



By email: comment@osc.gov.on.ca

September 27, 2023

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission, New Brunswick
Manitoba Securities Commission
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities, Northwest Territories
Office of the Superintendent of Securities Nunavut
Office of the Yukon Superintendent of Securities
Ontario Securities Commission
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Re: Proposed amendments to Form 58-101F1 Corporate Governance Disclosure (Form 58-101F1), of National Instrument 58-101 *Disclosure of Corporate Governance Practices* (NI 58-101) and Proposed changes to National Policy 58-201 *Corporate Governance Guidelines* (NP 58-201)

Introduction

Axis Connects (“AC”) and Simplex Legal LLP (“Simplex”) would like to take this opportunity to respond to the Request for Feedback by the Canadian Securities Administrators to Proposed Amendments to Diversity Disclosure in NI 58-101, Form 58-101F and NP 58-201 (“RFF”).

Background

AC is a not-for-profit located in Calgary, Alberta, whose mandate includes acting as a central hub for organizations committed to advancing diversity in Calgary's business community. Simplex is an independent law firm with offices across Canada, affiliated with Epiq, a global legal technology firm. While neither AC nor Simplex are investors or issuers, each has constituents and clients, respectively, who are. For this reason, we would respectfully ask that you consider the comments that follow as high-level guiding principles.

We would like to provide the following as context for our comments:

Corporate governance is being reformed as the international business landscape is being reshaped by an accommodation of market volatility, globalization and innovation. Collectively, these forces are driving new societal values, needs and expectations. Amid all this momentum for change, we are seeing governments and regulators respond with corporate governance reforms. This is essentially an exercise in legitimacy and modernization and potentially addresses important economic and social realities. So listening here is essential, and an open line of consultation is critical, which brings us back to this Roundtable this morning. (Excerpt from the transcript dated **October 16, 2013** [*emphasis added*] of the Ontario Securities Commission Roundtable Discussion on Women on Boards and Senior Management)

We are aware that the Ontario Securities Commission hosted the “OSC Roundtable: Strengthening diversity in our capital markets” on **September 14, 2023** (the “2023 OSC Roundtable”). One of the writers of this letter, Patricia Brister, attended virtually. At the time of writing, the transcript for that session was not yet available. In her search of the OSC website for the transcript, she came across the transcript for the foregoing roundtable discussion that took place almost 10 years ago to the day. We have included it here as a statement about the timeless and ongoing significance of diversity on boards of directors and in executive leadership and evidence that there is still work to be done.

High Level Comments

1. “Above all, do no harm.”¹

The essence of this concern was raised by several parties at the 2023 OSC Roundtable in the context of the potential for harm in publicly reporting information given by individuals who have self-identified. We echo that concern.

2. Peter Dey.

Two of our comments are somewhat aligned with statements made by Peter Dey at the 2023 OSC Roundtable related to the purpose of corporations, in general, and directors’ duties.

Purpose of the Corporation. Without the benefit of the transcript, we recall the essence of Mr. Dey’s comment to be that actions taken to increase diversity should align with the purpose of all corporations, which is to produce goods and/or services. It is only in this way that diversity will take hold in a meaningful and sustainable way, as corporate governance has, in general, over the past decades.

While we agree that actions to increase diversity should align with the purpose, generally, of the entity that is the corporation, we would argue, respectfully, that the purpose of corporations has evolved beyond the production of goods and/or services. In fact, some authors say that in a technology-driven transformation of the economy, the reason for a corporation’s existence is better articulated as a mission-purpose – “an aspirational idea about its existence that has the capacity to bond internal and external stakeholders to the company, inspiring innovation, productivity, and customer loyalty. This understanding of corporate purpose offers a pathway to a more inclusive and interconnected form of modern capitalism.”²

Directors’ Duties. Again, without the benefit of a transcript, our recollection is that Mr. Dey’s comment was that actions taken to increase diversity, when tied to directors’ duties, will result in change. We would

¹ In latin, “Primum Non Nocere.” Although the literature sets out shortcomings of the phrase, it stands as a reminder of the ethical concern in a variety of research fields about the need to protect against activities that carry the potential for harm. Although its origins are unclear, the expression has been in use in England and America since 1860, so it has stood the test of time. (Smith, C. M. (2005). *Origin and Uses of Primum Non Nocere-Above All, Do No Harm*. Journal of clinical pharmacology, 45(4), 371-377. <https://doi.org/10.1177/0091270004273680>. (Accessed: 09.19.2023)

² Kershaw, D., & Schuster, E. (2021). *The Purposive Transformation of Corporate Law*. The American journal of comparative law, 69(3), 478-538 at 478. <https://doi.org/10.1093/ajcl/avac004> (Accessed: 09.19.2023)

restate that by reference to the duties of care and loyalty owed by both directors and executive officers, as well as the business judgment rule, a legal defense available to both directors and executive officers. Through these lenses, diversity may be seen as a way for directors and executive officers to satisfy their legal obligations to act in the best interests of the corporation, while facilitating access to a legal defense in the event a decision is made that ultimately causes the corporation to suffer a loss.

3. Alignment with the United Kingdom (“UK”) and the United States (“US”)

As noted in Annex B of the RFF, regulatory bodies in the UK (the Financial Conduct Authority) and the US (the Securities and Exchange Commission) made statements in 2022 regarding diversity disclosure (i) as it relates to boards and senior levels of executive management; and (ii) board members and nominees, respectively. As a matter of legitimacy and modernization, it will be important for Canada to at least keep pace with the way jurisdictions around the world are increasing diversity.

4. Alignment with the *Canada Business Corporations Act* (“CBCA”)

Section 172.1(1) of the *CBCA* and Part 8.2 of the *Canada Business Corporations Regulations, 2001, SOR/2001-512* (“*CBCR*”), affecting all distributing corporations governed by the *CBCA* including TSX Venture Exchange issuers, took effect January 1, 2020. *CBCA* corporations that are listed on the TSX are also subject to NI 58-101. Bringing the diversity components of *NI 58-101* in line with the *CBCA* will be important to maintain consistency amongst, credibility of and compliance with the legal, regulatory and policy frameworks in Canada.

Thank you for your consideration of the foregoing. If you have questions, comments or wish to discuss further, please do not hesitate to contact the writers.

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