the Principles on the separation of the roles of chairman and chief executive being good practice. We consider that the Principles should include the need for a greater proportion of independent non-executives on the board when the CEO/Chairman positions are combined in one person. Additionally, we believe it should be clearly stated that problems relating to the chief executive moving up to the position of chairman are not restricted to two-tier boards. On unitary boards (as on two-tier boards) this practice risks difficulties in respect of the board's supervisory function and may inhibit an objective assessment of management strategy, and the initiatives of the successor CEO.

E.3 Attendance records and training: p.40

We support the disclosure by boards of director attendance records. In addition we consider the provision of specialised training for directors to be best practice.

FEE (FÉDÉRATION DES EXPERTS COMPTABLES EUROPÉENS)

FEE (Fédération des Experts Comptables Européens – Federation of European Accountants) as the representative organization for the accounting profession in Europe grouping together 41 professional bodies in 29 countries representing over 500.000 individuals, is pleased to have the opportunity to comment on the revised OECD Principles of Corporate Governance. We welcome the revision of the OECD Principles. The current environment and recent corporate scandals show again the importance of proper corporate governance. FEE itself underlined the key role of corporate governance in our discussion paper of September 2003 on the Financial Reporting and Auditing Aspects of Corporate Governance (copy enclosed). Other relevant recent FEE papers to which we would like to draw your attention are our discussion paper on the Enforcement of IFRS within Europe of April 2002 and our paper on A Conceptual Approach to Safeguarding Integrity, Objectivity and Independence Throughout the Financial Reporting Chain of November 2003.

The main issues we address in this letter concern:

- Reduction of information risk through appropriate disclosure.
- Need to adopt the Principles within the context of the applicable laws and regulations of each individual country.
- Emphasis on the "comply or explain" approach.
- Responsibility of the board for financial reporting, risk management and internal control.
- More emphasis on the role and responsibilities of non-executive directors.
- Voluntary corporate governance codes allows for adaptation to new trends and issues.
- Role of the internal audit function needs to be elaborated.

- Questions to the external auditor to be put in context.

- Independence of external auditors.

General

1. We believe it is very important to draw a distinction between information risk, by which we mean the risk that stakeholders are not given sufficient, accurate information on which to base their decisions, and underlying investment or business risk, meaning the risk inherent in a particular activity or the risk appetite of the business's management team. We suggest that it is a fundamental principle that corporate governance requirements should be designed so as to (a) reduce information risk to stakeholders by ensuring that there is appropriate disclosure and (b) ensure that the organisation's business risks are properly managed. In the latter case, risk management should be set in the context of the on-going need to take calculated risks and make investments to generate profits and ensure the future prosperity of the organisation. We recommend that this principle, which is recognised by regulators in many countries but often overlooked when setting detailed requirements, should be explicitly stated in the OECD's guidelines.

2. FEE appreciates that OECD takes into consideration the different national corporate governance systems and that the principles are built up in respect to one-tier and two-tier systems which are treated as equivalent systems. FEE explicitly appreciates the remarks in the preamble on the term "board" used in the document. That is, in a two tier system, the term "board" refers to the "supervisory board" while "key executives" refers to the "management board". In a unitary system the term "board" includes both. However, we doubt whether the responsibilities given to the "board" do in all cases and jurisdictions with a two-tier system appropriately reflect the responsibilities of a supervisory board, or whether they encompass at least in certain cases also tasks which would be within the responsibility of the management board (e.g. principle V.D.1. where it is stated that the board should set performance objectives, or principle V.D.7 where it is stated that the board should ensure the integrity of the corporation's accounting and financial reporting systems). We therefore suggest that in the Preamble to the Principles to state that, where relevant, the Principles need to be adapted within the context of the applicable laws and regulations of each individual country.

3. In the current environment and the demise of a number of important companies all over the world it has become evident that risk management and internal controls are crucial elements in the corporate governance and the success of business. It is of concern to us that these aspects are hardly addressed in the Principles and annotations.

4. The Principles should recognise more clearly that there is rarely a single model of governance that fits every business, which is why many countries have adopted a "comply or explain" approach. This would require companies to disclose departures from the corporate governance code applicable to them so that a departure should not per se be regarded as negative, as long as it is fully explained. Further, it is for the stakeholders, not the regulators, to decide on the basis of the explanation given whether the departure from the corporate governance code is acceptable. The role of the regulator is to decide whether the explanation is sufficient to allow stakeholders to form that view. We believe this principle should be explicitly stated in the OECD paper. Again in our Discussion Paper on the Financial Reporting and Auditing Aspects of Corporate Governance (as enclosed), we emphasized the use of disclosure as a powerful regulatory tool.

5. We are of the opinion that the principles should make clear the responsibility of the board (executive and non-executive directors, management and supervisory board) for financial reporting. It should also be made clear that the board (or in the case of two tier boards, the management board) is responsible for their company's systems of risk management and internal control. These individuals are the first line of defence for the financial statements, internal control and risk management and not the (external) auditor.

6. The role and responsibilities of non-executive directors in a unitary system and the members of a supervisory board in a two-tier system – more and more important in the current climate – should have been addressed in more detail in the Principles including what constitutes independence. We refer in this respect to our papers mentioned in paragraph 4.

7. The annotations on page 15 address the status of corporate governance codes and contain rather negative wording about the voluntary status of corporate governance codes. We believe the emphasis should be more positive. Corporate Governance must evolve, able to respond quickly to new trends and issues. In many countries the legislative processes are too slow to assure such responsiveness and non-statutory codes have developed as a result. There is no evidence such codes are any less well enforced than their statutory equivalents, but several countries have examples of statutory arrangements failing to keep up with business trends. Furthermore voluntary codes are often subject to some form of endorsement or recognition, by stock exchanges, regulators or governments.

However, we agree that for transparency and comparability reasons there should be only one corporate governance code at the national level applicable to a company, that is that the company cannot choose which code it would like to follow. In this respect, FEE supports the conclusions of the Jaap Winter Report and the European Commission Communication on Company Law and Corporate Governance that there is no need for a separate European Corporate Governance Code in legislation, but that codes should be developed at national level and that only some principles and common benchmarks should be part of the European legislation, as also recommended in the Jaap Winter report.

8. The role of the internal audit function in corporate governance can be misunderstood. We find it essential that the OECD Principles are compatible with modern views as expressed by the Institute of Internal Auditors and elsewhere such as in the work of COSO, however some language in the draft may give another impression. Although in the external auditors' perspective internal audit is part of the internal control framework, internal audit must not be seen as a substitute for proper systems of internal control which should be in place and operating effectively whether or not there is an internal audit function.

Detailed Comments

9. Principle I.C.2. states that shareholders should have the opportunity to ask questions to the external auditor. We believe that there are a number of practical issues that need to be carefully considered before the text of the Principles is finalised, and we would therefore ask the OECD to make the necessary changes to the text.

- There are some jurisdictions with two-tier board systems (such as Germany) where the external auditor is accountable to the representatives of the shareholders and other relevant stakeholders on the supervisory board. In these jurisdictions, the issue of questions to the external auditor will need to reflect the law in their respective countries.

- It should be remembered that those people within the company who are charged with the governance (i.e. the directors) of the organisation are the individuals who are responsible for the preparation, approval and ownership of the financial statements. Questions related to the financial statements as well as the future development and viability of the company and other such matters should be addressed to the relevant directors and not the external auditors.

- The auditor has to deal with issues of professional obligations and duties related to client confidentiality. This is regulated in law in some Member States and caution needs to be exercised to ensure that conflicts are not created.

- We therefore strongly recommend making Principle I C 2 more precise. In those countries where shareholders should rightly have the opportunity to ask questions of the external auditors, that the questions should not cover areas that are properly the responsibility of the company, but be limited to the responsibilities of the external auditor, the audit work performed and the auditors' report.

- The OECD should also be careful to ensure that such a shareholders' right does not result in any change of the current liability regimes which – due to different legal systems, traditions etc. – should be a national rather than a European or global issue.

10. Principle IV: In the opening sentence of Principle IV reference is made to the "timely and accurate disclosure" of information. We recommend that the word "accurate" be replaced by the word "fair". "Accurate" implies a level of precision that is frequently not possible in either financial statements or other information provided to shareholders and other stakeholders. Indeed, accuracy can be at the expense of fairness in some circumstances and we believe that information should be provided in a manner which does not advantage one group of users over another and is in that sense "fair".

11. Principle IV.A.2 requires the disclosure of company objectives. The annotations should provide clarification as to what can be expected from companies in order to avoid boiler plate wording. Indications could include information about the company's strategy and risk profile. A.8. requires the disclosure of governance structures and policy but does not refer to practices and disclosure on performance, which would be much more relevant information, as further detailed in our general comment on the previous page.

12. Principle IV C/D: The terminology used for the auditor is confusing and it would be helpful if the auditor could be referred to as "external auditor" everywhere.

13. Principle IV.C indicates that the audit of financial statements exists to provide an assurance to the board and to the shareholders. Although we would agree that in practice the audit can be a valuable tool for the board, in most countries the recipient of assurance is the shareholders. There are however some countries with two-tier boards and their own individual laws and corporate governance requirements (such as Germany) where the primary recipients of assurance are the representatives of the shareholders and other relevant stakeholders on the supervisory board. This difference should be reflected in the wording of the text.

14. Principle IV.D: On the same grounds as referred to in Principle IV C (above) the principle should be clarified in a similar way. External auditors are in most countries accountable to the shareholders whereas in some countries (such as Germany) the auditor is responsible to the representatives of the shareholders and other relevant stakeholders on the supervisory board. This difference should similarly be reflected in the wording of the text. The term accountability also needs clarification in that it means a reporting responsibility of the external auditor for his

work,taking into account the different national liability regimes. It would also be useful if the principle could be elaborated to make clear that boards are expected to cooperate with the external auditor. In the interest of audit quality, directors and management should be under some form of (legal) obligation to disclose truthfully to external auditors any information, which may be specifically relevant to the audit, such as perhaps instances of fraud and accounting error without the external auditors specifically enquiring (since they may be unaware of such issues arising).

15. The Annotations to Principle IV should make explicit reference to the necessity for all the parties in the supply chain for financial reporting, which includes management, the (supervisory) board and their advisors (including lawyers, banks and analysts), to have a legal duty to act in the public interest in respect of the provision of financial information.

16. Page 32 of the annotations gives further clarification of Principle IV.C. It says: "Provision of non-audit services by the external auditor to a company can significantly impair their independence and might involve them auditing their own work". We regard this as too strong a statement that may be misinterpreted in isolation as suggesting that all non-audit services can lead to significant impairment of independence. There are many services provided by auditors which have no bearing on their independence and indeed which contribute to the quality of their audit. This is why regulators in many countries who have studied the issue have avoided assertions of this type.

