



May 15, 2014

Director General, Marketplace Framework Policy Branch  
Industry Canada  
235 Queen Street, 10<sup>th</sup> Floor  
Ottawa, Ontario K1A 0H5

Sent by email to [cbca-consultations-lcsa@ic.gc.ca](mailto:cbca-consultations-lcsa@ic.gc.ca)

**Re: Consultation on the Canada Business Corporations Act**

Dear Director General:

We are writing in response to Industry Canada's request for comments regarding the Canada Business Corporations Act (CBCA).<sup>1</sup>

With approximately C\$6 billion in assets under management, NEI Investments' approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will build long-term sustainable value for all stakeholders and provide higher risk-adjusted returns to shareholders.

In this submission we explain our perspective on various issues raised in the consultation document, with the understanding that certain issues may best be addressed through CBCA, while others may be dealt with more effectively through securities regulation or stock exchange listing requirements. Given the jurisdictional complexities, Industry Canada should work with provinces, securities regulators and the Toronto Stock Exchange (TSX) to ensure that issues are handled consistently and through the most appropriate legislative or regulatory channels.

NEI Investments is a stakeholder in many large publicly-traded companies incorporated under CBCA. We would like to see the recommendations below applied to those companies. We recognize, however, that some of these recommendations are specifically targeted at the protection or rights of shareholders, and may therefore be less relevant or appropriate for the smaller or privately-held companies that constitute the majority of companies incorporated under CBCA. It is reasonable that in some areas expectations for a large publicly-traded company should be higher, because it has a greater impact on the markets. At the same time, it is important to ensure that requirements for smaller publicly-traded companies do not become a barrier to initial listing. It should also be taken into consideration that larger privately-held companies, and companies operating in Canada but listed on non-Canadian exchanges, may also have significant impacts for stakeholders.

---

<sup>1</sup> [http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h\\_cl00867.html](http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_cl00867.html)

NEI INVESTMENTS

T: 604.633.0615 F: 604.633.0619  
NEIinvestments.com Toll Free: 1.888.809.3333  
505 - 1111 West Georgia Street Vancouver, British Columbia V6E 4M3



NEI Investments is a member of the Canadian Coalition for Good Governance (CCGG), and offers the following comments in addition to points raised in CCGG's submission.<sup>2</sup>

## Key Recommendations

Our key recommendations can be summarized as follows:

- We believe the purpose of the corporation and the role of directors should be articulated more clearly in CBCA, focusing on the imperative of creating long-term sustainable value, and based on stakeholder theory.
- We are concerned that a special incorporation structure for “socially responsible enterprises” under CBCA could undermine the principle that all companies must be socially and environmentally responsible.
- CBCA should address specifically the corporate “responsibility to respect” human rights set out in the 2011 UN Guiding Principles on Business and Human Rights.
- The outcome of shareholder votes should not only be disclosed, but also presented in a fair and consistent way that gives an appropriate interpretation to votes for and against, and to abstentions. Where multiple share classes exist, the votes of shareholders in different classes should be disaggregated to expose any differences in perspective.
- Based on precedents in Canada and other jurisdictions, and in coordination with CSA and TSX, we see scope for some aspects of ESG disclosure to be mandated under CBCA, at least for larger companies.

## Comments on Discussion Paper topics

### Executive Compensation (I)

We believe the advisory vote on executive compensation should be mandatory for larger publicly-traded companies, and that CBCA may be an appropriate vehicle for this.

Compensation is one driver for corporate behaviour: inevitably, the attitude of management and employees toward risk will be influenced by the way they are rewarded. Appropriate compensation frameworks incentivize effective risk management and help to build long-term sustainable value. We believe that mandating the advisory vote on executive compensation – “Say on Pay” – would be in the interests of shareholders. A Say on Pay vote helps to focus the attention of investors on the quality of compensation disclosure and practice. It also gives shareholders a targeted way to provide feedback to companies on the crucial issues of compensation policy and practice. Without it, we can only express dissent by withholding support from one or more of the directors who serve on the compensation committee, or from the board as a whole. This is problematic if we view the directors concerned as otherwise valuable to the board. We prefer a mechanism that allows us to send a direct message about the specific topic of executive compensation. As most boards make compensation decisions annually, we believe that Say on Pay votes should also be conducted annually.

