The Institute for Human Rights and Business (IHRB)\(^1\) welcomes the opportunity to offer comments on the draft OECD Principles of Corporate Governance (the Corporate Governance Principles or the Principles) opened for public comment in November 2014. IHRB is a global centre of excellence and expertise on the relationship between business and internationally proclaimed human rights standards. We work to shape policy, advance practice and strengthen accountability to ensure the activities of companies do not contribute to human rights abuses, and in fact lead to positive outcomes.

IHRB commends the OECD on the initiative to open the draft Corporate Governance Principles for public comment. This was a recommendation we made in our September 2014 submission on the public consultation on the draft OECD Guidelines on Corporate Governance of State-Owned Enterprises (the SOE Guidelines)\(^2\) due to the important links between the Corporate Governance Principles and SOE Guidelines.\(^3\) We would be pleased to respond to any questions and to be involved in further dialogue on this subject.

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\(^1\) See www.IHRB.org
\(^3\) IHRB participated in a discussion organized by TUAC during the June 2014 Global Forum on Responsible Business Conduct focused on the relevance of the UN Guiding Principles on Business and Human Rights to both the Corporate Governance Principles and the SOE Guidelines. TUAC, Roundtable on Corporate Governance at: http://www.tuac.org/en/public/e-docs/00/00/0E/F6/document_doc.phtml
General Comments on the draft OECD Principles of Corporate Governance

We have several brief preliminary comments that are then reinforced in more specific comments below:

- The revision of the Corporate Governance Principles is a good moment to assess whether the Principles are fit for purpose in the 21st Century. It provides an opportunity to set out a vision of the role of companies for the 21st century. That vision has already been expressed in range of other areas of OECD instruments that rightly focus on responsible business conduct, eliminating bribery and corruption, eliminating tax evasion, investing in the green economy and that are relevant to considering the types of markets to be shaped by the Corporate Governance Principles. This vision of corporate governance principles that promote long-term sustainability and that facilitate the continued stability of capital markets is one on which IHRB agrees. The current prevailing model of maximizing shareholder value as the ultimate goal of corporate activities is being increasingly challenged by various constituencies as a model leading to inter alia: short-termism set against the long-term interests of shareholders in the value of the company, declining innovation in search of quicker profits, a lack of long-term commitment and vision from senior management, a race to the bottom in terms of employment conditions, and increasingly aggressive tax planning. Instead, corporate governance principles for the 21st century should reflect an approach of managing companies for the long-term, with a focus on sustainable value for the company, society and the environment. Corporate governance requirements must reflect the complexity of the risk each company poses, but the baseline expectation that all companies of all sizes in all geographies and sectors must operate with respect for those that may be directly affected by their activities and operations should be the cornerstone. Our more specific comments below reinforce this approach but we also suggest that these points should be drawn out in the preface to the Principles to frame their interpretation.

- The revision also provides the opportunity to reinforce policy coherence in the Principles by referencing and building on relevant OECD instruments and wider international standards that are mutually reinforcing. Policy coherence would be enhanced by listing all relevant OECD and international instruments upfront and stating that the Corporate Governance Principles will be interpreted and applied in a manner consistent with these instruments. This would make the OECD’s intent much clearer, and coherent. The Principles contain several welcome references in the annotations to the 2011 OECD Guidelines on Multinational Enterprises which in turn recommend that companies apply good corporate governance practices drawn from the Principles. The new Guidelines on Multinational Enterprises’ chapter on human rights is based on the UN Guiding Principles on Business and Human Rights. The Corporate Governance Principles do not (yet)

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4 As one leading group of international academics from the fields of Company Law, Economics, Accounting, Management and Politics put it: “Ultimately, the combination of drivers behind MSV (maximizing shareholder value) and limited liability leads to systemic moral hazard by companies – shareholders are benefiting from short-term value created by inconsiderate risk taking while being shielded from medium- to long-term losses for the company and society that may result from that same inconsiderate risk taking: a ‘privatisation of profits and socialization of costs’. The Modern Corporation, ‘Statement on Management’, at: http://themoderncorporation.wordpress.com/management-and-msv/

5 The OECD recently carried out an investment policy review in Myanmar. The first chapter focused on Responsible Business Conduct, presenting a robust set of recommendations, suggesting that if it is appropriate to expect responsible business conduct from the Government and companies in Myanmar then there is nowhere in the world that such expectations would not be appropriate.