Objectivity, as assured through independence, is one of the fundamental principles to be observed by the external auditor. External auditors are required and certainly expected to provide other assurance services as well as statutory audit of the financial statements. The risk to the auditors' independence and possible safeguards which may arise from provision of other services is addressed in our codes of ethics. The external auditor must conscientiously consider whether a non-audit engagement involves threats, which would, either in fact or in appearance impede the observance of this fundamental principle. Where such threats exist the external auditor should put safeguards in place that eliminate the threats or reduce them to clearly insignificant levels. If the external auditor is unable to fully implement adequate safeguards, he should refrain from acting. This approach prohibits relationships and situations, including the provision of those non-audit services which compromise auditors' objectivity and is also enshrined in the IFAC Code of Ethics and the EU Recommendation on Statutory Auditor Independence. The IFAC Code of Ethics is now to be revised under oversight of the PIOB (Public Internal Oversight Board) with members of regulatory and public interests groups such as IOSCO, Basel Committee Banking Supervisory Board, EC, World Bank and the International Association of Insurance Supervisors. The IOSCO statement on Principles of Auditor Independence of October 2003 also supports such a principles based approach. Also the Financial Stability Forum (FSF) underscored the need for strong auditor independence and public oversight arrangements to restore confidence in the integrity of the financial reporting framework. They urged relevant authorities and concerned parties to ensure the speedy implementations of IOSCO's principles. We also refer you to FEE's position on auditor's independence (copy enclosed) that gives detailed arguments why a blanket prohibition of non-audit services is inappropriate and misguided in most places.

We therefore suggest the sentence to read: "Provision of non-audit services by the external auditor to a company can provide a threat to his independence and can only be undertaken if sufficient safeguards are put in place to eliminate such a threat, or reduce it to an insignificant level".

17. The same page also mentions as an example of underpinning auditor independence mandatory firm rotation to avoid a perceived familiarity risks. Several studies have evidenced – United States General Accounting Office – Report to Senate Committee November 2003; UK Coordinating Group on Audit and Accounting Issues Final report, 29 January 2003, SDA Universita Bocconi, The impact of mandatory audit rotation on audit quality and on audit pricing: The case of Italy,

2002, etc- that the negative consequences of external rotation outweigh the potential benefits. External firm rotation leads to a loss of cumulative audit knowledge and increases the risk of audit failure in the first years after rotation. FEE supports the rotation of key audit partners as foreseen in the EC Recommendation on Statutory Auditors' Independence and the IFAC Code of Ethics. We therefore strongly suggest deleting the text between brackets and to replace "mandatory rotation of auditors" by "mandatory rotation of key audit partners".

18. Page 33 of the annotations gives further clarification of Principle IV.D. It refers to the practice that external auditors are recommended by an independent audit committee or equivalent body. In a number of countries the law requires prior intervention of other bodies such as for instance the Workers Council in such recommendation or appointment. Therefore it would be better to refer to "another body" instead of to "an equivalent body".

The last sentence of the paragraph refers to the external auditor having a duty of care to the company as a whole and not to an individual or group of corporate managers, which we fully support. This sentence could be further clarified by not only referring to any individual or group of corporate managers but also to any specific group of shareholders.

19. Principle IV.C states that a Board should apply ethical standards. We believe that the principle, or at least the annotations should more specifically address the integrity of management and board members. As set out in our papers, "Discussion Paper on Enforcement of IFRS within Europe" and "FEE Paper: A Conceptual Approach to Safeguarding Integrity, Objectivity and Independence throughout the Financial Reporting Chain" each participant in the corporate reporting chain should have proper industry codes and practices including a clear ethical obligation to raise issues of concern.

20. Principle V.D.7. and the corresponding annotations on page 37 of the annotations seem to imply that the audit is part of the financial reporting system, which is confusing the responsibilities of the board and the external auditor. We therefore recommend replacing the word "including" with "and". Audit should be seen as distinct of the accounting and financial reporting system, be it that they form all parts of the enforcement system. It would also be helpful to split D.7. into two separate points, the second point being on systems of control.

21. Principle V.E.3. and page 40 of the annotations say that board members should be able to commit themselves effectively to their responsibilities. This Principle should address the need for the board members to have the experience and competence to fulfil their responsibilities to their company. The Sarbanes-Oxley Act, Jaap Winter Report, and our Discussion Paper on Corporate Governance include similar requirements.

DSW: DEUTSCHE SCHUTZVEREINIGUNG FÜR WERTPAPIERBESITZ

DSW, Germany's leading shareholder association with more than 28.000 members, appreciates the review of the OECD Principles of Corporate Governance.

We strongly support the approach of the steering group with regard to the following items:

I.C. 3 ***effective shareholder participation in key corporate governance decisions,***

I. F. 1 ***exercise of ownership rights by institutional investors***.

Furthermore DSW provides the following comments and suggestions, which reflect the situation and the still existing deficits in the German capital market:

II. (introduction):

All shareholders should have the opportunity to obtain effective redress for violation of their rights.

DSW strongly supports the view of the OECD steering group that 'the confidence of minority investors is enhanced when the legal system provides mechanisms for minority shareholders to bring lawsuits when they have reasonable grounds to believe that their rights have been violated. The provision of such enforcement mechanisms is a key responsibility of legislators and regulators.' Unfortunately Germany still does not offer each shareholder the possibility to bring individual compensation claims in the case of intentional or grossly negligent misleading information by board members to court. Although such a rule was proposed by the Government commission under the lead of Professor Baums, this is still not transmitted into the German law. The draft for German law on 'the modernisation of the law for shareholder claims' (UMAG) proposes just a lower quorum for shareholders in order to force the board to forward any compensation claims vs. the management, but not the possibility for individual claims.

Since other countries such as the Netherlands and Italy provide their shareholders with such an individual compensation claim, the equitable treatment of shareholders, especially those of the shareholders in Germany, is disregarded. It is not understandable that a shareholder in Germany is in such a bad legal situation compared to shareholders in other countries.

II. 1. 4.

Unrestricted cross border voting should be facilitated.

Already in 1999 DSW published a European Study comparing minority shareholders' rights, voting rights and proxy voting in 15 European countries. The outcome mainly showed that legal and practical obstacles make the exercise of the votes cross border almost impossible. It is therefore time to set minimum standards such as *common notice periods of at least 1 month, abolition of different quorum requirements and the removal of any obstacles which prevent proxy voting*. It would be very helpful, if the OECD principles could include such concrete cases for minimum standards in their annotations.

IV. A. 4.and I. C. 3.

Disclosure of materiel information on remuneration

DSW agrees with the Principles' approach to disclose the remuneration policy, since ' it is important for shareholders to know the specific link between remuneration and company performance when they assess the capability of the board and the qualities they should seek in nominees for the board.'

Since 2002 DSW regularly publishes a survey on the development of the director's pay of DAX 30 companies in relation to the development of the company's earnings per share.

And each time we have to see that companies still link directors' pay to the dividend, which is in our view, not a suitable instrument to measure the managements' performance.

Since the Cromme-Commission last year introduced a higher transparency on the structure of the remuneration towards the shareholders, DSW will especially emphasise on this aspect in the upcoming annual general meeting season.

Beyond this, we believe that the issue of pension benefits will become an increasingly important issue. Since in DSW's view the overall remuneration also includes any pension schemes or benefits, we would like to ask the steering group to define 'remuneration' in detail in the annotations in order to avoid any misunderstandings.

Furthermore it should be clear that full disclosure should include the individual disclosure of pension benefits per board member, such as it is the case in the U.K..

IV. A. 4.

Disclosure for board members include their qualifications, the selection process, other company directorships and whether they are regarded as independent by the company.

and V. D. 5.

The board should fulfil certain key functions, including e***nsuring a formal and transparent board nomination and election process***.

DSW fully supports the proposed disclosure regarding the selection process for board members. Increased transparency on the reasons why a company is proposing a candidate and a full disclosure of his qualifications as well as a statement of independence by the company will make it easier for the shareholders to understand and duly vote on the election of board members.

THE INSTITUTE OF INTERNATIONAL FINANCE (IIF)

The Institute of International Finance (IIF) welcomes the opportunity to comment on the draft revisions to the OECD Principles of Corporate Governance. Since their introduction in 1999 the principles have been the focal point of discussion among investors, government authorities, and others seeking to improve corporate governance practices. We welcome the efforts of OECD governments to revise the principles with the intent to help enhance the legal, institutional, and regulatory framework for corporate governance and to provide guidance and suggestions for stock exchanges, investors, corporations, and other parties that have a role in this process.

In the interest of building a more solid framework for corporate governance, we have reviewed the revised principles and offer comments and suggestions that will help strengthen them (Annex 1.) We also propose additional elements from our own corporate governance guidelines that cover important issues not currently addressed under the revised principles. These additional elements would assist countries in establishing a framework that would not only benefit investors but also – perhaps more importantly -- encourage the further development of local equity markets. In this connection, we would like to emphasize the need for establishing principles that protect minority shareholders. As investors in these markets, we have encountered frequently conflicts of interest between majority shareholders and minority investors, be

they foreign or domestic. We would also recommend that if some of the suggestions cannot be reflected in the Principles, they should be referenced in the Annotation document.

The IIF Guidelines for Corporate Governance have evolved from the work of the IIF Equity Advisory Group (EAG), which was established in January 2001 (Annex 2.) The EAG is comprised of leading asset managers with portfolio equity investments in emerging markets in excess of $70 billion. The group is engaged in strengthening the environment for liquid, resilient capital markets in order to support a stable and rising flow of portfolio and private equity to emerging markets.

The basic thrust of our comments is that more specificity is needed to make the principles an effective tool in achieving the goals set forth by OECD governments. Instead of their general character, the OECD principles should take the nature of guiding principles in order to enhance their practical usefulness. This would help authorities in many countries to identify and adopt basic operating standards in order to establish a sound corporate governance framework that will gain the confidence of investors and improve the prospects for capital flows. In particular, there is a need to strengthen the rights of shareholders by explicitly promoting the principle of one-share one-vote. Moreover, our recommendations for changes to the OECD principles would help to clarify the structure and responsibilities of the board of directors and the importance of independent directors. In addition, we recommend that the role and function of audit, nomination, and compensation committees be spelled out more clearly.

We would also encourage that additional principles be included in the revised OECD draft. These principles would help to reinforce shareholder rights in the crucial areas of voting and meeting procedures. In addition, recommendations are made for the share of independent directors that should be represented on the board as well as guidelines for term limits. Specific accounting issues are also addressed.

The investor community has expressed a strong interest in seeing the IIF principles incorporated into corporate governance practices. Through the IIF's country specific Task Forces, which have conducted in-depth corporate governance assessments is seven key emerging market countries, we have found that authorities are searching for and welcoming guidance as to what specific principles should be included in their framework. The specific principles that we propose herein have been well received by emerging market authorities.

We hope that you will find our recommendations useful and we would be happy to discuss them with members of the OECD Steering Group on Corporate Governance. We look forward to your response and the prospect of the OECD Principles giving more weight to the concerns of investors.

Annex 1: Comments

I. Elements of OECD Principles Weaker than IIF Guidelines

OECD: I-B

Shareholders should have the right to participate in…decisions concerning…the authorization of additional shares.

IIF Guidelines: Capital Increase

There should be constraints on sales to the majority shareholder group. Shareholder approval is required. Any capital increase, over a period of a year and above a minimum threshold, must first be offered to all existing shareholders (pre-emptive rights).

Comment

The OECD Principles should explicitly mention the "pre-emptive rights" of existing shareholders.