Where Canadian companies are offering Say on Pay on a voluntary basis, compensation votes have not proven to be disruptive, and we have observed significant progress in compensation disclosure and practice at these companies, although there is still much room for improvement. As a result, our 2014 Proxy Voting Guidelines now include a guideline to withhold our vote for the incumbent Chair of the Board at companies that do not offer shareholders “Say on Pay”.

---

<sup>2</sup> Canadian Coalition for Good Governance (2014). Re: Industry Canada Consultation on the Canada Business Corporations Act [http://admin.yourwebdepartment.com/site/ccgg/assets/pdf/Submission to Industry Canada May 14, 2014 re ~onsultation Paper on the CBCA Final signed.pdf](http://admin.yourwebdepartment.com/site/ccgg/assets/pdf/Submission_to_Industry_Canada_May_14,_2014_re_~onsultation_Paper_on_the_CBCA_Final_signed.pdf)



Internationally, a number of jurisdictions have mandated some form of Say on Pay, including the U.S., the U.K. and Australia. We are concerned that Canada may be seen as lagging on this issue. Although many leading companies in Canada have adopted the advisory vote on a voluntary basis over the past five years, the trend of voluntary uptake may now be slowing.<sup>3</sup> Disclosure requirements are not a substitute for giving shareholders the opportunity to vote on compensation. As the advisory vote is an agenda item and proposal at the Annual General Meeting (AGM), it seems appropriate to address this issue through CBCA, which sets out procedure on the conduct of the AGM and specific items that should be submitted to a shareholder vote.

We note that the question of mandating the advisory vote on executive compensation was raised by the Ontario Securities Commission (OSC) during its consultations on shareholder democracy in 2011. Although OSC has not followed up as yet, we emphasize the need for coordination on this topic with securities regulators and with TSX.

## **Shareholder Rights (II)**

### *A. Voting*

#### *Voting procedure and disclosure*

We believe it is appropriate to address voting procedure and disclosure issues through CBCA, which sets out procedure on conduct of the AGM. We note that TSX has already implemented requirements on director vote results disclosure.

We support mandatory voting by ballot and comprehensive disclosure of results. Prompt and accurate vote result disclosure should be encouraged at all public companies, no matter how small. We would also support additional requirements to ensure that the outcome of votes is not only disclosed, but presented in a fair and consistent way. It is our understanding that the way in which different types of votes (“for”, “against” and “abstain”) are added together to determine the outcome of the vote is set out in bylaws, and may vary from company to company. Several shareholder proposals have been filed in the U.S. this season at companies perceived to have inconsistent or unfair practices in this area. We would prefer to see consistency across all companies. Further consultation may be required to establish a common framework for representation of results in Canada, but our current position is that non-votes should not be included in the denominator nor considered as votes in support of management, and “abstain” votes on shareholder proposals should be reported separately, and not added to the total of votes either “for” or “against” a proposal. When we abstain on a shareholder proposal, generally it is because we consider the topic of the proposal to be important, but in our opinion neither the solution put forward by the proponent nor the rebuttal by the company is fully convincing. In this situation, our abstention is a considered and deliberate act, and we explain our viewpoint in our proxy voting disclosure.

Where multiple classes of shares exist with different voting rights, we recommend a requirement for separate disclosure of the vote results for each class of shares. This would make transparent any divergence between the perspectives of shareholders in each class.

#### *Director elections*

CBCA should be updated to reflect new TSX requirements for individual director elections on an annual basis, based on a majority voting policy. We are not aware of any negative impacts of the TSX requirements. We also believe these actions will enhance the image of Canadian markets internationally: in March 2011 we co-led a global group of investors representing

---

<sup>3</sup> Blakes (2014). Say on Pay: Is the Canadian Future Voluntary? <http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1914>



U.S. \$832 billion in assets under management in writing to the Ontario Securities Commission, calling for requirements on individual director elections and majority voting.<sup>4</sup>

Slates obstruct shareholders from voting against individual directors for performance issues such as poor board attendance or poor decision-making on a specific board committee. The only option in such cases is to vote against the whole board, or conduct a costly proxy fight. Shareholder interests are best served by ending slate voting and mandating that voting on director candidates should be conducted on an individual basis. Under the plurality voting system, whereby “withhold” votes are discounted, directors can be elected without receiving a majority of shareholder votes – indeed, a single vote in favour of a director nominee is all that is required for election. Where director nominees are also shareholders, they can be elected on the basis of their own votes. Once again, this prevents shareholders from voting against specific under-performing directors. We believe shareholder interests are best served by mandating a majority voting system in which director nominees require the support of the majority of votes cast to be elected.