6 UN Guiding Principles on Business and Human Rights (2011)
include any references to the UN Guiding Principles on Business and Human Rights, in contrast to the welcome (though narrowly constructed) reference in the draft SOE Guidelines. This omission risks confusion in expectations and an uneven playing field between SOEs and private companies, and importantly misses the opportunity to point companies to an internationally accepted standard that provides important guidance on expectations of business to respect human rights. References in appropriate places (as set out in our specific comments below), would usefully supplement the welcomed but more general references to “human rights” in the document and provide further guidance to businesses that may be unfamiliar with recent developments in this field. We assume the final version of the Principles will also include a cross reference to the SOE Guidelines for consistency.

- The Corporate Governance Principles refer consistently to “employees” throughout the draft. Attention to employees as key stakeholders, including as members of the board, is very welcome. However, given the reality of current workforces, employees may make up a shrinking percentage of the workforce in a growing percentage of companies as they move to contracting an increasing number of temporary workers through various types of arrangements. We would therefore suggest using the term “workers” to replace “employees” or “employees and other workers” throughout the Principles (except where explicitly relevant, such as in Chapter VI.G) to reflect this 21st century reality.

- IHRB is also pleased to see that contrary to earlier suggestions on revising the Principles, they apply to all companies, large and small, providing for flexibility to account for different sizes and circumstances while insisting on core corporate governance principles for all. This sends the clear message that all companies need to be concerned about appropriate governance.

- IHRB particularly welcomes a number of the changes already introduced into the draft Principles including:
  - Repeated references to human rights and environmental and social considerations
  - Emphasis on the board and company duties to stakeholders
  - Increased focus on long-term interests
  - Strengthened attention to ethical standards and the internal systems to support this
  - Stronger disclosure requirements and encouraging large companies to embrace concepts such as sustainability and integrated reporting
  - Reporting on beneficial ownership
  - Some references to board diversity
  - The new focus on investment intermediaries and stock exchanges

- The Principles would benefit from relevant cross-referencing - both to make the document more understandable, but also to ensure that the Principles are consistent. There are many cases throughout the document where such cross referencing would be useful but we give just a few examples: between paragraphs 65 &115 and between the various paragraphs covering remuneration.

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Specific Comments on the draft OECD Principles of Corporate Governance

Explanation: We have provided specific comments, including specific drafting suggestion in the order presented in the draft Corporate Governance Principles, referencing the relevant Chapter. The text of the current draft is indicated in italics and additions and deletions are suggested in track changes to indicate specific suggested changes to the draft text.

I. Chapter I: Ensuring the Basis for an Effective Corporate Governance Framework

- **Chapter I, Overarching Statement.** The revision of the overarching aim of this chapter and in particular its reference to “fair” markets is welcome - “corporate governance framework should promote transparent, and efficient and fair markets. It should be consistent with the rule of law and ensure effective supervision and enforcement.” It goes some way in reflecting the evolution in views on the purpose of the corporation and governance roles in the ten years since the 2004 version of the Corporate Governance Principles. However we note that there is no further explanation in the annotation about what “fair” means. This could be linked to Chapter I.A as follows: “The corporate governance framework should be developed with a view to its impact on overall economic performance, market integrity and the incentives it creates for market participants and the promotion of fair markets - markets that are ethical, responsible, transparent and efficient markets.”

- **Chapter I, para. 2:** There is a pattern throughout the Principles that signals that ethics and responsibilities are secondary to economic objectives. We suggest rebalancing this from the start of the document: “Countries seeking to implement . . . . with the objective of maintaining and strengthening its contribution to market integrity, economic performance, and ethical, responsible and transparent conduct of all parties involved.”