OECD: I-C-1

Shareholders should be furnished with sufficient and timely information concerning the date, location and agenda of general meetings, as well as full and timely information regarding the issues to be decided at the meeting.

IIF Guidelines: Meeting notice and agenda

Meeting notice and agenda should be sent to shareholders within a reasonable amount of time prior to meetings to prepare the proxy system and to be released publicly. Meeting notice and agenda should be sent at least one month prior to meeting.

Comment

The OECD Principles should be more specific as to "how timely the relevant information should be provided to shareholders before the meeting."

OECD: I-E-1 & 2

Markets for corporate control should be allowed to function in an efficient and transparent manner. The rules and procedures governing the acquisition of corporate control…such as mergers and sales of corporate assets should be clearly articulated and disclosed. Transaction should occur at transparent prices and under fair conditions that protect the rights of all shareholders according to their class. Anti-takeover devices should not be used to shield management and the board from accountability.

IIF Guidelines: Takeover/buyout/merger procedures

Shareholder approval of takeover/buyout/merger should be required. Exchanges should require that if an offer is made above a reasonable minimum threshold of outstanding stock, then a significant portion of that purchase must be through a public offer. For offers above an even larger threshold, all shareholders need to be presented with an offer. Any anti-takeover measures must be approved through shareholders' vote. Anti-takeover measures include actions such as poison pills, golden parachutes, and issuance of bonds with special rights in the event of a takeover.

Comment

The OECD Principles should introduce the concept of a "threshold level" which activates public offer procedures.

OECD: II-A-1

Within any class, all shareholders should have the same voting rights. (Annotation: The OECD Principles do not take a position on the concept of "one-share one-vote".)

IIF Guidelines: Multiple voting classes

One-share one-vote should be a threshold requirement for new issues. Firms are encouraged to reduce and eventually eliminate the number of non-voting and super-voting shares.

Comment

The OECD Principles should clearly endorse the one-share one-vote rule.

OECD: II-A-3

Votes should be cast by custodians or nominees in a manner agreed upon with the beneficial owner of the shares.

IIF Guidelines: Proxy system

Firms are encouraged to allow proxy voting. Best practice: Proxy system should be universally available to all shareholders – foreign and domestic.

Comments

The OECD Principles should clearly state the need for proxy voting.

OECD: II-A-5

Company procedures should not make it unduly difficult or expensive to cast votes at general shareholder meetings.

IIF Guidelines: Meeting structure

Meetings should be conducted in a timely and efficient manner. Reasonable efforts to prevent vote fraud should be implemented, as well as mechanisms allowing for the right to recount contested votes.

Comment

The OECD Principles should be more specific about what constitutes "unduly difficult and expensive" voting in order to be meaningful.

OECD: II-C

Board members and key executives should be required to inform the board whether they, directly or on behalf of third parties, have a material interest in transactions directly affecting the corporation.

IIF Guidelines: Conflict of interest

Any potential or actual conflicts of interest on the part of directors or senior executives should be disclosed. Head of audit committee should not have any such conflicts of interest. Board members should abstain from voting if they have a conflict of interest pertaining to that matter. Audit or ethics committee is required to review conflict of interest situations.

Comment

The OECD Principles should require that any conflicts of interest be not only reported to the board but also disclosed publicly. Voting abstention and the role of an audit committee should also be articulated.

OECD: IV-A-4

For board members, disclosure should include their qualifications, the selection process, other company directorships and whether they are regarded as independent by the company.

IIF Guidelines: Definition of independence of directors

Define independence, disclose biography, and make statement on independence. Definition of independence: an independent director cannot (a) have been an employee of the firm in the past 3 years, (b) have a current business relationship with the firm, (c) be employed as an executive of another firm in which any of the company executives serve on that firm's compensation committee (i.e., no cross-compensation committee link), and (d) be an immediate family member of an executive officer of the firm or any of its affiliates. An independent director should have an adequate understanding of and competency in business. After serving some predetermined number of years on the board, directors should no longer be considered to be independent.

Comment

The OECD Principles should provide a clearer and more detailed definition of independent directors.

OECD: IV-A-5

Related-party transactions should be disclosed.

IIF Guidelines: Related-party ownership

Companies should disclose directors' and senior executives' shareholdings, and all insider dealings by directors and senior executives should be disclosed. Senior executives' and directors' share transactions should be disclosed within 3 days of execution. Best Practice: Total share ownership of connected parties must be disclosed if greater than 5-10% of outstanding shares. Total ownership exceeding 30% would trigger a buyout offer in which all shareholders are treated equally.

Comment

The OECD Principles should recommend that connected-party ownership exceeding a certain threshold should be disclosed.

OECD: IV-E

Channels for disseminating information should provide for equal, timely and cost-efficient access to relevant information by users.

IIF Guidelines: Investor relations

There should be an investor relations program. Best Practice: CFO or CEO assumes this job as officer.

Comment

The OECD Principles should explicitly mention the importance of CEO/CFO involvement in an effective investor relation program.

OECD: V-C

Board should apply high ethical standards. It should take into account the interests of stakeholders.

IIF Guidelines: Ethical rules of conduct for directors

Adopt a code of business conduct and ethics for directors, management and employees. Best Practice: Code should be made available to all shareholders.

Comment

The OECD Principles should require that an ethical code be made available to shareholders.

OECD: V-E-1

Board should consider assigning a sufficient number of non-executive board members…to tasks…(of) ensuring the integrity of board nomination.

IIF Guidelines: Nomination and election of directors

There should be a committee, chaired by independent non-executive that nominates new board members. Minority shareholders should have mechanism for putting forward directors at Annual General Meeting (AGM)/Extraordinary General Meeting (EGM).

Comment

The OECD Principles should make explicit reference to the need for a nomination committee. They should also address the importance of putting in place a mechanism that enables minority shareholders to propose candidates for directors.

OECD: V-E-1

Board should consider assigning a sufficient number of non-executive board members…to tasks…(of) ensuring the integrity of board remuneration.

IIF Guidelines: Compensation committee

For large companies, must be chaired by independent non-executive director with majority of committee non-executive and preferably independent. Best Practice: Rule would also apply to small companies.

Comment

The OECD Principles should make explicit reference to the need for a remuneration committee. They should also define "sufficient number" to mean a majority.

OECD: V-E-1

Board should consider assigning a sufficient number of non-executive board members…to tasks…(of) ensuring the integrity of financial and non-financial reporting.

IIF Guidelines: Audit committee

Must be chaired by a qualified independent director with the majority of independent directors. Best practice would also allow committee to call for second independent director.

Comment

The OECD Principles should make explicit reference to the need for an audit committee. They should also define "sufficient number" to mean a majority.

II. Elements of IIF Guidelines Absent in OECD Principles

Cumulative voting

Cumulative voting is an effective tool to reflect the interests of minority shareholders by allowing them to cast all of their board of director votes for a single candidate.

Mandatory redemption and Share buybacks

Since mandatory redemption and share buybacks significantly affect the interests of shareholders, they should be conducted in a transparent and equitable manner.

Special (extraordinary) shareholders meetings

Minority shareholders having some minimum threshold of outstanding shares should be able to call special meetings to represent or protect their interests.

Share blocking mechanism

Share blocking is a mechanism, which provides for a cut-off date before shareholder meetings so that share transactions taking place after this date cannot entail the transfer of the voting rights. Share blocking system is intended to facilitate the voting process.

Share of independent directors

At least one-third of the board members should be non-executive, a majority of who should be independent. As a best practice, the majority of the board should be independent.

Frequency and record keeping of board meetings

This should be mentioned. It is also important that non-management directors hold regularly-scheduled meetings without the presence of executive directors.

Term limits for independent directors

Specific term limits are desirable.

Semi-annual frequency of audited financial report

This should be articulated in addition to the annual release of an audited financial report.

Financial background required for an audit committee chair

This should be explicitly addressed.

Explanation and quantification of departures from accounting standards

Any departures from accounting standards should be explained in the annual report. It is also important to ensure that: 1) communication with the external auditor takes place without the presence of senior executives, 2) breakdown of proportion of fees paid for each service be made public in the annual report, and 3) provision of audit and non-audit services from the same external auditor be banned.

THE INSTITUT DER WIRTSCHAFTSPRÜFER IN DEUTSCHLAND E.V. (IDW)

The Institut der Wirtschaftsprüfer in Deutschland e.V. (IDW), the representative of the German auditing profession, appreciates the OECD´s invitation to interested parties to comment on the above mentioned Principles and is pleased to provide the OECD with the German auditing profession's view on the OECD Principles on Corporate Governance.

Our comments focus on selected issues in which we believe our profession has expertise and experience and therefore a contribution to make to the debate.

1. General remarks

IDW appreciates that OECD takes into consideration the different national corporate governance systems and that the draft principles have been established in respect of both unitary and two-tier systems and further that they are treated as equivalent systems. IDW explicitly appreciates the remarks in the preamble on the definition "board" used in the document to accommodate the suggested principles to both the unitary and the two-tier-system. However, we are not sure whether the definition, that is, in a two-tier-system, the term "board" refers to the "supervisory board" while "key executives" refers to the "management board" and the responsibilities given to the "board" in the draft principles apply to all two-tier systems. There are at least some principles where the reference to the term "board" does not conform with the responsibilities of the supervisory board in the German board system: E.g. in Principle V.D.1. it is stated that the board should fulfil certain key functions, including "setting performance objectives", and that, according to principle V.D.7, the board should ensure "the integrity of the corporation's accounting and financial reporting systems". In the German corporate governance system, both these functions are the responsibility of the executive board.

2. Preamble

The preamble states that the corporate governance framework should be developed with a view to its impact on overall economic performance.

The recent accounting scandals and corporate governance crises are evidence of the considerable changes to the environment in which both businesses and auditors operate. Growing orientation towards capital markets and the increasing significance of shareholder value based business have offered an incentive for management to focus on short term goals in some cases resulting in an increase in the appeal of aggressive accounting policies, a loose interpretation of accounting standards or even to a culpable manipulation of accounts in cases of a lack of integrity. Therefore, it is most important to concentrate on long-term economic performance to avoid the negative effects of short term orientation.

We propose an amendment to the principle that *"the corporate governance framework should be developed with a view to its impacts on overall long-term economic performance (...)".*

3. Section I: The rights of shareholders and key ownership functions

Principle I.C.2 states that shareholders should have the opportunity to ask questions to the board and the external auditor.

It has to be considered, that the responsibility for financial accounting lies with the executive board. For this reason, the executive board is the adequate and responsible addressee of questions asked by shareholders, not the external auditor.

For a two-tier system, like in Germany, it should be considered that the supervisory board is – through the approval process – also involved in the responsibility for financial reporting and that the supervisory board represents and acts on behalf of shareholders and other relevant third parties. The external auditor is accountable to shareholders and other relevant parties not directly, but indirectly through the supervisory board, to which the external auditor is directly accountable.