#### Over-voting and empty voting

The Canadian Securities Administrators (CSA) have been exploring the problems of over-voting and empty voting, both of which undermine the integrity of the proxy voting system.<sup>5</sup> Any action in the CBCA context should be coordinated with CSA and other stakeholders.

We believe reforming lending practices could contribute to addressing these issues. NEI Investments has a policy prohibiting securities lending, as this can affect our ability to vote on important issues on behalf of our unit holders, as well as diminishing the value of our holdings by the very short selling that we would be enabling through share lending. While a market-wide ban on securities lending may be problematic because of broader liquidity concerns, we believe regulators should consider restricting the process of recalling shares by the lender after the record date, unless it is for trading purposes only, to ensure that voting rights are retained by the possessing entity (either the lender or borrower) at record date to avoid over-voting. One alternative solution may be to move the record date closer to the meeting date, which is already the case in some jurisdictions. As this would reduce the volume of such recalls, it may nullify most concerns over trading liquidity and reduce over-voting and empty voting, although it would be important to ensure that proxy advisors are still able to provide end-users with research in a timely manner.

We are also concerned at the possibility that, in over-voting situations, shareholders who voted closest to the “cut-off” deadline may be disadvantaged if the last votes to arrive are simply discarded.

To encourage a transition to improved transparency, which may minimize over-voting related to share lending, issuers could be required to disclose in post-meeting voting results the level of over-voting that occurred and the methodology used to determine the final vote tally. If this transparency were provided to investors, confidence in the system would increase as over-voting rates fell over time, eventually eliminating the need to disclose such information.

---

<sup>4</sup> NEI Investments/SHARE (2011). Staff Notice 54-701 Regulatory Developments Regarding Shareholder Democracy Issues [http://www.neiinvestments.com/neifiles/PDFs/5.5%20Public%20Policy%20and%20Standards/UNPRI%20Signatory%20submission%20to%20OSC\\_Staff%20Notice%2054-701.pdf](http://www.neiinvestments.com/neifiles/PDFs/5.5%20Public%20Policy%20and%20Standards/UNPRI%20Signatory%20submission%20to%20OSC_Staff%20Notice%2054-701.pdf)

<sup>5</sup> Canadian Securities Administrators (2013). Consultation Paper 54-401 Review of the Proxy Voting Infrastructure. [http://www.osc.gov.on.ca/en/NewsEvents\\_nr\\_20130815\\_csa-proxy-voting.htm](http://www.osc.gov.on.ca/en/NewsEvents_nr_20130815_csa-proxy-voting.htm)



## *B. Shareholder and Board Communication*

### *Electronic meetings*

We welcome the efforts by many issuers to provide the opportunity for more shareholders to participate in the AGM through electronic means such as webcasts. However, we do not believe companies should be permitted to limit shareholder meetings to an electronic format, as this reduces the opportunity for shareholders to interact and communicate directly with directors and management.

### *Communication with beneficial owners*

In earlier submissions to securities regulators, we have expressed concern that objecting beneficial owner (OBO) anonymity presents an obstacle to the transparency that should be a key feature of a well-functioning proxy voting system, as well as to investors exercising their full rights and responsibilities as stakeholders in public companies. In jurisdictions other than the U.S. and Canada, issuers are permitted to communicate directly with all their shareholders. We believe that removal of OBO status would promote improved reconciliation of ownership by issuers. At the very least, OBO status could be removed after the record date to facilitate reconciliation. At the same time, provision should be made to ensure that those who prefer to vote electronically and minimize receipt of paper documentation are able to do so. NEI Investments has OBO status primarily to facilitate electronic voting and to avoid receiving unnecessary documents, rather than because of a desire for anonymity. From a corporate engagement perspective, we would prefer increased transparency for issuers seeking to ascertain if we hold a position in the company. On numerous occasions issuers have told us that they cannot verify our holdings at their end of the system, which can be an obstacle to dialogue.

