Submission on Proposed Amendments to Form 58-101F1 Corporate Governance Disclosure and Proposed Changes to NP 58-201 Corporate Governance Guidelines

28/09/2023

Submission to the Canadian Securities Administrators (CSA)

ASSOCIATION DES BANQUIERS CANADIENS

CANADIAN BANKERS ASSOCIATION

General Comments

The Canadian Bankers Association (**CBA**)[1] appreciates the opportunity to provide input on the proposed amendments to Form 58-101F1 *Corporate Governance Disclosure* and proposed changes to National Policy 58-201 *Corporate Governance Guidelines* (collectively, the **Proposals**).

Our members are advocates for strengthening the degree to which our boards and senior management teams reflect the clients and communities we serve. For many years, banks have been recognized leaders in promoting diversity, equity and inclusion throughout their organizations, including at the board and executive levels.

This work has included policies and practices to identify where barriers exist for diverse groups, the development of diversity goals or objectives, programs to accelerate diversity within senior management, employee training on cultural competency and combatting unconscious bias, the creation of programs to grow and protect the leadership pipeline, and enhancements to the application and selection process for executive roles. All of this effort is supported by diversity disclosure practices adopted by our members that go beyond the representation of women to include non-gender diversity information.

We are therefore supportive of the overall objectives of the Proposals, particularly as they relate to increasing transparency about diversity beyond gender and providing investors with decision-useful information.

That being said, as federally regulated financial institutions (**FRFI**s), our members are subject to overlapping federal diversity disclosure requirements. These requirements are either already in place and under review (*Employment Equity Act* (**EEA**)) or in development (*Bank Act* and other FRFI legislation). Given this context, we would encourage the CSA to ensure that the outcome

[1] The Canadian Bankers Association is the voice of more than 60 domestic and foreign banks that help drive Canada's economic growth and prosperity. The CBA advocates for public policies that contribute to a sound, thriving banking system to ensure Canadians can succeed in their financial goals.

of the Proposals favours flexibility and harmonization of the requirements with federal diversity disclosure requirements to the greatest extent possible. We also encourage the CSA to adopt a uniform approach across Canada.

We believe that a flexible and harmonized approach not only promotes efficient and competitive capital markets, but it also helps avoid a number of potential unintended consequences that could arise from a more prescriptive approach, including:

- **Unintended consequences for investors:** Prescriptive CSA requirements that are not harmonized with federal diversity disclosure requirements could have the unintended consequence of undermining comparability by creating inconsistencies in the disclosures published by federally regulated issuers compared to non-federally regulated issuers, thus making it more difficult for investors to compare information between the two. Moreover, mandating a standard table of diversity data may lead to a simple comparison of issuers that loses sight of the important context behind the numbers.

- **Privacy concerns:** Given the relatively small size of many corporate boards, a prescribed granular approach to board diversity disclosure may compromise the anonymity of individual board members' identification as part of a designated diversity group.

- **Larger boards:** A granular approach to board diversity disclosure may also have the unintended consequence of incentivizing issuers with smaller boards to significantly increase their size in order to achieve specific levels of representation from each prescribed diversity category – even though a larger board may not be ideal from an effective governance perspective.

Finally, a flexible regime (i.e., the "Form A" alternative set out in the Proposals) would not equate to a "status quo" approach. In our view, the Form A approach, preferred by securities regulators in British Columbia, Alberta, Saskatchewan and the Northwest Territories, would achieve meaningful progress.

We will elaborate on our above comments in our detailed responses to the questions posed in the CSA Notice that accompanies the Proposals (**CSA Notice**).

Specific CSA Questions

Board nominations

1. **The Proposed Amendments would require the disclosure of the skills, knowledge, experience, competencies and attributes of candidates that are considered and evaluated. Does this requirement raise concerns for issuers regarding disclosure of confidential or competitively sensitive information? Please explain.**

Our members generally disclose information similar to the information contemplated by this question. As such, we do not have concerns with the proposed disclosure to the extent that the Proposals do not require the disclosure of the rationale for selecting any specific candidates.