In addition, such an extensive right against the external auditor does not conform with the auditors´ obligation to confidentiality and professional secrecy which is regulated by law (§ 43 par. 1 sentence 1 Wirtschaftsprüferordnung, § 203 Strafgesetzbuch). The revision of the 8th EU-Directive also envisages that Member States shall ensure confidentiality and professional secrecy on all information and documents in relation to the audit. The obligation to confidentiality and professional secrecy is the elementary premise for a constructive dialogue between the auditor and the audited company, which is a prerequisite for the performance of high quality audits.

Therefore, we propose not to introduce a right of shareholders to ask questions to the external auditor because it would not be a useful corporate governance principle and may even be detrimental to the performance of high quality audits.

4. Section IV: Disclosure and Transparency

4.1. Principle IV.A.2

Principle IV.A.2 requires that disclosure should include material information on company objectives.

For reasons of protection of a company's position of competition it is doubtful whether companies would disclose detailed information, e.g. on its future strategy. Therefore, only general information could be expected but such information would be boilerplate and would, as a result, not provide any additional use to addressees.

For that reason, we propose that such a requirement should not be introduced.

4.2. Principle IV.B.

The explanatory statements to principle IV.B. (page 32) state that effective oversight over the audit profession is necessary. Reference is taken to IOSCO Principles of Auditor Oversight issued in 2002 that "a mechanism should exist to require auditors to be subject to the discipline of an auditor oversight body that is independent of the audit profession (…)."

We agree that appropriate and effective oversight mechanisms are important to improve public confidence and the credibility of high quality reporting. But it seems doubtful whether an oversight body absolutely independent of the profession can judge auditing issues without any professional knowledge of the auditing business. Especially in complex circumstances the necessity of professional knowledge and experience must not be ignored if an adequate judgement is to be reached.

Therefore representatives of the audit profession should be involved in the composition of an oversight body, while leaving the majority of that body to non-practitioners. Even PCAOB Release 2003-024 on Proposed Rules relating to the Oversight of Non-US Public Accounting Forms, dated Dec.10, 2003, page 11, and PCAOB Rule 4011 refer to criteria including the „*majority of non-practitioners*".

4.3. Principle IV.C

The explanatory statements to principle IV.C (page 32) state that the "provision of non-audit services by the external auditor to a company can significantly impair their independence and might involve them auditing their own work."

We do not support an overall prohibition of non-audit services because their provision does not necessarily cause a threat or even impairment to auditors´ independence. In contrast, the provision of non-audit services has a positive effect on the quality of the statutory audit since the provision of such services increases and deepens the auditors´ understanding of the client's business and, therefore, allows the audit to be carried out in a more focused and effective manner.

But it is our conviction and we strongly concur with the principle of prohibition of self-review, which means that an auditor is not allowed to carry out an audit in cases where the provision of non-audit services leads to the auditor examining work which has either been directly prepared by his audit firm or in which the audit firm has had significant involvement. In such cases, there is a risk, that the auditor's objectivity in performing an audit, and as a result, the quality of the audit as a whole could be significantly impaired. We therefore propose that the sentence be composed as follows:

"Provision of non-audit services by the external auditor to a company can significantly impair their independence in cases of self-review while involving them auditing their own work."

4.4. Principle IV.D

Principle IV.D states that "external auditors should owe a duty of care to the company and be accountable to the board and shareholders."

As noted previously, in the German corporate governance system, the external auditor is directly accountable to the company, especially the supervisory board. For two-tier systems, where the supervisory board assures that the information needs of shareholders are satisfied, the accountability of the external auditor should be limited to this body. In Germany and in other two tier systems, where the supervisory board represents the interests of shareholders and other relevant third parties (see our comments under 3), the external auditor is directly accountable to this body. Therefore, there is no need for any direct accountability of the external auditor to shareholders.

We hope that our comments will be of practical use in your deliberations. If you have any further questions about our views on these matters, we would be pleased to be of further assistance. Please note that we have also sent a copy of this letter to Prof. Dr. Ulrich Seibert, the German representative in the OECD Steering Group of Corporate Governance.

NIKE, INC.

We appreciate the opportunity to comment on the draft revised text of the OECD Principles of Corporate Governance. NIKE, Inc. has always supported sound corporate governance practices and further supports the efforts of the OECD to provide guidelines on corporate governance practices.

In this global economy, it is imperative that global companies are given consistent standards of corporate governance to follow. As a global company, NIKE, Inc. strongly encourages the Steering Group on Corporate Governance to consider alignment of these Principles of Corporate Governance with the corporate governance requirements of other significant standard setting bodies, such as the United States Securities and Exchange Commission and the New York Stock Exchange.

In addition, it would be most helpful if the Principles specified that the corporate governance laws that shall govern a public company are those of the country of the securities exchange in which a public company is listed for trading. Such a clarification would avoid the unintended but substantial burden of complying with different or conflicting governance, reporting, disclosure, and filing requirements in multiple jurisdictions.

TRAIDCRAFT

SUMMARY

Traidcraft welcomes the consultation on the OECD Principles of Corporate Governance. The principles seem to be written with European and US company structures in mind. In developing countries there is a greater proportion of more family run businesses, where the relationship between 'owner' and 'manager' is integrated. In these circumstances it is important that independent views are heard and in particular that stakeholders' interests are respected.

In the current context of government actions to improve corporate accountability particularly within OECD member countries there is a need for this document to highlight the need for regulatory approaches, and that voluntary or self regulatory systems are not sufficient. There is not enough commitment by governments to protect stakeholders from negative impacts of companies, yet there is vocal support for CSR initiatives, which have limited impact. This lack of an even handed approach by governments makes it all the more important the OECD Principles of Corporate Governance give a strong lead on the need to safeguard stakeholders, and are therefore appropriately evolved in accordance with stakeholder expectations.

Our submission sets out five reasons why corporate governance needs to address environmental and social issues through legal mechanisms.

i) Where legislation exists the social performance by companies is higher (e.g. in the area of Health and Safety). There is growing support amongst democratically elected representatives for more robust legislative approaches

ii) Governments have a responsibility to safeguard the public good in an effective, credible manner

iii) Companies should be obliged to uphold and comply with international human rights standards and goals

iv) Governments have a role in rebuilding confidence in companies by regulating in a manner that links corporate responsibility with impact and influence

iv) To stimulate companies to improve their social impact

Traidcraft makes a number of detailed comments on the draft text. Overall the OECD should take an approach that improves the accountability of companies to external stakeholders for their impacts. Accountability needs to be improved in three ways: through participatory forms of governance, in directors' duties and in the realisation of stakeholders' rights. Increased disclosure by companies of their social and environmental impacts is needed in order to support these measures and demonstrate company actions. . Disclosure is needed not only of material issues important to the company but also of material issues to stakeholders.

A summary of Traidcraft's recommendations is at the end of this response. Our recommendations propose changes to the text under consultation and as well as complementary actions to be undertaken by the OECD to improve business accountability.

A. TRAIDCRAFT

Traidcraft is one of the UK's leading fair trade organisations, selling food, household products, soft furnishings and clothing from nearly 100 producer groups based in 31 countries in Africa, Asia and Latin America. Traidcraft was established in 1979 and comprises two operational organisations: Traidcraft plc and Traidcraft Exchange, a registered charity.

Traidcraft plc is a medium-sized company which last year had a turnover of £12.06 million and made a profit of £416,000. Traidcraft plc has recently raised £3.25 million in a successful share issue.

Traidcraft Exchange is a development charity whose work spans capacity building amongst producers in developing countries, market access, policy development and advocacy. Through its Policy Unit, Traidcraft Exchange seeks to influence government policy and business practice in the North and the South to the benefit of the poor in the developing world.

Traidcraft is a pioneer of social accounting in the UK; having published the first independently audited plc report in 1993[33]. Since then, the methodological approach (which Traidcraft developed initially with the New Economics Foundation) has been adopted and adapted by many larger organisations. It has also helped shape the AA1000 standard operated by the Institute of Social and Ethical AccountAbility (ISEA).

Traidcraft initiated the Just Pensions[34] project to highlight international development risks pertinent to investment and to capitalise on recently introduced UK regulation that Pension Fund's Statement of Investment Principles should disclose whether they consider social, environmental or ethical aspects.

A case study of Traidcraft plc and the replicability of its management and governance to an 'Average plc' can be found at :
http://www.traidcraft.co.uk/PDFs/Traidcraft%20Case%20Study%20(Annex%201).pdf

B. FAIR TRADE AND CORPORATE GOVERNANCE

The internationally agreed definition of Fair Trade is as follows:

[33] For the most recent Social Accounts, see www.traidcraft.co.uk

[34] www.justpensions.org

"Fair Trade is a trading partnership, based on dialogue, transparency and respect that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalised producers and workers – especially in the South.

"Fair Trade organisations (backed by consumers) are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade."[35]

Fair Trade is a growing in market size and impact. There are more than 800,000 small-scale producers working in nearly 3,000 grassroots organisations producing Fair Trade goods. In 2002, European Fair Trade Association members had a combined turnover of almost € 150m[36]. World-wide Fair Trade sales are more than half a billion Euros[37]. In 2002 sales of Fair Trade labelled products increased 22% on the previous year[38] and this is estimated to have generated 50 million US$/€ of additional income to producers and workers.

In these ways Fair Trade is contributing to the realisation of the Millennium Development Goals, which seek to reduce the number of people living in absolute poverty by half by 2015. Through engagement with a worldwide network of producers and partner organisations that work with some of the world's poorest communities the Fair Trade movement has first-hand knowledge of the conditions under which trade can be a powerful force for sustainable economic and social development. Company Law also has a role to play in promoting accountable and equitable trading relationships.

Fair Trade experience provides models of corporate governance for modernising company law. Fair Trade organisations take a pro-active approach to socially responsible business practices, focusing on the positive benefits of sustainable business practices for all. The success of Fair Trade in coupling profitability and economic effectiveness with international development objectives makes it a particularly valuable model to improve the corporate governance of mainstream businesses so that they have a better impact.

- Fair Trade organisations across Europe have experience of <u>understanding their social impact</u> so that they can manage their impacts for social benefit.

- Fair Trade organisations embed <u>stakeholder engagement</u> with their management approaches. This process enables the joint identification of risks to optimum business performance and enables appropriate action to be taken

[35] Source: FINE, formed through the informal co-operation between Fairtrade Labelling Organizations International (**F**LO), the International Federation for Alternative Trade (**I**FAT), Network of European World Shops (**N**EWS), and the European Fair Trade Association (**E**FTA).

[36] Source: European Fair Trade Association (EFTA) <u>www.eftafairtrade.org</u>. Figure on the basis of retail-figure calculations

[37] GRAHAM YOUNG FOR THE KING BAUDOUIN FOUNDATION (MAY 2003) 'FAIR TRADE'S INFLUENTIAL PAST AND THE CHALLENGES OF ITS FUTURE.' WHERE A BILLION EQUALS A THOUSAND MILLION.

[38] Source: Fairtrade Labelling Organizations International (FLO) <u>www.fairtrade.net</u>

- Fair trade organisations have corporate governance systems and management approaches, which embed the balancing of social and commercial considerations. In particular Fair Trade organisations have expertise in balancing social and financial objectives and in managing global supply chains.

C. INTRODUCTORY COMMENTS ON OECD PRINICIPLES OF CORPORATE GOVERNANCE DRAFT REVISED TEXT

Traidcraft welcomes the OECD's consultation on its Corporate Governance Principles.