- **Chapter I, para 2 & para I.B.4:** There is a reference to “avoiding over-regulation” in these two paragraphs. It may be more appropriate to reference a “smart mix” of regulations and other voluntary measures rather than to imply that regulation is inappropriate.

- **Chapter I.D, para. 10:** IHRB would recommend highlighting the opportunity for States to fill a gap where their national stock exchanges do not yet include environmental, social and governance (ESG) indexes. Reference to this opportunity in the draft would reinforce States’ efforts to encourage responsible investment and the continuous improvement of ESG standards, including with respect to human rights.8

- **Chapter I.E, para. 11:** Private sector institutions that have been delegated public sector tasks should have a specific duty to take into account the public interest. We suggest more concrete wording as follows: “Where certain functions, for example in the context of takeover reviews, have been delegated to non-public bodies, the governance structure of any such delegated institutions should be transparent and encompass have a duty to take into account the public interest”

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I. **Chapter II: The Rights and Responsibilities and Equitable Treatment of Shareholders and Key Ownership Functions**

- **Chapter II:** IHRB supports the strengthening of shareholder rights as a general matter. However, where shareholders are businesses themselves, they also have responsibilities, including under the OECD Guidelines on Multinational Enterprises and under the UN Guiding Principles on Business and Human Rights. This has been addressed under our comments on Chapter III below but could also usefully be referenced in Chapter II, para. 13 or through an additional, dedicated paragraph for the annotation based on other language already in the Principles (such as from paragraphs 2 and 102): “Shareholders should exercise their rights in a responsible manner, to support ethical, responsible and transparent corporate governance practices and operations, with due regard of, and to deal fairly with other stakeholder interests, including those of employees, creditors, customers, suppliers and local communities. Observance of environmental, social and human rights standards is relevant in this context. Shareholders that are businesses should take due account of their responsibilities *inter alia* under the OECD Guidelines on Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.”

- **Chapter II.F:** IHRB agrees that without appropriate checks and balances, there is a possibility of companies abusing their abilities to form partnerships and related companies in order to transfer or divest assets. IHRB would request consideration of an appropriate reference to the Action Plan on Base Erosion and Profit Shifting (BEPS) in the draft Principles to reinforce policy coherence across OECD initiatives. Addressing illegal tax planning and practices is a relevant consideration for the Principles which are setting the tone and requirements for “ethical, responsible and transparent corporate governance practices” (Chapter I, para. 2).

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5 These and the additional recent initiatives to address illicit financial flows, such as the ongoing efforts of the OECD, G20 and G8; and the 2014 Financial Action Task Force (FATF) guidance on transparency and beneficial ownership has become a recent focus of human rights and global integrity groups, recognizing that the vast sums lost through illegal flows are then not available to governments for use to support legitimate development objectives. See for example: [http://www.gfintegrity.org/issue/illicit-financial-flows/](http://www.gfintegrity.org/issue/illicit-financial-flows/)
III. Chapter III: Institutional Investors, Stock Markets, and Other Intermediaries

- **Chapter III.A, para 45:** The focus on the numerous intermediaries making up complex investment chains between companies and their ultimate beneficiaries is welcome (para 42). The complexity of investment chains reinforces the need for explicit reference to the responsibility to respect human rights under the UN Guiding Principles on Business and Human Rights by all companies, including those in the investment chain, in order to appropriately respond to the economic realities that companies may be linked to human rights impacts via long chains of business relationships. We suggest that the following sentence is added to this annotation paragraph 45: “While this principle does not require institutional investors to vote their shares, it calls for disclosure of how they exercise their ownership rights and responsibilities under the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights with due consideration to cost effectiveness and their responsibilities”.

- **Chapter III.A, para 45:** IHRB would request cross-references to the on-going work with respect to the application of the OECD Guidelines on Multinational Enterprises to the financial sector, including to investors, that addresses the responsibility of financial intermediaries. This would strengthen the policy coherence among different areas of relevant OECD work and help clarify for companies how these different work streams fit together.