### *Shareholder proposals*

Occasionally, we file shareholder proposals to advance our corporate engagement goals. We have a strong preference for dialogue. When company is not willing to engage in dialogue, or we have a difference of opinion that cannot be resolved, we may file a shareholder proposal to establish the views of other investors. For us, this is not the first choice. Nevertheless, we regard the right to file a shareholder proposal as a fundamental tenet of shareholder democracy.

It would simplify matters if the deadline for submitting a shareholder proposal under CBCA could be harmonized with the provincial approach, referencing the date of the last AGM. Consideration could be given to harmonizing the permitted number of words allowed in a shareholder proposal across the various federal and provincial acts providing for incorporation of companies. It would be also be appropriate to ensure that proponents have a reasonable length of time to present proposals at the AGM. This could take the form of a minimum time that must be offered, and a maximum time after which the Chair can intervene to end the presentation. As a proponent, we strive to ensure that our presentation is completed within five minutes, even if more time has been allowed by the Chair, as a courtesy to the company and other shareholders.

## *C. Board Accountability*

### *The purpose of the corporation and the role of directors*

We believe the purpose of the corporation and the role of directors should be articulated more clearly in CBCA, focusing on the imperative of creating long-term sustainable value for stakeholders, including shareholders.

It is a widespread belief that the main purpose and obligation of a publicly-traded company, and by extension the key duty of its directors, is to benefit shareholders by maximizing the share price. This “shareholder primacy” perspective has been the

dominant theory of the firm for several decades. While shareholder primacy drives much investment thinking, its legal foundations are weak at best.

Stakeholder theory holds that the purpose of the corporation is to create value for all its stakeholders. It has found support in law, management theory and from many people who actually run companies. Taking the long view and considering the interests of a broad set of potential beneficiaries can reduce risks, lower costs and allow exploitation of opportunities that contribute to long-term value.<sup>6</sup>

Section 122 (1) of CBCA states: *“Every director and officer of a corporation in exercising their powers and discharging their duties shall (a) act honestly and in good faith with a view to the best interests of the corporation; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.”*<sup>7</sup> CBCA stresses the importance of the interests of security holders, but nowhere does it state that these interests are to be placed above all others. In *Peoples Department Stores Inc. (Trustee of) v. Wise*, the Supreme Court of Canada ruled: *“[I]t is clear that the phrase the ‘best interests of the corporation’ should be read not simply as the ‘best interests of the shareholders’... We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments, and the environment.”*<sup>8</sup> In *BCE Inc. v. 1976 Debentureholders*, the Supreme Court of Canada reiterated that the interests of stakeholders beyond shareholders might be taken into account, and also found that *“[w]here the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.”*<sup>9</sup>

Although the current language of CBCA appears consistent with stakeholder theory, and the Supreme Court rulings appear to reinforce this interpretation, much discourse on the purpose of the corporation and the role of directors continues either to promote shareholder primacy, or to support managerial entrenchment at the expense of shareholders. We believe, therefore, that it would be helpful to provide an enumeration of the duties of directors that is more specific, encompassing a long-term perspective and the need to consider the interests of a range of stakeholders. An example of such an approach can be found in Section 172 of the U.K. Companies Act, which sets out a list of possible considerations in promoting *“the success of the company for the benefit of its members as a whole”*, including long-term consequences, the interests of a range of stakeholders, impacts on the community and the environment, and the company’s reputation.<sup>10</sup> We believe there would be value in further consultation on the purpose of the corporation and role of directors under CBCA.

### Separation of Chair and CEO

We strongly favour separation of the Chair and CEO roles. We are concerned that the combined role represents (or may be perceived to represent) a power concentration that undermines the independence of the board and its ability to hold management to account, even where a substantial majority of the other directors are independent.