We note that (p2) '*the Principles are intended to assist OECD and non-OECD governments in their efforts to evaluation and improve the legal, institutional and regulatory framework for corporate governance in their countries and to provide guidance and suggestions for .. other parties that have a role in the process of developing good corporate governance.'*

Traidcraft is supportive of these principles, and in particular the importance of stakeholders, but does not consider that these principles are adequate in their role in providing guidance for the development of good practice, in the current context of globalisation.

Traidcraft agrees with the following included in the Preamble that '*Corporate governance involves a set of relationships between a company's management, its board, its shareholders and stakeholders*' and that *'factors such as business ethics and corporate awareness of the environmental and societal interests of the communities in which it operates can also have an impact on the reputation and the long term success of a company.'* (p4) However these points need to be reinforced in the main 'Principles' section of the text.

Traidcraft, as a social enterprise, supports the statement '*Employees and other stakeholders play an important role in contributing to the long term success and performance of the corporation, while governments establish the overall institutional and legal framework for corporate governance.'* (p4) Unfortunately we do not see enough commitment by governments to protect stakeholders from negative impacts of companies, whilst they are making moves to promote the beneficial interactions between stakeholders and companies. This lack of an even handed approach by governments makes it all the more important that the OECD Principles of Corporate Governance should give a strong lead on the need to safeguard stakeholders, and that the Principles are appropriately evolved in accordance with stakeholder expectations.

Reasons corporate governance needs to address environmental and social issues

i) For the public good

Nation states are under an obligation to act in the interests of society. Companies are such an important and influential part of the public's everyday life; thus the regulation of companies is an important way in which nation states can ensure that society is best protected from harmful corporate impacts. OECD principles need to raise the concept of what constitutes a company director's duty of care (Section V A) as well as the importance for governments to regulate and check whether current corporate governance practice do in fact protect society.

ii) To ensure compliance with international standards and goals

The OECD member governments are signatories to a wide range of internationally recognised conventions and initiatives on human rights and labour standards. Companies headquartered in OECD member governments should be obliged to adhere to these standards throughout their areas of operation. Some companies not only have poor social and environmental impacts but many do not respect international standards (that member governments are signatory to) and have poor human rights records,

use abusive purchasing practices[39][40] and degrade the environment. The following recent examples are a selection of companies' problematic practices overseas:

- The UK's BP's investment in PetroChina made BP complicit in abusing human rights in Chinese occupied Tibet[41]

- Germany's Neumann Kaffee caused the eviction of subsistence farming families from 60,000 hectares without consultation or compensation in Uganda[42]

- Italy's Parmalat's operations in Brazil were evaluated against ILO conventions by Brazil's Social Observatory in July 2001 and the following findings were made:

- Unjustified pressure to work weekends and holidays

- Gender discrimination

- Persecution of union members[43]

- The UK-listed British American Tobacco (BAT) continues to operate in Burma despite systematic human rights abuses associated with the oppressive regime.

The OECD needs to improve companies' respect for and adherence to the core labour standards[44] of the International Labour Organisation and the UN's Universal Declaration of Human Rights. The latter has recently been usefully set out for businesses in the 'U.N. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights'[45] and the OECD would do well to promote these in the future version of its 'Principles of Corporate Governance'. Good corporate

[39] UK Department of Trade and Industry press release P/2000/674 (10 October 2000) 'Byers Publishes Competition Commission Report On Supermarkets.' The report follows the decision by the Director General of Fair Trading (DGFT) in April 1999 to refer the industry. The Secretary of State has accepted the Commission's recommendations. The Commission has identified three situations where competition is distorted and operates against the public interest. The first concerns the relationship between supermarket chains and their suppliers including farmers. The Commission recommends that a Code of Practice should be established which would put relations between supermarkets and their suppliers on a clearer and more predictable basis. Stephen Byers said, "I agree that a Code of Practice should be introduced. Like the Commission I do not believe that a voluntary code would be adequate. The relevant supermarkets will have to give legally binding undertakings to comply with the remedies. I am asking the DGFT to approach those supermarket chains with 8% or more of the market (currently ASDA, Safeway, Sainsbury, Somerfield and Tesco) to agree a Code of Practice which would meet the concerns identified by the Competition Commission. This would include provisions for independent dispute resolution.

[40] http://www.corporatewatch.org.uk/pages/whats_wrong_suprmkts2.htm#encouraging (August 2003) 'What's Wrong with Supermarkets?' The UK Competition Commission Report on Supermarkets (2000) cited 52 ways in which supermarkets exploit their dominant power over suppliers. At the heart of this is the supermarkets' refusal to enter into binding contractual agreements, leaving their suppliers without redress. Other practices include delaying payments by 15 days more than terms agreed; changing quality standards agreed without adequate notice; requiring buyback of unsold goods and making deductions from returns to cover wastage.

[41] Free Tibet Press Release, (18 April 2002) 'Chinese soldiers' applaud BP's support for exploitation of Tibet while chairman stonewalls Tibetans at company AGM'

[42] ActionAid UK (June 2003) 'Unlimited companies'

[43] Social Observatory, Brazil (2001) 'Social And Labour Programs And Conditions - Parmalat'

[44] ILO Declaration on Fundamental Principles and Rights at Work states that all countries have an obligation to respect, promote, and realise particular fundamental principles and rights i.e. freedom of association and the effective recognition of the right to collective bargaining; elimination of all forms of forced or compulsory labour; effective abolition of child labour; and elimination of discrimination in respect of employment and occupation

[45] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). http://www1.umn.edu/humanrts/links/norms-Aug2003.html

governance and the inclusion of accountability of social and environmental impacts within company law is crucial if sustainable development is to be made a reality

iii) To re-orientate companies to contribute solutions

The international community is not able to deliver some of its strategies and policies (e.g. on sustainable development, protection of human rights or poverty reduction) without the co-operation of business. In particular the OECD's commitment to the Millennium Development Goals will be undermined unless the negative social impacts of businesses are curtailed. It is therefore appropriate that OECD principles of corporate governance should give companies a strong guidance to consider their social impact.

iv) To rebuild confidence in companies: to recognise responsibility is proportionate to impact

There is a need to rebuild society's confidence in companies and their shares by making companies more transparent and accountable for their operations. Traidcraft's view is that where a company has impact it has a proportionate responsibility and that OECD's Corporate Governance Principles should acknowledge this responsibility by promoting accountability to those impacted by a company. Some companies have significant adverse impacts on the environment and on society as a whole. To ignore these impacts would not only be irresponsible and morally wrong, it will also harm the long-term interests of business.

v) Legislative requirements of companies are needed

The democratically elected European Parliament in their response to the European Commission's Communication on Corporate Social Responsibility believed that legislative changes would be required to improve business's impact on society and the environment. According to the UK's Business in the Community's Corporate Responsibility Index[46] , companies score highest in the areas where there is legislation. There is currently an overemphasis on voluntary approaches to improving the social impact of companies. This voluntary approach does not deal with the systemic conflicts of interest (between short term vs. long term, social vs. financial demands) that the OECD's draft text correctly states policy makers should focus on (p14 Annotations).

When discussing the legal and regulatory requirements that affect corporate governance practices the draft correctly presents the following (on p15):

- *'Mechanisms should also be established for parties to bring claims to protect their rights'*

- Policy '*assessments should take into account the need for effective enforcement, including the ability of authorities to deter dishonest behaviour and impose effective sanctions for violations'*

The OECD Principles of Corporate Governance therefore need to highlight, more than the current draft does, the need for regulatory approaches for companies not adhering to internationally agreed standards and causing social harm.

C.1 Detailed Comments on The OECD's Principles of Corporate Governance

[46] Corporate Responsibility Index published (12/03/03) http://www.bitc.org.uk/news/news_directory/indexresults2002.html

This section of Traidcraft's response will comment on both the Principles and the accompanying annotations together. In general Traidcraft is supportive of the Principles in the draft text. Our response below outlines areas where the text needs to be improved or areas where there are omissions.

I Rights of shareholders and key ownership functions

F The exercise of ownership rights by all shareholders, including institutional investors should be facilitated.

1 Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights. The voting record of such investors should also be disclosed to the market on an annual basis.

Missing from section I is a discussion of what stakeholders including shareholders can do to initiate change by putting pressure on the company from outside company procedures. Shareholders with certain percentage of the share capital or stakeholder impacted significantly should be able to ask a court or administrative authority to authorise a special investigation into the affairs of the company.

RECOMMENDATION – Insert new point. Stakeholders and shareholders have the right to ask a court of administrative authority to initiate a special investigation into the affairs of the company.

Traidcraft supports active institutional investors. Shareholders have responsibilities, which go with their rights. The largest shareholders are institutional shareholders, which hold a significant proportion of the stock market on behalf of millions of individuals. Inaction by these investors reduces the proper scrutiny of companies. In addition, inaction by institutional investors also indicates that they are not exercising their responsibilities towards their clients They rarely consult their contributing members as to issues of future sustainable development. Traidcraft found through its work on Just Pensions (www.justpensions.org) that there is a poor chain of accountability and communications from pension fund holder to pension fund trustee and fund manager on the environmental and social impacts of investment. Traidcraft welcomes the practical suggestion made in the text that institutional investors need to set aside sufficient human and financial resources to improve their accountability. Training of trustees should be a priority.

Disclosure by pension fund trustees of any social or environmental policies in their investment principles is, on its own, insufficient. The Just Pensions project found that once pension fund trustees had developed a policy on social, environmental and ethical issues many did not change the management of the pension investments (either in-house or through an external fund manager) to reflect the changes in policy made.[47]

Traidcraft therefore calls on the OECD to use the corporate governance guidelines to stimulate greater accountability in the investment decision-making chain, by proposing greater transparency, not only to the market, but also to their clients of voting records and engagement activities with companies. Since corporate governance systems are designed to deal with the problems that result from separation of ownership and control of a company it is appropriate to consider the accountability of shareholders in the OECD's corporate governance principles.

RECOMMENDATION Title of point I F1 of the OECD principles for corporate governance should be reworded as follows: "Institutional investors acting in a fiduciary capacity should disclose their overall

[47] Just Pensions (July 2002) 'Do UK Pension Funds Invest Responsibly?'

corporate governance and voting policies, including the extent to which social, environmental and ethical issues are considered, with respect to their investments, and how they manage these policies. This information should be disclosed to the market and their contributing clients on an annual basis.

III The Role of Stakeholders In Corporate Governance

A The rights of stakeholders that are protected by law should be respected

C Performance enhancing mechanisms for employee participation should be permitted

D Where stakeholders participate in the corporate governance process, they should have access to relevant and sufficient information on a timely and regular basis.

E Stakeholders, including individual employees should be able to freely communicate their concerns about illegal or unethical practices to the company board and their rights should not be compromised for doing this.