- **Chapter III.A, para 44/45:** This Chapter refers to institutional investors and asset managers acting in a fiduciary capacity. There is increasing evidence that taking environmental, social and corporate governance considerations into account should be a part of fiduciary duty. As the Corporate Governance Principles are promoting responsible shareholder practice, we suggest that institutional investors should be encouraged to disclose their policy on the extent (if at all) to which social, environmental or ethical considerations are taken into account when making investment decisions.

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11 See: Scope and application of ‘business relationships’ in the financial sector under the OECD Guidelines for Multinational Enterprises; Due diligence in the financial sector: Adverse impacts directly linked to financial sector operations, products or services by a business relationship; Expert letters and statements on the application of the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights in the context of the financial sector

12 As noted in a letter from NEI Investment to the UN Working Group on Business and Human Rights in 2011: “Traditionally, the fiduciary duty of investment institutions has been interpreted as an obligation to focus on the immediate financial interests of their beneficiaries. More recently, with rapid growth in the number of institutions adopting responsible investment principles, there is increasing acceptance of the position that fiduciaries can and should take into account all factors that may be material to the performance of assets under their control – including long-term environmental, social and governance (ESG) factors. The UN Environment Program Finance Initiative (UNEP-FI) and the UN Principles for Responsible Investment (PRI) have played an important role in mainstreaming these ideas. The Freshfields study, conducted under the auspices of UNEP-FI, is widely regarded as the most authoritative argument in support of the legality of considering ESG issues in investment decisions.” See also the 2009 follow-up to the Freshfields study and the recent summary from PRI, UNEP Financial Initiative and the Global Compact on changes in the interpretation of fiduciary duty.

13 Note that this is already required in the UK, see: Fiduciary Duties of Investment Intermediaries (2014) Law Com No 350 paras 6.91 to 6.98. The International Corporate Governance Network Global Governance Principles 10.4
Chapter IV: The Role of Stakeholders in Corporate Governance

- **Chapter IV, para 60:** There is a reference to “teamwork” in the second sentence. This seems misplaced as few customers would consider themselves as part of the corporate team. The overall relationship that is described here can be more appropriately called a “value chain”.

- **Chapter IV.A, para 61:** We recommend an addition as follows to be consistent with the rest of the Chapter: “The rights of stakeholders are often usually established by law (e.g. labour, business, commercial and insolvency laws), or by contractual relations, or mutual agreements—that companies must respect, comply with or by international agreements that set expectation for company adherence.” Given the close link between the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, it would be important to draw companies and regulators attention to the more detailed underlying international standard for clarification. In addition, as human rights are referred to repeatedly in the document (which is most welcome), including a reference to this now globally accepted set of principles on business and human rights provides a firm reference point that is globally applicable. “Human rights” can otherwise appear to be a quite vague term for regulators and businesses who are not aware of the status and detailed nature of existing international standards. Finally, IHRB would recommend referring to “good” rather than “best” practice in relation to the due diligence required to implement and verify companies’ commitments to respect the rights of stakeholders. We note that this is the only reference to “best” practice throughout the draft Corporate Governance Principles, with otherwise numerous references to “good” practice on various issues. This sends the message that somehow due diligence in relation to stakeholder commitments and responsibilities is not only optional but also unobtainable for any company not considered best in class. IHRB would strongly urge this message to be reconsidered. The baseline expectation to respect the rights of those potentially affected by a company reflects the scale and complexity of the company’s size, sector, operational context, ownership and structure as well as severity of its human rights risks. Sending any message other than affirmation of this baseline expectation for all companies, not just the “best”, undermines the OECD’s leadership to date in the field of responsible business standards and practice. “Best-Good practice calls for implementation of internationally recognised agreements and verification through due diligence procedures, notably as provided for in the OECD Guidelines for Multinational Enterprises and its general principles on due diligence and the UN Guiding Principles on Business and Human Rights and its more detailed provisions on due diligence.”