With respect to director term limits, although the CSA Notice does not include questions on this issue, we would like to share our views on this important topic. We are pleased to see that the Proposals do not set mandatory term limits for directors. While term limits are a consideration in governance planning, a legislated mandatory limit can lead to the loss of valuable talent and fails to recognize that longer-tenured directors can provide significant value to the board, including experience, institutional knowledge, familiarity with the business and an ability to assume leadership positions as board or committee chairs.

Approach to diversity

2. **We are consulting on two alternatives with respect to the requirement to provide disclosure on the approach to diversity (Form A and Form B). Which approach best meets the needs of investors for making investing and voting decisions? Which Form best meets the needs of issuers in describing their approach to diversity at the board and executive officer level? Do either of the approaches raise concerns for issuers? Are there certain requirements in either form that you find preferable to the equivalent requirement in the other form? Please explain.**

In our view, the aim of the CSA's initiative should be to strive for a result that best meets the

needs of investors *and* issuers – we do not view these as separate, competing objectives. As noted in our opening comments, we believe that a flexible and harmonized reporting regime best meets the needs of issuers and investors alike.

For this reason, subject to our response to Question 3 below, we believe that the Form A requirement for issuers to disclose their "approach" to diversity is preferable to the Form B obligation to disclose the issuer's "written strategy" regarding diversity. We agree with the commentary in the CSA Notice on this point, which notes that Form A recognizes that "not all issuers may have a formal strategy on diversity…"

We also note that, as drafted, the requirement to disclose a diversity strategy under Form B, paragraph 6(2)(a), is mandatory – i.e., the "comply or explain" approach applicable to many aspects of Form B is not available here. We do not believe that this prescriptive approach is warranted for this requirement.

3. Is information on the diversity approach and objectives of issuers with respect to executive officer positions useful for investors? Does this requirement raise concerns for issuers? Please explain.

Regarding the requirement to disclose an issuer's approach to diversity with respect to executive officers, we note that this is unique to Form A. Moreover, the CSA Notice explains that Form B would not require this information, as "such granular disclosure may increase regulatory burden without corresponding benefit for investors."

In our view, this is one aspect of Form B that is preferable to Form A, as it allows the flexibility for issuers to choose whether and when to disclose this information in response to the needs and evolving expectations of the issuer's stakeholders over time.

4. Should issuers be required to disclose data about specified designated groups, consistent with the approach in Form B? Or should issuers be required to disclose data about women only and the identified groups for which they collect data, consistent with the approach in Form A? Please explain.

We believe the flexibility of Form A on this point strikes the right balance, for the following

reasons:

i) Diversity is not a Static Concept

Experience has shown in recent years that defining designated diversity groups is no easy task. Our understanding of the talent segments that comprise our society is evolving, with definitions quickly becoming outdated and of limited use to issuers and investors. A prime example of this is provided by the current review of the federal EEA, which is contemplating re-defining the current four designated groups (women, Aboriginal peoples, persons with disabilities, and members of visible minorities) to:

> reflect the **modern understandings** of the current designated groups (for example, **different sub-groups within the larger group**) and consider **adding more groups** (emphasis added).[2]

Another example of the difficulty of defining diversity groups is found in the Form B definition of LGBTQ2SI+ persons:

> "LGBTQ2SI+ persons" includes persons who are any of the following: lesbian, gay, bisexual, transgender, 2-spirit, intersex or queer.

The above definition assigns meaning to each element of the acronym except for the "+" symbol. This contrasts with the Government of Canada approach, which assigns a distinct meaning to the "+", stating that it "is inclusive of people who identify as part of sexual and gender diverse communities, who use additional terminologies."[3]

As stated in the CSA Notice, the Form A approach has the benefit of avoiding these definitional difficulties by "remov[ing] securities regulators from defining to whom an issuer's approach to diversity must apply."