Traidcraft welcomes the recognition that some stakeholders are impacted by company actions. However we are concerned that the text assumes most stakeholders are able to realise appropriate protection from a company's actions through existing legislation and also by the credibility given to voluntary actions by companies to stakeholders. (Part III A)

The UN Universal Declaration of Human Rights was drawn up more than half a century ago and is internationally recognised, yet companies through their actions persist in violating human rights. Clearly stakeholders are not all protected by law, and frequently it is those stakeholders with the least power who are not protected. The OECD Principles of Corporate Governance should therefore include reference to the Universal Declaration of Human Rights and in particular to the timely and useful UN document setting out how companies can uphold human rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'.[48] Unwillingness by governments to hold corporate decision- making to account for the social impacts of their decisions, is irresponsible, engenders disillusionment with multinational companies and will add to global discontent of how western governments influence trade.

Inclusion of stakeholder considerations is also crucial at times of corporate restructures, mergers and acquisitions. It is particularly important that companies are not able to restructure to avoid responsibility for harm they may have caused to stakeholders. When companies are able to avoid such responsibilities it damages the reputation of all companies and the regulatory environment they are governed by.

RECOMMENDATION - Amend point III A to recognise that companies need to ensure their actions do not violate human rights (as defined in 1976 and supplementary Conventions[49]), and that policies need to be adopted to safeguard the human rights of stakeholders affected by a company's actions (whether or not those rights are protected in law). Reference to 'UN Norms on the Responsibilities of

[48] 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). http://www1.umn.edu/humanrts/links/norms-Aug2003.html.

[49] International Covenant on Civil and Political rights, and International Covenant on Economic, Social and Cultural Rights came into force in 1976 and are supplemented by 4 thematic treaties: Convention on the Elimination of all forms of Racial Discrimination; Convention on the Elimination of all forms of discrimination against women, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and Convention on the Rights of the Child as well as International Labour Organisation's Core conventions.

Transnational Corporations and Other Business Enterprises with Regard to Human Rights' is needed in the annotated text to give companies guidance.

RECOMMENDATION - OECD to promote and support the current draft text of the 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' as they go through the UN process.

Point III B of the OECD principles of corporate governance correctly state that affected stakeholders have the right to obtain redress. This clause needs to be broadened and supplemented. As stated earlier internationally agreed human rights are not protected in law against actions by companies. Stakeholders whose human rights have been violated are also entitled to redress, even if they are not protected by current legislation. . Redress from OECD based companies should be accessible irrespective of where the stakeholder is based. There is a need for a body to be set up either within each member government or internationally to receive complaints from stakeholders whose rights have been violated and to arbitrate on their behalf.

OECD has already piloted such a mechanism, and the experience of the OECD Multinational Guidelines is relevant here. However, implementation of these Guidelines is weak due to reluctance of National Contact Points to process claims made. Complaints need to be processed more quickly, fairly and in a transparent manner for the OECD Multinational Guidelines to be viewed as credible.

RECOMMENDATION – Point III B needs to be amended so that stakeholders whose human rights have been violated are able to seek redress, not just those who are protected by law.

RECOMMENDATION – An additional point needs to be inserted after point III B. Member governments need to set up an independent organisation to arbitrate and provide redress to stakeholders whose human rights have been violated by companies headquartered domestically. The existence of the independent body as well as procedures for filing a complaint needs to be communicated widely and particularly to stakeholders whose rights may have been violated.

RECOMMENDATION – In parallel to this process, member governments need to improve their commitment to processing complaints made by stakeholders under the OECD Multinational Guidelines quickly, fairly and transparently.

Traidcraft welcomes points made in III E regarding a complaints mechanism. Such a mechanism should set out clearly what information is needed for a company to start its investigation. Complaints should be made to the corporate board and the identity of the complainant should remain confidential . Whilst 'whistleblowing' legislation exists in the UK, it is less common for other stakeholders to be able to alert companies to wrong doings.. Some enlightened companies have complaints mechanisms in place to report unethical practices, which include their impacts in their supply chains. These companies have found that it is important that sufficient promotion of the complaints mechanism is undertaken for it to be used.

It is to companies' advantage to have such a system in place so that they are aware of their impacts, before such practices are discovered by the media or the company is in court. A complaints mechanism run by companies is, however, not sufficient to protect the human rights of stakeholders, because an independent organisation is required for this purpose. However a direct complaint to a company may result in a speedier resolution, which is of benefit both to the company and impacted stakeholders.

RECOMMENDATION – Point III E needs to be re-phrased to indicate to companies that it is in their interests to have a credible complaints mechanism in place.

RECOMMENDATION – Annotation of point III E to include the following. "Companies and regulators should ensure that the existence of a complaints mechanism is disseminated to stakeholders, and that the mechanism is widely accessible (as a minimum available on the home page of their website)".

IV Disclosure And Transparency

A Disclosure should include, but not be limited to, material information on

1. *Financial and operating results of the company*

2. *Company objectives*

3. *Major Share Ownership and voting rights*

4. *Members of the board and key executives, and their remuneration. For board members, disclosure should also include their qualifications, the selection process, other company directorships and whether they are regarded as independent by the company.*

5. *Related party transactions*

6. *Material foreseeable risk factors*

7. *Material issues regarding employees and other stakeholders*

8. *Governance structures and policies*

B Information should be prepared, audited, and disclosed in accordance with high quality, internationally recognised, standards of accounting, financial and non-financial disclosure, and audit.

C An annual audit should be conducted by an independent, competent and qualified, auditor in order to provide an external and objective assurance to the board and shareholders on the way in which financial statements have been prepared and presented.

Stakeholders have a right to access information which is relevant to their welfare and so the information to be disclosed under these provisions should not be limited to material solely of interest to the company.. (Guidance on the disclosure of material risks is currently provided in the UK by the Association of British Insurers whose members have a significant stake in the London Stock Market. The ABI has produced guidance on the disclosure and management of social, environmental and ethical risks.. However it does not go far enough in requiring disclosure of issues pertinent to stakeholders.) This needs to be included in the introduction of the annotated comments and added to the annotation of point IV A7.

RECOMMENDATION – The annotated introduction to section IV needs to refer to the right of individuals to information.

RECOMMENDATION – Point IV A7 to be reworded to emphasis equality between stakeholders and disclosure of information pertinent to stakeholders. (Suggestion: 'Material issues to a company's stakeholders')

The title of point IV A 2 should be expanded beyond 'company objectives' and needs to be reworded to 'prompt disclosure of company policies in regard to business ethics, human rights, political donations and public policy'. For such policies to be credible companies need to review the implementation of these policies.

RECOMMENDATION – Reword title of IV A2 as follows. Disclosure on 'company objectives, including policies related to business ethics, protection and promotion of human rights and public policy, and review findings of the implementation of such policies'.

It is in the interests of all to encourage executives and board members to abide by the law. Point IV A4 should therefore be amended to include disclosure of civil and administrative law convictions.

RECOMMENDATION – Insert into the title of IV A4 disclosure of civil or administrative law convictions.

Point IV A6: the annotation should be expanded to prompt companies to re-evaluate the process by which they assess 'material foreseeable risk factors' and the competencies needed by those evaluating risks. Companies frequently do not have the expertise or the management information systems to collect information regarding their social impact and so they are ill-prepared to judge risks they might face as a result of their impact on society. (The UK government's consultation on the Operating and Financial Review[50] set out a process by which the materiality of risks could be evaluated.) Likewise traditional auditors also do not have the appropriate competencies to evaluate business probity, human rights and environmental risks. It may be more appropriate for independent comment of a company's risks in non-financial areas to be made by a stakeholder panel or others with more appropriate knowledge of a company's social impact. Audit statements must not over claim, or mislead which parts of disclosure have been audited.

RECCOMMENDATION – Annotation for point IV A6 needs to be expanded to prompt companies to re-evaluate the process by which they assess 'Material foreseeable risk factors' and that a wide range of competencies are needed by those evaluating risks.

RECOMMENDATION – Point IV C needs to be amended (replace 'financial statements' with 'corporate disclosure') and supplemented with the following sentence. 'Audit statements need to clearly state which parts of company disclosure they have audited.'

Point IV A8 mentions the 'comply or explain' approach, which in the way it is currently applied is weak. The 'comply or explain principle' only works when there is monitoring of the relevant corporate governance codes. The issue is not just whether member states monitor and enforce compliance and disclosure, but whether member states actually assess quality of the disclosure rather than just its existence. In the UK the Financial Services Authority sets out the initial listing requirements but has no role in checking the integrity or completeness of the disclosure. When the contents of an initial listing document is then questioned there is a vacuum as to who has the authority to force a change, to withdraw or to re-issue the listing.

RECOMMENDATION – Point IV A8 should be amended to 'Governance structures, policies and review of implementation of the policies. Appropriate regulatory authorities should have the competence to assess the content of policies and structures adopted rather than accept the disclosure given'.

V Responsibilities Of The Board

A Board members should act on fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.

[50] 'The Operating and Financial Review Working Group on Materiality: A consultation document' (June 2003) Department for Trade and Industry, UK

C The board should apply high ethical standards. It should take into account the interests of stakeholders.

D The board should fulfil certain key functions, including

7 Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and the appropriate systems of control are in place, in particular, systems of risk management, financial and operational control and compliance with the law and relevant standards

Accountability to stakeholders should be improved in three ways: through participatory forms of governance, in directors' duties and in stakeholders' rights. Missing from section V of the guidelines is a discussion of participatory governance structures, as used by some social enterprises. Promotion of more democratic forms of participatory governance needs to be embedded within the core of corporate governance considerations of social and environmental impact. Such considerations are not inimical to business success, as proved by the growth and success of fair trade companies. For example, the Day Chocolate Company[51] is part owned by its raw material producers, representatives of whom sit on the Board. This is an example of an innovative corporate governance structure, which involves at Board level a stakeholder group that is significantly impacted on by the production activities of the company. This inclusion has in turn influenced Day Chocolate company's strategic decisions.

RECOMMENDATION – OECD corporate governance steering group to investigate more participatory forms of governance, and how involvement of different stakeholders views can valuably influence a company's governance.

RECOMMENDATION – Amend introductory annotation to section V to discuss participatory forms of governance, where key stakeholders' views with their particular skills is heard at board level.

Company boards need to reflect the skills and expertise to face up to the challenges of the 21st century which go beyond short-term profits to the pressing global issues of climate change, population growth, poverty and diminishing natural resources. Companies need to be able to better manage conflicts with communities regarding control of resources and respect for human rights. At the moment most company boards do not have the breadth of competencies needed. There is a missing discussion from the OECD Principles of Corporate Governance on the balance between the protection of public good and shareholders. There is a need for boards of directors to be accountable and liable should their company have any adverse impact on third parties. Traidcraft believes that directors' duties are fundamental to the proper running of a company and therefore the duty of care element within point V A needs to be made more explicit. Company directors should have a duty of care to consider their impact on the environment and society, similar to their duty of care for Health and Safety.

Recommendation - Amend title of V A to the following: "Board members should act on a fully informed basis, in good faith, with due diligence and care for environmental or social impacts, and in the best interest of the company".