- **Chapter IV.E:** Companies and regulators increasingly recognise the importance of maintaining an open dialogue between the company and its stakeholders. This section currently seems to limit that conversation to illegal or unethical practices only. Stakeholders may well have other serious concerns, particularly where the company creates serious risks for stakeholders that might be useful information for the board in considering its duties for risk management set out under Chapter VI.D.1. This section might therefore usefully broaden the language in paragraph E: “Stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practices or other serious concerns...”

c) note that institutional investors as asset owners have responsibility to “effectively integrate relevant environmental, social and governance factors into investment decision-making and on-going management.”
to the board and to the competent public authorities and their rights should not be compromised for doing this.”

• **Chapter IV.A, para 65**: IHRB welcomes this provision and attention paid to the protection of those bringing the complaints. The OECD Guidelines on Multinational Enterprises and the UN Guiding Principles refer to operational-level grievance mechanisms for workers and external stakeholders. Adding this reference would reinforce the message that it is in a company’s interest to proactively manage its risks and impacts, rather than wait for grievances to escalate: “Some companies have established an operational-level grievance mechanism (in line with the OECD Guidelines on Multinational Enterprises or the UN Guiding Principles on Business and Human Rights) or ombudsman to deal with complaints.”

• **Chapter IV.F, para 66**: Creditors include employees / workers who have rights to wages, as well as medical insurance, pension, and severance payments, depending on the extent of local law. This should be highlighted in the annotations. In addition, policy makers and regulators should ensure that their priority to payments in the event of insolvency or bankruptcy is explicitly mentioned in applicable laws and regulations.

IV. **Chapter V: Disclosure and Transparency**

• **Chapter Chapter V: Disclosure and Transparency**: As noted in our further comments below, what is considered “material” continues to evolve. As these Principles are intended to set guidance for corporate governance for the 21st Century, they should reflect and anticipate those changes in the Principles. We therefore strongly suggest the following changes in wording: “The corporate governance framework should ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, financial and non-financial performance, ownership, and governance of the company.”

• **Chapter V, para 72**: IHRB would again recommend explicit reference to the UN Guiding Principles as relevant to guiding disclosure aimed at improving public understanding of the structure and activities of enterprises, corporate policies and performance with respect to environmental and ethical standards and with the communities with which they operate. This paragraph gives the impression that disclosure of this type of information is relevant only to improving “public understanding” rather than conveying the sense that this information may also be material information for shareholders. It is increasingly acknowledged that the significance of human rights information to investors and the public has evolved to a level that can require its disclosure as material information, depending on the circumstances.14 We suggest the following additions: “Disclosure of also helps improve public understanding of the structure and activities of enterprises, corporate policies and performance with respect to environmental, social, human rights and other ethical standards, and companies’ relationships with the communities in which they operate may be required because the information is material information, and may also help improve public understanding of the structure and

activities of enterprises. The OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights are relevant in this context.”

- **Chapter V.A.2, para 76:** IHRB welcomes the addition of human rights to this paragraph. We would however recommend explicit reference be added to disclosure not just of “policies” but also “risks and impacts” or “performance” in line with the wording of paragraph 72 (which refers to corporate policies and performance) as follows: “In addition to their commercial objectives, companies are encouraged to disclose policies and risks and impacts/performance relating to business ethics, the environment, human rights, including where relevant within their supply chain, and other public policy commitments.” We note that the recent changes to EU law on reporting require information on specific risks to provide a more holistic picture of the risks created by and facing a company.  
  This paragraph, like paragraph 72, is written in a way that suggests that this type of information is relevant only as background information but is not relevant to informing materiality considerations.

- **Chapter V.A.2, para 77:** We welcome the reference to integrated reporting as we note that such integrated reporting can provide a more comprehensive and holistic picture of a company. We note that the new ICGN Global Governance Principles from the International Corporate Governance Network call for integrated reporting.