---

<sup>6</sup> More detail on our perspective on the stakeholder theory/shareholder primacy debate can be found in the following report: NEI Investments (2012). *Crisis, What Crisis?* [https://www.neiinvestments.com/Documents/Research/Exec\\_Comp\\_English\\_Final.pdf](https://www.neiinvestments.com/Documents/Research/Exec_Comp_English_Final.pdf)

<sup>7</sup> Government of Canada. *Canada Business Corporations Act (R.S.C., 1985, c. C-44)*. <http://laws-lois.justice.gc.ca/eng/acts/C-44/>

<sup>8</sup> CanLII. *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 SCR 461.

<http://www.canlii.org/en/ca/scc/doc/2004/2004scc68/2004scc68.html>

<sup>9</sup> *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560. <http://www.canlii.org/en/ca/scc/doc/2008/2008scc69/2008scc69.html>

<sup>10</sup> Companies Act 2006 <http://www.legislation.gov.uk/ukpga/2006/46/section/172>

### Disclosure on strategic environmental and social matters

We see value in mandating a discussion of company priorities and strategy on key ESG issues. This important context is missing in many company reports. Where companies do outline non-financial risks in financial reporting, the disclosure is often of boilerplate quality.

### **Securities Transfers and Other Corporate Governance Issues (III)**

Under CBCA at least 25% of board directors should be Canadian residents, rising to over 50% in prescribed sectors. We believe it is important for boards to include directors who understand the current legal, cultural and operating environment in the country of incorporation.

### **Incorporation Structure for Socially Responsible Enterprises (IV)**

We are not convinced that there is a need for a special incorporation structure for “socially responsible enterprises” (SRE) under CBCA. We are concerned that creating such a structure could undermine the principle that all companies must be socially and environmentally responsible.

In recent years new hybrid corporate models have emerged including Benefit Corporations in the U.S. and Community Contribution Companies in British Columbia. We question whether special incorporation structures are really necessary in Canada, as it is our understanding that there is no real barrier to specifying a specific social mandate in the articles of incorporation of a company formed under CBCA. One Canadian legal scholar has described the emergence of the benefit corporation as “a U.S. solution to a U.S. problem”, and cautioned against assumptions about its utility in Canada, where corporate law does not support a shareholder primacy orientation.<sup>11</sup>

For many years, stakeholders (including NEI Investments) have been working to ensure that corporate responsibility is seen as relevant for all enterprises. There has been much progress, ranging from CSA and TSX initiatives on environmental and social disclosure for listed companies, to the articulation of an universal “responsibility to respect” human rights within the UN Guiding Principles on Business and Human Rights.

We believe there is a risk that the creation of a SRE structure under CBCA might be misinterpreted as a signal that traditional corporations are not accountable for anything other than financial returns. This could create negative social and environmental outcomes that far outweigh any benefits delivered by the efforts of SREs themselves. As described elsewhere in this submission, we would prefer to see amendments to CBCA that clarify and underline the corporate responsibility obligations of every business enterprise.

### **Corporate Governance and Combatting Bribery and Corruption (VI)**

The current act does not address reporting and auditing from an anti-corruption perspective. We note that the CSA corporate governance framework<sup>12</sup> pushes issuers to establish a code of business ethics, which is where some companies

---

<sup>11</sup> Carol Liao (2013). A Canadian Model of Corporate Governance: Insights from Canada's Leading Legal Practitioners [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2354514](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354514)

<sup>12</sup> Canadian Securities Administrators (CSA):

- National Policy 58-201 Corporate Governance Guidelines [http://www.osc.gov.on.ca/en/SecuritiesLaw\\_rule\\_20050617\\_58-201\\_corp-gov-guidelines.jsp](http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20050617_58-201_corp-gov-guidelines.jsp)
- National Instrument 58-101 Disclosure of Corporate Governance Practices [http://www.osc.gov.on.ca/en/SecuritiesLaw\\_rule\\_20050617\\_58-101\\_disc-corp-gov-pract.jsp](http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20050617_58-101_disc-corp-gov-pract.jsp)



choose to address important topics such as anti-corruption measures and anti-discrimination policy. Consideration could be given to introducing within CBCA requirements relating to business ethics.

### **Diversity of Corporate Boards and Management (VII)**

We view diversity of boards and management as a driver of long-term value, as well as an ethical issue. Our perspective on the value of diversity embraces not only gender and ethnicity but also other attributes such as aboriginal status, sexual orientation and disability, as well as representation of different age groups. In addition, we advocate for companies to recruit directors with wider diversity of experience and expertise, including environmental, social and governance issues that are material to the business.