Point V C needs to be promoted to be the first point in the section on responsibilities of the board or point V A should include in its title reference to public good and human rights. It is not acceptable for companies to compete on the basis of violating human rights. The relevance of human rights to business has recently been set out in UN 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' and this should be referred to in the annotated text for

[51] www.divinechocolate.com

point V C alongside references to ILO Core conventions. Pursuit of business gain and competition with other businesses should not be at the expense of the attainment of human rights. The current draft text gives primacy to shareholders, without recognising the importance of human rights of all of a company's stakeholders. The annotation of V D7 correctly states that the incentive structures of business need to be aligned so that compliance with high standards of business ethics is rewarded. Likewise the annotation for this section should also state that conflicts between human rights and business targets need to be resolved so that employees are rewarded and incentivised to uphold human rights, rather than being torn between opposing objectives.

RECOMMENDATION – Insert the following sentence into the title of point V C. "The board should undertake to protect and promote the human rights of its stakeholders." Point V C should then be inserted before current point V A.

RECOMMENDATION – Amend annotation to refer to UN 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' in the text for point V C. The annotation for V C should also point out that it is necessary for corporate boards to ensure that an incentive structure is in place which rewards employees of a business for upholding human rights and that where protection of human rights standards might be at odds with different corporate objectives such conflicts are resolved, or employees given clear guidance that the protection of human rights takes priority.

Point V D 7 as currently drafted covers two areas and should be split into two points. The two areas on adherence to financial standards and controls should be treated separately from compliance with other laws. The two areas need to be given equal weight and should be listed as key functions of the board.

RECOMMENDATION – Point V D 7 to be split into 2 points. "Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular systems of risk management, financial and operational control". The proposed title for the second point is as follows: "Ensure the appropriate systems of operational control and compliance with the law and relevant standards, including international human rights standards".

SUMMARY OF RECOMMENDATIONS

Current text of OECD Principles of Corporate Governance	**Traidcraft's Recommended Changes to the Text & Recommendations for actions by OECD**
I *Rights Of Shareholders And Key Ownership Functions*	Insert new point. Stakeholders and shareholders have the right to ask a court of administrative authority to initiate a special investigation into the affairs of the company.
F The exercise of ownership rights by all shareholders, including	Title of point I F1 of the OECD principles for corporate governance should be reworded as follows: "Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies, including the extent to which social, environmental and ethical issues are considered, with respect to their investments, and how they manage these policies. This

Current text of OECD Principles of Corporate Governance	**Traidcraft's Recommended Changes to the Text & Recommendations for actions by OECD**
institutional investors should be facilitated. *1 Institutional investors acting in a fiduciary capacity should disclose their overall corporate governance and voting policies with respect to their investments, including the procedures that they have in place for deciding on the use of their voting rights. The voting record of such investors should also be disclosed to the market on an annual basis.*	information should be disclosed to the market and their contributing clients on an annual basis.
III The Role Of Stakeholders In Corporate Governance *A The rights of stakeholders that are protected by law should be respected*	Amend point III A to recognise that companies need to ensure their actions do not violate human rights (as defined in 1976 and supplementary Conventions[52]), and that policies need to be adopted to safeguard the human rights of stakeholders affected by a company's actions (whether or not those rights are protected in law). Reference to 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' is needed in the annotated text to give companies guidance.
B Where stakeholder interests are protected by law	Point III B needs to be amended so that stakeholders whose human rights have been violated are able to seek redress, not just those who are protected by

[52] International Covenant on Civil and Political rights, and International Covenant on Economic, Social and Cultural Rights came into force in 1976 and are supplemented by 4 thematic treaties: Convention on the Elimination of all forms of Racial Discrimination; Convention on the Elimination of all forms of discrimination against women, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and Convention on the Rights of the Child as well as International Labour Organisation's Core conventions.

Current text of OECD Principles of Corporate Governance	**Traidcraft's Recommended Changes to the Text & Recommendations for actions by OECD**
stakeholders should have the opportunity to obtain redress for the violation of their rights.	law. An additional point needs to be inserted after point III B. Member governments need to set up an independent organisation to arbitrate and provide redress to stakeholders whose human rights have been violated by companies headquartered domestically. The existence of the independent body as well as procedures for filing a complaint needs to be communicated widely and particularly to stakeholders whose rights may have been violated.
E Stakeholders, including individual employees should be able to freely communicate their concerns about illegal or unethical practices to the company board and their rights should not be compromised for doing this.	Point III E needs to be re-phrased to indicate to companies that it is in their interests to have a credible complaints mechanism in place. Annotation of point III E to include the following. "Companies and regulators should ensure that the existence of a complaints mechanism is disseminated to stakeholders, and that the mechanism is widely accessible (as a minimum available on the home page of their website)".
IV Disclosure And Transparency	Annotated introduction to section on IV needs to refer to the right of individuals to information.
A Disclosure should include, but not be limited to, material information on *2. Company objectives*	Reword title of IV A2 as follows. Disclosure on 'company objectives, including policies related to business ethics, protection and promotion of human rights and public policy, and review findings of the implementation of such policies'.
A 4. Members of the board and key executives, and their remuneration. For board members, disclosure should also include their	Insert into the title of IV A4 disclosure of civil or administrative law convictions.

Current text of OECD Principles of Corporate Governance	**Traidcraft's Recommended Changes to the Text & Recommendations for actions by OECD**
qualifications, the selection process, other company directorships and whether they are regarded as independent by the company.	
A 6. Material foreseeable risk factors	Annotation for point IV A6 needs to be expanded to prompt companies to re-evaluate the process by which they assess 'Material foreseeable risk factors' and that a wide range of competencies are needed by those evaluating risks.
A 7. Material issues regarding employees and other stakeholders	Point IV A7 to be reworded to emphasis equality between stakeholders and disclosure of information pertinent to stakeholders. (Suggestion: 'Material issues to a company's stakeholders')
A 8. Governance structures and policies	Point IV A8 should be amended to 'Governance structures, policies and review of implementation of the policies. Appropriate regulatory authorities should have the competence to assess the content of policies and structures adopted rather than accept the disclosure given'.
C An annual audit should be conducted by an independent, competent and qualified, auditor in order to provide an external and objective assurance to the board and shareholders on the way in which financial statements have been prepared and presented.	Point IV C needs to be amended (replace 'financial statements' with 'corporate disclosure') and supplemented with the following sentence. 'Audit statements need to clearly state which parts of company disclosure they have audited.'
V Responsibilities Of The Board	Amend introductory annotation to section V to discuss participatory forms of governance, where key stakeholders' views with their particular skills is heard at board level.
A Board	Amend title of V A to the following: "Board members should act on a fully

Current text of OECD Principles of Corporate Governance	**Traidcraft's Recommended Changes to the Text & Recommendations for actions by OECD**
members should act on fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.	informed basis, in good faith, with due diligence and care for environmental or social impacts, and in the best interest of the company".
C The board should apply high ethical standards. It should take into account the interests of stakeholders.	Insert the following sentence into the title of point V C. "The board should undertake to protect and promote the human rights of its stakeholders." Point V C should then be inserted before current point V A. Amend annotation to refer to UN 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' in the text for point V C. The annotation for V C should also point out that it is necessary for corporate boards to ensure that an incentive structure is in place which rewards employees of a business for upholding human rights and that where protection of human rights standards might be at odds with different corporate objectives such conflicts are resolved, or employees given clear guidance that the protection of human rights takes priority.
D The board should fulfil certain key functions, including *7 Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and the appropriate systems of control are in place, in particular, systems of risk management, financial and operational control and compliance with the law and relevant*	Point V D 7 to be split into 2 points. "Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular systems of risk management, financial and operational control". The proposed title for the second point is as follows: "Ensure the appropriate systems of operational control and compliance with the law and relevant standards, including international human rights standards".

Current text of OECD Principles of Corporate Governance	Traidcraft's Recommended Changes to the Text & Recommendations for actions by OECD
standards	
	Recommendations for actions by OECD
	OECD corporate governance steering group to investigate more participatory forms of governance, and how involvement of different stakeholders views can valuably influence a company's governance.
	In parallel to this process, member governments need to improve their commitment to processing complaints made by stakeholders under the OECD Multinational Guidelines quickly, fairly and transparently.
	OECD to promote and support the current draft text of the 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' as they go through the UN process.

ASSONIME

I detail below some comments of Assonime on the draft revision of OECD Principles of Corporate Governance. I apologize for the delay of a few days but I hope you may take into consideration our letter.

In general terms, Assonime agrees with a reinforcement of the Principles in response to recent corporate scandals. It is our assumption that both effective governance structures and appropriate disclosure of companies' corporate governance play an important role in sustaining investor confidence, strengthening equity markets and supplying capital to firms.

As regards governance structures, we believe that the draft Principles may be usefully complemented as follows:

i) In order to grant shareholders the "right to obtain relevant and sufficient information on the corporation on a timely and regularly basis" (Principle I.A.3), it should also be recognized the right for the company to "know its shareholders". This may be achieved through more effective forms of registration of shareholders.

ii) Assonime strongly supports shareholders' rights to access the relevant information in advance of general meetings and to participate and vote in such meetings. Nevertheless we believe that the right for shareholders to place items on the agenda of general meetings and to submit proposals, as expressed under Principle I.C.2, should be limited and eventually left to national regulations. Indeed the change of the agenda during the meeting may damage the absent shareholders and those who voted by proxy.

iii) Effective shareholder participation in key corporate governance decision should be granted. However the equity component of compensation schemes for key executives and employees should be fully disclosed to the general meeting, rather than approved by shareholder.

As far as disclosure is concerned, we believe that the following may provide additional improvement:

i) We support the requirement of better disclosure by institutional investors. In particular, we agree with Principle I.F, which requests institutional investors to disclose their overall corporate governance and voting procedures as well as the way to manage material conflicts of interest. The disclosure of institutional investors' corporate governance shall be made independently from the fact that (a) such investors actually hold shares in listed companies or (b) the investment funds managed by such investors are listed. Therefore, we suggest that the Annotations to Principle I.F.1 be integrated according to the above. Furthermore, we deem that the Annotations to Principle I.F.2 should be complemented by specific reference to the disclosure of operations concerning the financial instruments issued by the group which the institutional investor belongs to.

ii) We support the disclosure of material information on major share ownership and voting rights. The structure of a group of companies and the intra-group relations should be as transparent as possible. The directives on transparency obligations and on takeover bids will achieve this result. In addition to the Annotations to Principle IV.A.3, further disclosure should be provided with regard to: (a) the financial instruments issued by subsidiaries and affiliates and (b) all the operations which cause a material change in the economic and financial position of the group.

iii) Principle IV.B requires the information to be "prepared, audited and disclosed". Given that not all the information must be audited by an external firm (i.e. press release) it would be better to change the word "audited" with "controlled".

Thank you for taking these remarks into consideration.

IFAC

The International Federation of Accountants (IFAC) welcomes the opportunity to make this submission on the draft revised text of the OECD Principles of Corporate Governance. IFAC has been pleased to participate in the discussion leading to the development of this revision and believes that the principles are an extremely important element of the international financial system. In general, IFAC supports the changes proposed to the original document, and the comments below should be taken in the context of support for the Principles themselves as an element of the Financial Stability Forum's key set of standards as well as support for the periodic revision of those standards.

Having had the opportunity to provide input during the development of this revision, IFAC's comments below are confined to those specific matters which we regard as being of greatest significance. The comments below are presented in the order in which they appear in the document.