- **Chapter V, para 86:** This paragraph should reflect and cross-reference paragraph 76 which already acknowledges that this information is important for investors and other users of information. It is also important because these social risks are also foreseeable risk factors in many industries and therefore should be included. “Users of financial information and market participants need information on reasonably foreseeable material risks that may include: … and risks related to business ethics, the environment, human rights (including labour rights), including where relevant within their supply chain and to the environment.” We note that in the latest guidance on reporting in the UK, “Disclosures about the environment, employees, social, community and human rights issues are required when material. There is also a requirement to include disclosures on gender diversity.”

15 Directive 2014/95 amending Directive 2013/34/EU as Regards Disclosure Of Non-Financial And Diversity Information By Certain Large Undertakings And Groups refers to in Article 1: “Large undertakings ... shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking’s development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including:
(a) a brief description of the undertaking's business model; (b) a description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented; (c) the outcome of those policies; (d) the principal risks related to those matters linked to the undertaking’s operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks; (e) non-financial key performance indicators relevant to the particular business. Where the undertaking does not pursue policies in relation to one or more of those matters, the non-financial statement shall provide a clear and reasoned explanation for not doing so.”

Chapter V.B, para 92: We question why the statement “The Principles support the development of high quality internationally recognised standards” was taken out of the Principles, as this is an important indicator. We also question why there is a specific reference added to just “financial” reporting when the heading in B importantly adds a reference to “non-financial reporting.” This paragraph should also reference emerging standards around non-financial reporting.18

V. Chapter VI: The Responsibilities of the Board

Chapter VI, Overarching Statement, Chapter A & Chapter C, paras 102 & 103: There are important inconsistencies between the Overarching Statement and paragraph 102, as well as between the statements in Chapter A and Chapter C with respect to the duty owed to stakeholders. Paragraph 102 implies that the board has accountability towards stakeholders, but neither Statement A nor paragraph 103 reflect this fully. Statement C notes that the board must take account of the interest of stakeholders, but none of the paragraphs address responsibilities towards stakeholders in terms of statutory duties, but rather seem to rely solely on a reference to ethical standards. Failing to signal this growing trend of addressing stakeholder interest as a part and parcel of statutory duty or fiduciary duty is perhaps the greatest challenge of the current draft of the Principles. We strongly suggest that these important shifts in director duties to stakeholders should be signaled in the Principles, accompanied by stronger alignment between Chapters IV and VI. For example, the 2006 UK Companies Act places a statutory duty on directors to have due regard to the likely consequences of decisions on employees, impact on the community and the environment, explicitly incorporating an enlightened shareholder value approach.19 Under a stakeholder approach, such as practiced in the Netherlands, directors are required to take into account the interests of a range of stakeholders.20 The conclusion from a 2010 survey of corporate and securities law in 39 jurisdictions conducted for the UN Special Representative of the Secretary General on Business & Human Rights noted the following three general trends: (i) directors are generally permitted to consider impacts on non-shareholders, including human rights impacts provided they are acting in the company’s best interests and in a growing number of jurisdictions, directors are explicitly or implicitly required to consider such impacts at an oversight level in order to act with the expected care and due diligence especially where failing to do so might expose the company to reputation, legal or other risk; (ii) a prudent director would do well to consider and act on potential human rights impacts, in accordance with their oversight role; and (iii) there is increasing need for directors to balance company’s short-term and long-term interests in considering impacts on non-shareholders.21 The recent International Corporate Governance Network Global Governance Principles state in the very first principle under “duties” that boards should act in the best interest of the company while having regard to relevant stakeholders.22 Numerous other recent examples of such explicit directors’ duties concerning the

22 International Corporate Governance Network, “ICGN Global Governance Principles” (2014), Chapter 1.0 Responsibilities, 1.1 Duties.
impacts of their company on employees and external stakeholders have also been mandated, for example in the Philippines, Singapore, Indonesia, India, and Sweden, amongst others.23

- **Chapter VI, para. 101:** There is some inconsistency in the language in this important Chapter. Other parts of the Chapter referring to the board acting in the longer term interest of the company is missing, crucially, from this paragraph. This paragraph is also missing a reference to “human rights” which has been helpfully added at other relevant points in the text; it should be added here to be consistent. It could also be improved by adding “Another important board responsibility is to oversee systems designed to ensure that the corporation obeys applicable laws, including tax, competition, labour, environmental, equal opportunity, health and safety laws and respects the rights of stakeholders.”