Progress on board diversity in Canada has been painfully slow – even in the face of evidence that bringing women onto the board correlates with company outperformance. With emerging market jurisdictions such as India already taking action on gender diversity, we are concerned that Canada risks falling into a laggard position.<sup>13</sup>

For the time being we are content to monitor the progress of OSC's initiative<sup>14</sup> to expand the current corporate governance framework to include gender diversity. This would address the diversity issue within a context that is already familiar to boards and management of public companies, and cover all larger TSX-listed companies.

We are cautiously optimistic that establishing requirements for diversity disclosure, and providing guidance on recommended diversity policies and practices, will be an effective means to achieve the objective of increased diversity, as it would push more companies to put the issue on their agenda. The rate of increase in the representation of women on boards in Canada appears to have accelerated somewhat over the past year,<sup>15</sup> suggesting that even before requirements have been established, discussion and consultation on diversity disclosure has stimulated action by some issuers to recruit women directors. However, if diversity statistics do not improve significantly over the next three to five years, at the time of the next review of CBCA it would be appropriate to consider other options such as binding quotas. The experience in countries that have imposed quotas appears to have been that, once the effort was made to look for them, qualified women candidates could be found.

### **Corporate Social Responsibility (IX)**

#### *The corporate "responsibility to respect" human rights*

We would like to see CBCA address specifically the corporate "responsibility to respect" human rights set out in the 2011 UN Guiding Principles on Business and Human Rights.<sup>16</sup> The UN Guiding Principles make it clear that the "responsibility to respect" extends to all businesses: it is "a global standard of expected conduct for all business enterprises wherever they operate" (paragraph 11) that "applies to all enterprises regardless of their size, sector, operational context, ownership and structure" (paragraph 14).

The Guiding Principles outline a specific set of actions that companies should undertake (paragraph 15): "In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to

<sup>13</sup> The Indian Companies Act, 2013 s.149 includes a provision that "such class or classes of companies as may be prescribed, shall have at least one women director." [http://egazette.nic.in/WriteReadData/2013/E\\_27\\_2013\\_425.pdf](http://egazette.nic.in/WriteReadData/2013/E_27_2013_425.pdf)

<sup>14</sup> Ontario Securities Commission (2014). Proposed Amendments to Form 58-101F1 Corporate Governance Disclosure of National Instrument 58-101 Disclosure of Corporate Governance Practices [http://www.osc.gov.on.ca/en/SecuritiesLaw\\_ni\\_20140116\\_58-101\\_pro-amd-f1.htm](http://www.osc.gov.on.ca/en/SecuritiesLaw_ni_20140116_58-101_pro-amd-f1.htm)

<sup>15</sup> Catalyst (2014). A Push for Change – Women on Public Company Boards in Canada and Australia. <http://www.catalyst.org/knowledge/push-change>

<sup>16</sup> United Nations (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>

*their size and circumstances, including: (a) A policy commitment to meet their responsibility to respect human rights; (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights; (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”* It is also specified that the human rights policy should be approved at the most senior level, and embedded throughout the enterprise (paragraph 16).

The present lack of clarity within the basic legal and policy frameworks that govern business behaviour regarding what companies may or must do in order to ensure respect human rights is highlighted in the Guiding Principles, with the recommendation that *“laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards”* (paragraph 3). Against this background, it would be appropriate and helpful for CBCA to address this topic.

### Mandatory ESG disclosure

It is critical to our processes that listed companies should provide regular updates on environmental, social and governance (ESG) issues, as well as financial information. Based on precedents in Canada and other jurisdictions, we see scope for some aspects of ESG disclosure to be mandated under CBCA, at least for larger companies. This should be based on further targeted consultation and undertaken in close coordination with CSA and TSX.