Preamble

In the opening paragraph of the preamble, reference is made to the Financial Stability Forum's (FSF) twelve Key Standards for Sound Financial Systems. IFAC shares the view of the FSF that there is benefit in having sound and uniform standards applied internationally. The objective of convergence to common sets of standards is one which IFAC fully supports. IFAC therefore considers that it is appropriate that the OECD emphasize the value to investors and others from having similar standards applied globally. IFAC would wish to have the preamble emphasize more heavily the value derived from the adoption of uniform standards of corporate governance.

I – The Rights of Shareholders and Key Ownership Functions

In respect of I.C.2, IFAC has a reservation about the proposal that "shareholders should have an opportunity to ask questions to the Board and the external auditor" in annual general meetings. It should be made clear that any questions should be only in respect of the audit work carried out and the auditor's report. Also, there is a potential risk that having the auditors available to answer questions will encourage questions which potentially breach the auditor's duty of client confidentiality, which in many jurisdictions is a legal duty.

In relation to I.G, IFAC considers that this principle should be extended by the use of an example to indicate the nature of possible exceptions to the principle that shareholders should be allowed to consult with each other. This matter is discussed in the Annotations to the OECD Principles of Corporate Governance (the Annotations) and we believe that some of these examples are compelling. For this reason, we would want, within principle I.G, explicit examples which would illustrate the limits of the general principle. In particular it should be made clear, within principle I.G, that consultations amongst shareholders should not breach any legal, regulatory or market codes in respect of takeovers.

In relation to V.C, IFAC considers that the second sentence referring to the need to take into account the interest of stakeholders neither follows directly from nor is closely related to the first sentence concerning the need for the Board to apply higher standards. IFAC considers that the second sentence should be attached to principle A under section V. However, to place this sentence after the assertion that the Board members should act in the best interest of the company draws attention to the potential conflict between the interest of the company and the shareholders on the one hand and the interest of stakeholders on the other. Given the preeminence of the obligation to act in the best interest of the company, the second sentence should then read "To the extent that it does not conflict with the best interest of the company and the shareholders, the Board members should take into account the best interests of stakeholders."

II - The Equitable Treatment of Shareholders

IFAC has no comment to make on the principles in II.

III – The Role of Stakeholders in Corporate Governance

IFAC has no comment on this section of the draft revised text.

IV – Disclosure and Transparency

In the opening sentence of this section reference is made to the "timely and accurate disclosure" of information. IFAC recommends that the word "accurate" be replaced by the word "fair". "Accurate" implies a level of precision that is frequently not possible in either financial statements or other information provided to shareholders and other stakeholders. Indeed, accuracy can be at the expense of fairness in some circumstances and IFAC believes that information should be provided in a manner which does not advantage one group of users over another and is, in that sense, "fair".

IFAC also believes that in the Annotations to this section there should be explicit reference to the necessity for all the parties in the supply chain for financial reporting, which includes management and their advisors (including lawyers, banks, and analysts), to have a legal duty to act in the public interest in respect of the provision of financial information. This issue is addressed in the report of the independent task force on Rebuilding Public Confidence in Financial Reporting, a copy of which can be downloaded from http://www.ifac.org/Credibility/ViewPoints_PubDL.php?PubID=00061

In relation to IV.B, IFAC strongly believes that reference should be made to specific sets of standards that, like the OECD Principles, are within the FSF set of twelve key standards. Specifically, the reference to accounting standards should refer to the standards produced by the International Accounting Standards Board, and in respect of audit, the standards produced by the International Auditing and Assurance Standards Board.

Within IV.F, IFAC believes that there should be explicit reference to lawyers and bankers in addition to the references to "analysts, brokers, rating agencies and others." Both these groups can have significant influence on the quality of financial reporting.

V – The Responsibilities of the Board

In the Annotation on page 40, reference is made to the recognized "good practice that there is an independent chair of the board", separate from the chief executive. IFAC believes that there should be a principle added that the function of chairing the board and the function of managing the company should be independent. IFAC believes that this matter is sufficiently significant to warrant its separate identification as a principle, probably best located between the present V.E and V.F.

The discussion of this matter in the Annotation should then relate to this new principle. IFAC's position does not necessarily require that the Chief Executive Officer and Chair positions be occupied by different people, but it does recognize that the Chief Executive Officer needs to be overseen by the Board, and that this function of the Board is inconsistent with the Chief Executive having a significant role in the management of the Board in addition to his/her role in the management of the business. Therefore, if the positions of Chair and Chief Executive are not separate, a senior independent director plus other non-executive Board members might fulfill the role that would otherwise have been carried out by an independent Chair.

Annotations to the OECD Principles of Corporate Governance

IFAC also wishes to raise a small number of more specific points in the annotation section. Within the Annotation to IV.C there is a sentence which states that "Provision of non-audit services by the external auditor to a company can significantly impair their independence…". IFAC considers the appropriate way to address this concern is through the application of the IFAC Code of Ethics for Professional Accountants, which requires the application of a "threats and safeguards" approach to independence issues. Under this approach, endorsed by the independent task force on Rebuilding Public Confidence in Financial Reporting (referred to above), the auditor has an obligation to ensure that, in respect of any potential threat to independence, there is an adequate safeguard.

In relation to the annotation to section V "The Responsibilities of the Board", and specifically in respect of part A in that section, IFAC would argue that, in jurisdictions where Board members are not legally required to act in the best interest of the shareholders, their contracts with the company should require this.

In respect of V.E.1, IFAC would recommend that the reference in the principle to "assigning a sufficient number of non executive Board members" should instead be "assigning a **majority** of non

executive Board members". This then would be qualified by the rest of the sentence which specifies that this requirement relates to those situations where there is a potential for conflict of interest. Where this potential exists, it is difficult to see a number less than a majority being adequate to address the situation.

IFAC also has concerns with the requirement (p.17) that shareholder resolutions approved and within the competence of the shareholders are binding on the Board. While this is not stated as a principle, it is stated in an unequivocal manner and could require the Board members to act in ways they believed to be against the best interest of the company.

IFAC welcomes the opportunity to make this submission and would be pleased to discuss it should you find it helpful to do so.

INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND & WALES (ICAEW)

The Institute of Chartered Accountants in England & Wales is pleased to provide a letter of comment in response to the OECD's proposed text for its revised Principles of Corporate Governance ('the proposed text').

The Institute is the largest individual body of professionally qualified accountants in Europe with over 125,000 members. Individual members work in many sectors in business and the public sector as well as practising as accountants and auditors. We operate under a Royal Charter that reflects our commitment to the public interest and we have been actively involved with corporate governance issues in the UK for over a decade.

The OECD's work is of considerable importance and whilst the preamble on page 2 states that the Principles "are not intended to substitute for ….initiatives to develop more detailed best practice" the Principles are nevertheless influential. As the proposed text of the revised Principles addresses a wide audience (governments and companies) and deals with a complex topic that is influenced by many aspects, including law and market regulation/practice, it is vital that the finalised document is both clear and balanced.

FEE, the European Federation of Accountants, sent you a letter of comment dated 10 February 2004. Overall, we are supportive of their comments and, therefore, in this letter we do not wish to repeat all of their comments. We will concentrate on a few specific matters.

Codes of Corporate Governance

The UK has a relative advantage in that our approach to corporate governance has been evolving for well over decade and the culture and habits that breathe life into our system have matured over that time. Over the period, shareholder activism (particularly amongst institutional shareholders) has increased and we suggest that transparency and accountability are now well developed in the UK. Disclosure is a powerful aid to regulation.

We believe that shareholders, particularly the UK institutions, are well aware of the status and implementation requirements of the Combined Code (the Code). Much of this is due to the 'comply or

explain' approach that forms a vital part not only of the UK's corporate governance framework, but also of frameworks in a number of other countries.

Codes do have the added advantage that they can be updated more easily and in a much more timely manner to take account of changing circumstances than is the case with legislation.

We assume that the OECD is well versed in the UK's comprehensive corporate governance framework, which is primarily comprised of three levels:

1. **Law** such as the Companies Act;

2. **Regulation** such as the Listing Rules of the UK Listing Authority. If quoted companies do not abide by the Listing Rules they risk de-listing. Rules 12.43A of the existing Listing Rules refers to Principles and Provisions that are found in the Code;

3. **The Combined Code on corporate governance.** For UK listed companies, the 2003 Code contains 35 Principles (main and sub-principles) and 48 Provisions (the 'comply or explain' part of the Code).

We note that there is very little reference in the text to the role and place of codes in the corporate governance framework. Where they are mentioned, such as on page 15, the text gives an obvious bias to law and regulation. We suggest that the proposed text should provide a better balance on the issue of codes, and we recommend that this be rectified in the final text of the revised Principles.

Issues related to external auditors

FEE raises a number of important points in relation to external auditors. In particular, we would like to comment on the following:

Annual general meetings (I.C.2)

We do not object to questions to the external auditor from shareholders at the AGM, as long as they are limited to the audit work performed and the external auditor's report. Questions should not go beyond the responsibilities of the auditor. Matters relating to the content of the financial statements should be addressed to the board of directors who are responsible for the preparation of the financial statements.

Non-audit services and external audit rotation (IV.C – page 32)

Independence is one of the fundamental principles that must be observed by the external auditor. This is a key part of our ethical guidance to the UK audit profession. If the external auditor is unable to fully implement adequate safeguards, he should refrain from acting. This approach prohibits relationships and situations, including the provision of non-audit services, which compromise auditors' objectivity.

We consider that the wording in the current text that "… the provision of non-audit services by the external auditor to a company ***can significantly*** (our italics) impair their independence….." is too strong a statement that may be misinterpreted in isolation as suggesting that all non-audit services can lead to significant impairment of independence. There are many services provided by external auditors which have no bearing on their independence and indeed which contribute to the quality of their audit. We suggest that regulators in many countries who have studied the issue have avoided assertions of this type.

We agree with FEE that the wording on page 32 be improved along the lines that they suggest. Our suggested wording is "The provision of non-audit services by the external auditor to a company can pose a

threat to his independence and can only be undertaken if the external auditor puts sufficient safeguards in place to eliminate such a threat, or reduce it to an insignificant level".

On the matter of audit rotation, in the UK we support the requirement to change audit partners every five years. We do not require audit firm rotation. The rotation of key audit partners is covered in the European Commission's Recommendation on Statutory Auditors' Independence and the International Federation of Accountants Code of Ethics. We therefore also strongly suggest deleting the text between brackets and to replace "mandatory rotation of auditors" by "mandatory rotation of key audit partners".

Nomination of board members

Line 1 of Principle V.D.5 on page 37 refers to "an active role for shareholders in the nomination and election of board members". The subsequent part of the paragraph does not amplify what role shareholders should take in the nomination process.

Nomination committees, as part of their procedures, may wish to consult with leading institutional shareholders about the names of proposed individuals. If this is what is meant by the first sentence of the proposed text, then it should be stated as such. We do not believe that it is practicable for shareholders to be more involved in the nomination process unless they themselves wish to be nominated. Self-nomination, and all the requirements related thereto, should fall to be dealt with by company law.

We fully support the involvement of all shareholders in the formal election of board members at annual general meetings.