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[2] Employment Equity Act Review Consultation, Policy brief 1: Defining and expanding equity groups.
[3] See https://women-gender-equality.canada.ca/en/free-to-be-me/2slgbtqi-plus-glossary.html

By providing such flexibility, the CSA would ensure that disclosure rules and policy remain evergreen so that investors are being provided current information. A flexible approach also helps to ensure issuers can continually evolve their disclosures to address the representation of talent segments from underrepresented communities over time.

Although the CSA Notice indicates that Form B would allow voluntary disclosure with respect to groups beyond the five designated groups, we do not see this option reflected in the text or standard tables in Form B. As drafted, Form B consistently refers to disclosure only with respect to the five designated groups. This would also not solve the issues, summarized above, of group definitions becoming outdated or inconsistencies across different regulatory regimes.

ii) Meeting the Evolving Needs of Investors and Other Stakeholders

Even if an "other" diversity category was clearly specified as an option in Form B, in our view, this still falls short of the adaptability necessary for issuers to tailor their disclosure to meet the needs of their investors and other stakeholders. The experience of our members has demonstrated that these needs evolve over time. Our members have responded to this reality by adapting their diversity disclosure as and when required to meet the expectations of their investors and other stakeholders.

iii) Avoiding Unintended Consequences for Investors

Although Form B is intended to allow for comparability, existing diversity disclosure requirements under the federal EEA are not consistent with Form B – the designated groups are different and, as noted in our comments above, are likely to change as a result of the current review of the EEA.

This inconsistency may have the unintended consequence of undermining comparability, by making it more difficult for investors to compare information reported by federally regulated issuers to that of other issuers.

A standard table could also lead investors and their advisors (e.g., proxy advisory firms) to compare issuers by focusing exclusively or predominantly on reported targets and percentages, overlooking important qualitative information such as how the issuer is working to achieve diversity, important context such as the diversity (or lack thereof) of the jurisdictions in which the issuer operates, or important limitations in the reported data, such as different response rates in self-identification surveys, that restrict comparability across issuers. This could lead to investors drawing misleading conclusions about the diversity of the issuers being compared.

iv) Existing Board Composition and Governance Requirements

Banks are subject to stringent governance-related legislative and regulatory requirements regarding their boards that cover, among other things, board composition and qualifications. For example, bank boards must comply with the *Bank Act* requirement that a majority of the directors, including the Chief Executive Officer, be resident Canadians. This contrasts with companies incorporated under most provincial business corporation statutes, which do not have any Canadian residency requirements for directors.[4] Further, banks are subject to OSFI's *Corporate Governance Guideline,* which specifies there should be appropriate representation of financial industry and risk management expertise at the board and board committee levels. Banks must also ensure that relevant board members and employees have expertise in risk management and compensation based on the *Principles for Sound Compensation* adopted by the Financial Stability Board.[5]

A diversity disclosure regime should be able to accommodate these other robust governance requirements and to prevent potential conflicts that can impact banks' ability to effectively manage the composition of their boards.

Although we are pleased to see that neither Form A nor Form B has set mandatory diversity targets, Form B's requirement to provide granular board diversity data could have unintended

[4] *Bank Act,* ss. 159(2). See also Ontario Eliminates Director Residency Requirements and Permits Majority Shareholder Resolutions in Writing | Bennett Jones. Companies incorporated under the CBCA are required to have only 25% of their directors be resident Canadian.
[5] Guideline Corporate Governance - Sound Business and Financial Practices (osfi-bsif.gc.ca). See also: Principles for Sound Compensation Practices, Financial Stability Board (FSB), 2009.

consequences on board recruitment and composition. The granular presentation of board diversity data may lead issuers to substantially increase the size of their board to ensure specific levels of representation from the designated groups. Adding directors to the board to the point that it significantly exceeds the optimal size for a particular issuer may result in a board that is less effective from a governance perspective.

v) Flexibility Does Not Mean Status Quo

Annex L of the CSA Notice maintains that Form A can be viewed as "a status quo approach." We do not agree with this assertion. In our view, Form A represents significant and necessary progress. Form A, for the first time:

- Creates a framework for all reporting issuers to move beyond the current diversity disclosure regime which is focused exclusively on disclosure with respect to women.