Many of Canada’s largest publicly-traded companies already provide corporate responsibility reporting, or integrate corporate responsibility information to their annual report, on a voluntary basis. There are emerging precedents for mandating such disclosure for larger companies. In Canada, corporations under the Bank Act, the Insurance Companies Act and the Trust and Loan Companies Act are required to publish Public Accountability Statements including information on specified corporate responsibility matters.<sup>17</sup> Under the U.K. Companies Act Section 417, larger publicly-traded companies must publish a Directors’ Report Business Review including information on environmental, social and employee issues.<sup>18</sup> The European Union recently adopted a directive on disclosure of non-financial and diversity information that will apply to around 6000 of Europe’s largest companies and groups.<sup>19</sup> Creating requirements for both listed and privately-held large companies to report on key corporate responsibility issues of interest to stakeholders would help to create a level playing field in which companies are not discouraged from listing by the additional reporting requirements.

It has been clarified by both CSA and TSX that “material” environmental, social and governance (ESG) information must be disclosed by listed companies. For continuing listing, according to the *TSX Company Manual*, companies should follow Canadian Securities Administrators (CSA) National Instrument 51-102 *Continuous Disclosure Obligations*. In 2010, CSA published Staff Notice 51-333 *Environmental Reporting*,<sup>20</sup> which highlighted existing requirements to report on environmental issues. In its *Primer for Environmental and Social Disclosure*,<sup>21</sup> TSX highlights these requirements, noting that they apply equally to material social issues. It also emphasizes the obligation under the timely disclosure policy to immediately disclose material environmental and social information through a news release. Interpretations of materiality vary, however, and company decisions on which issues to report could vary depending on this interpretation. A further

---

<sup>17</sup> Public Accountability Statements (Banks, Insurance Companies, Trust and Loan Companies) Regulations SOR/2002-133. <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-133/FullText.html>

<sup>18</sup> Companies Act 2006. <http://www.legislation.gov.uk/ukpga/2006/46/section/417>

<sup>19</sup> European Commission (2014). Statement. [http://europa.eu/rapid/press-release\\_STATEMENT-14-124\\_en.htm](http://europa.eu/rapid/press-release_STATEMENT-14-124_en.htm)

<sup>20</sup> CSA (2010). Staff Notice 51-333: Environmental Reporting Guidance. [http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa\\_20101027\\_51-333\\_environmental-reporting.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101027_51-333_environmental-reporting.pdf)

<sup>21</sup> TMX/CPA (2014). A Primer for Environmental and Social Disclosure. <http://www.tmx.com/en/pdf/A-Primer-for-Environmental-and-Social-Disclosure.pdf>



concern is that companies may fail to disclose data consistently from year to year if a topic is not considered a material issue in a particular year. We value annual reporting on a consistent set of indicators as this allows us to perform trend line analysis, as well as to compare companies across sectors.

## Conclusion

In conclusion, we thank Industry Canada for seeking stakeholder comments on the CBCA and reiterate the following recommendations:

- We believe the purpose of the corporation and the role of directors should be articulated more clearly in CBCA, focusing on the imperative of creating long-term sustainable value, and based on stakeholder theory.
- We are concerned that a special incorporation structure for “socially responsible enterprises” under CBCA could undermine the principle that all companies must be socially and environmentally responsible.
- CBCA should address specifically the corporate “responsibility to respect” human rights set out in the 2011 UN Guiding Principles on Business and Human Rights.
- The outcome of shareholder votes should not only be disclosed, but also presented in a fair and consistent way that gives an appropriate interpretation to votes for and against, and to abstentions. Where multiple share classes exist, the votes of shareholders in different classes should be disaggregated to expose any differences in perspective.
- Based on precedents in Canada and other jurisdictions, and in coordination with CSA and TSX, we see scope for some aspects of ESG disclosure to be mandated under CBCA, at least for larger companies.

If you have any questions regarding this letter, please do not hesitate to contact **Michelle de Cordova, Director, Corporate Engagement & Public Policy** ([mdecordova@neiinvestments.com](mailto:mdecordova@neiinvestments.com) 604-742-8319).

Sincerely,  
**NEI Investments**

A handwritten signature in black ink, appearing to read "Robert Walker", with a long horizontal line extending to the right.

Robert Walker  
Vice President, ESG Services and NEI Ethical Funds

CC:  
Board of Directors, NEI Investments  
Ms. Michelle de Cordova, Director, Corporate Engagement & Public Policy, NEI Investments