- **Chapter VI, para. 102:** We suggest this addition for consistency: “Observance of environmental, and social and human rights standards is relevant in this context.”

- **Chapter VI.A., para. 104:** The additional language “or to an obligation to pursue aggressive tax avoidance” is potentially helpful but confusing. We are assuming that it means to read that the duty of care does not extend to an obligation to pursue aggressive tax avoidance. The sentence should be reworded to make this clear.

- **Chapter VI.A, para. 106:** IHRB welcomes the reference to the board duty to apply high ethical standards, to this being in the long-term interest of the company and to the OECD Guidelines on Multinational Enterprises as the good practice standard for applying “high ethical standards”. However, there is a disparity in language compared to the draft SOE Guidelines, which refer to the UN Guiding Principles on Business and Human Rights as a relevant reference point for ethical standards (para. 148), thus creating a disparity between the current drafts. IHRB would recommend explicit reference here to the UN Guiding Principles or, at a minimum, express language regarding human rights as a core part of ethical standards applied by Board to identify what human rights risks the company may cause, contribute or be directly linked to and how they should be managed.

- **Chapter VI.A, para. 107** last sentence: It is not clear what is being referred to as “fundamental” – is it ethical conduct or compliance with law? It should be both.

- **Chapter VI.A, para. 107 last sentence:** It is not clear what is being referred to as “fundamental” – is it ethical conduct or compliance with law? It should be both.

- **Chapter VI.A, para. 106:** We are surprised not to see here a reference to the OECD Anti-Bribery Convention which is referred to later in para. 117. We would welcome an introduction of the same language here that appears in para. 104 to “aggressive tax avoidance.” It would also be useful to reference the UN Guiding Principles on Business and Human Rights here as well. Note also that the correct reference is to the “ILO Declaration on Fundamental Principles and Rights at Work”24 - not the ILO Declaration on Fundamental Labour Rights.

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company is “willing to accept in pursuit of its goals.” That is an important part of risk management but not the complete picture. Many of the ethical standards, as well as relevant laws and regulations, that the board should oversee (according to Chapter VI.C) require a company to identify and manage the risks that the company creates and imposes on others - to the environment, to society, to human rights, through bribery and corruption. This is clearly set out in the due diligence provisions of the OECD Guidelines on Multinational Enterprises. Thus we would strongly suggest a revision as follows: “An area of increasing importance for boards and which is closely related to corporate strategy is risk policy. Such policy will involve specifying the types and degree of risk that a company is willing to accept in pursuit of its goals and how it will manage the risks it creates through its operations and relationships (such as those identified in para. 86). It is thus a crucial guideline for management that must manage risks to meet the company’s desired risk profile.”

This might usefully include a cross-reference to paragraph 61 and the due diligence process companies should undertake to understand their impacts.

• Chapter VI.D.1: In addition, while the draft Principles affirm that a key function of the board is to review and guide risk management “policies and procedures”, no mention is actually made to risk management “procedures” in the elaborating paragraph immediately below (para 108). The emphasis is exclusively given to risk policies, which fails to reinforce the need for continuous and systematic implementation of those policy objectives through procedures and processes, which should be regularly reviewed to ensure effective corporate performance. This is in contrast to the new and strong emphasis given later on to the importance of robust internal control systems in paragraphs 116-117, which are fundamentally interconnected with risk management policies and procedures and add a welcome new reference to non-financial risk and human rights in that context.