- Defines "identified group" in a way that is broad and adaptable so that issuers will be able to continually evolve their disclosures to address the representation of talent segments from underrepresented communities over time.

- Mandates disclosures with respect to an issuer's approach to diversity, including its diversity policies and targets as they relate to groups identified by the issuer as part of its diversity strategy.

- Mandates disclosure about the issuer's mechanisms to achieve these targets along with information on the annual and cumulative achievement of the targets.

The requirement to make these important new disclosures would be subject to oversight by securities regulators.

vi) Flexibility Facilitates Harmonization

Lastly, a key factor in favour of Form A is that its more flexible approach would reduce regulatory burden and inconsistency for federally regulated issuers who are subject to existing

(but evolving) diversity disclosure requirements under the EEA and, in the case of banks and other FRFIs, anticipated new diversity disclosure requirements under FRFI legislation.[6]

Both of these federal diversity-related initiatives are still in their early stages and may develop in ways that are inconsistent with Form B:

- **EEA review:** The consultation on the EEA review closed in April 2022, with the resulting EEA Review Task Force report expected in the coming months.[7] If Form B is adopted as proposed, it would likely be inconsistent with future changes to the EEA and significantly complicate compliance for federally regulated issuers.

- **FRFI legislation:** The 2023 Federal budget confirmed the federal government's intention to introduce amendments to the FRFI legislation to "adapt and apply" the CBCA diversity disclosure requirements, but the federal government has not yet disclosed the proposed amendments, nor confirmed what modifications would be made to the CBCA diversity disclosure requirements when "adapting" them to FRFIs. Form B's more prescriptive approach increases the risk of inconsistency with these future amendments to the FRFI legislation. To avoid this inconsistency, we encourage the CSA to work closely with the federal Department of Finance as the details of the federal initiative are developed.

Aligning the CSA's initiative with the evolving federal diversity-related initiatives would create a more comprehensive and clearer representation of equity and diversity in Canada's federally regulated issuer sector and assist FRFIs to implement the requirements of both regulatory regimes in an effective and efficient manner.

5. Would it be beneficial to require reported data to be disclosed in a common tabular format? Does this requirement raise concerns for issuers? Please explain.

For the reasons outlined in our response to Question 4 above, we do not support a requirement

[6] Federal Budget 2023 (at p. 255).
[7] Task Force on the Employment Equity Act Review - Canada.ca

to disclose data in a prescribed tabular format. The ability to tailor reporting to meet the evolving needs and expectations of investors and other stakeholders is a fundamental component of stakeholder engagement for our members.

We are also concerned about the potential privacy issues raised by the granular approach to the prescribed board diversity table in Form B.

We appreciate the effort to protect privacy by specifying that the data in Form B is to be based on voluntary self-identification and reported on an aggregate basis. Our concern is that these protections may be inadequate, given the relatively small number of individuals on many corporate boards.

For example, potential privacy issues may arise if a board member is the only director who has identified as a member of a given designated group. Because of the small number of board members, maintaining this director's anonymity may be effectively impossible. A related result of the granular approach in Form B would be increased reluctance on the part of directors who sit on smaller boards to self-identify, which would ultimately frustrate the goals of the Proposals.

6. **For CBCA-incorporated issuers, are there issues or challenges in providing both CBCA disclosures and the disclosure proposed under either Form A or Form B? Please explain.**

7. **Should we consider developing similar disclosure requirements for venture issuers in a second phase of this project? If so, should any changes be made to the proposed disclosure requirements to reflect the different stages of development and circumstances of venture issuers? Please explain.**

We have not provided responses to Questions 6 and 7 as they are not relevant to our members.

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Thank you for considering our comments on the Proposals. As this important initiative moves forward, we would urge the CSA to work with federal regulators to ensure that an adequate implementation period is established under either the Form A or Form B approach that makes

sense for federally regulated issuers. Given the need to make any necessary changes to information collection and reporting processes, an implementation period in the range of 12 to 18 months at a minimum would be required. We welcome the opportunity to discuss our comments and answer any questions you may have regarding our submission.