• Chapter VI.D.1 (or VI.E.2): The Corporate Governance Principles should also make supervision of the management of ethical standards and the risks of breach the responsibility of a Board member, together with the other kinds of risks identified in the OECD Guidelines on Multinational Enterprises. Boards are generally permitted to consider impacts on non-shareholders, including human rights impacts. Moreover, in a growing number of jurisdictions, board members are explicitly or implicitly required to consider such impacts at an oversight level in order to act with the expected care and due diligence, especially where failing to do so might expose the company to reputation, legal or other risk. Human rights is increasingly being recognized as a legitimate consideration in corporate risk management, whether through new legislation, law suits, advocacy campaigns targeting corporate reputations, listing requirements, investor pressure, and reporting requirements.

• Chapter VI.D, para. 111: IHRB would recommend that the company’s human rights and environmental performance are appropriately reflected as key measurable standards

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25 See: Study prepared for the European Commission DG Markt by: Carsten Gerner-Beuerle, Philipp Paech and Edmund Philipp Schuster (2013) (Department of Law, London School of Economics) “Study on Directors’ Duties and Liability,” p. 102 “Some legal systems provide more generally that directors are responsible for the establishment of effective risk management and control systems, which include sound accounting structures and, depending on the size of the business and the industry, additional operational and compliance controls. This latter aspect of the duty of care has become particularly relevant in financial institutions, where the financial crisis exposed significant risk management failures in some institutions.”

included in remuneration policies for board members and key executives. This would make it consistent with the same suggestions made in para. 117 which states “To be effective, the incentive structure of the business needs to be aligned with its ethical and professional standards so that adherence to these values is rewarded and breaches of law are met with dissuasive consequences or penalties”.

- **Chapter VI.D, para. 113**: IHRB would recommend explicit reference be made to diversity (gender, ethnic, disability and other non-discrimination considerations) regarding board nomination considerations. The sentence “There are increasing calls for open search processes extending to a broad range of people” is vague and should be made more explicit. Contrast para 130 which is explicit about gender diversity. Overall the Principles should encourage diversity on the board to promote gender balance and to reflect its diverse stakeholder groups (not only for reasons of non-discrimination).

- **Chapter VI.D, para. 117**: IHRB would recommend reiterating the relevance of the OECD Guidelines on Multinational Enterprises and UN Guiding Principles on Business and Human Rights as “relevant international agreements” pertinent to ensuring the effectiveness of internal controls, ethics and compliance programmes. IHRB would recommend the use of “business relationships” rather than “third parties” in relation to whom compliance programmes should be extended. This change coupled with the added words “inter alia” would appropriately reflect the vast array of business relationship structures that companies can participate in and from which are exposed to risk.27

- **Chapter VI.E, para. 130**: While IHRB welcomes measures on gender targets, we believe this should refer to other basis for diversity: race and ethnic origin at a minimum.28

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27 As IHRB notes in a recent report: “A defining characteristic of 21st century globalisation is the dramatic growth and increasing complexity of business relationships, including those that cross borders. This web of commercial transactions affects companies on every scale, and means that businesses have a direct or indirect relationship with hundreds and sometimes tens of thousands of enterprises that are not under their direct control or ownership. A single product, service or project can involve numerous companies in a web of multilateral business ties.” IHRB, “State of Play: The Corporate Responsibility to Respect Human Rights in Business Relationships” (2013), at: [http://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf](http://www.ihrb.org/pdf/state-of-play/State-of-Play-Full-Report.pdf)

28 See for example, the revised UK Corporate Governance Code (2014) which puts emphasis on diversity among the board, including gender and race: “In addition the FRC (Financial Reporting Council) has emphasised that key to the effective functioning of any board is a dialogue which is both constructive and challenging. One of the ways in which such debate can be encouraged is through having sufficient diversity on the board, including gender and race.” [https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2014/September/FRC-updates-UK-Corporate-Governance-Code.aspx](https://www.frc.org.uk/News-and-Events/FRC-Press/Press/2014/September/FRC-updates-UK-Corporate-Governance-Code.aspx)