

September 29, 2023

## BY EMAIL

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

c/o

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
22<sup>nd</sup> Floor, Box 55  
Toronto, Ontario M5H 3S8  
Email: [comment@osc.gov.on.ca](mailto:comment@osc.gov.on.ca)

Me Philippe Lebel  
Corporate Secretary and Executive Director,  
Legal Affairs  
Autorité des marchés financiers  
Place de la Cité, tour Cominar  
2640, boulevard Laurier, bureau 400  
Québec (Québec) G1V 5C1  
Email: [consultation-en-cours@lautorite.qc.ca](mailto:consultation-en-cours@lautorite.qc.ca)

**Re: CSA Notice and Request for Comment – Proposed Amendments to Form 58-101F1 *Corporate Governance Disclosure of National Instrument 58-101 Disclosure of Corporate Governance Practices* and Proposed Changes to National Policy 58-201 *Corporate Governance Guidelines***

We are writing in response to CSA Notice and Request for Comment (the “**CSA Notice and Request for Comment**”) on proposed amendments to Form 58-101F1 *Corporate Governance Disclosure of National Instrument 58-101 Disclosure of Corporate Governance Practices* and proposed changes to National Policy 58-201 *Corporate Governance Guidelines*, in each case relating to director nominations, board renewal and diversity (collectively, the “**Proposed Amendments and Changes**”).

We commend the Canadian Securities Administrators for its initiative to promote diversity beyond women on boards and in executive officer positions. Advancing and promoting a more

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diverse corporate environment is a worthy governance initiative and disclosure can play a key role in providing investors and other stakeholders with the information needed to make informed investment and voting decisions.

Our response letter is focused on providing our general feedback on the Proposed Amendments and Changes, which emphasizes our preference for the adoption of Form A over Form B for the reasons noted below. Given this approach to our response letter, we have not provided individual responses to questions 2 to 6 in the CSA Notice and Request for Comment. We have also not provided responses to questions 1 or 7 regarding board nominations and the application of National Instrument 58-101 to venture issuers, respectively.

### ***Increased Flexibility***

While we would expect benefits to accrue if either Form A or Form B were to be adopted, we are of the view that the adoption of Form A should result in the promotion and advancement of diversity while providing issuers with the necessary flexibility to identify and explain their own diversity objectives, policies and metrics. In our view, Form A strikes an appropriate balance between promoting and increasing transparency on diversity for investors while also providing a framework that is adaptable and less prescriptive for issuers. We believe that the greatest advantage of Form A is outlined on page 4 of the CSA Notice and Request for Comment, which highlights the fact that Form A provides each issuer with flexibility to design practices and policies respecting how it will address diversity in its specific circumstances while simultaneously removing securities regulators from determining an issuer's approach to diversity.

While Form B would provide a disclosure framework with standardized and comparable information, it limits the ability for issuers to identify categories of diversity that are best suited for their business and market. Form B would also anchor diversity initiatives in a more static definition of equity-seeking categories, though this is an area of continued evolution and social change. Board diversity plays a key role in effective corporate governance, but the disclosure regime should provide issuers with the flexibility to describe their equity initiatives and metrics rather than simply checking a box. Form A achieves this objective and should promote diversity beyond women through the introduction of the concept of "identified group", which is both broad and adaptable for issuers. Form A also allows an issuer to define the categories of diversity that are determined by the issuer's board to be most applicable to the issuer and to then provide the appropriate disclosure to explain how such diversity will advance the issuer's goals and overall business.

The calls for more diversity and representation in all aspects of society, including business, have only grown louder and more pronounced in recent years and are a key focus of market participants, regulators and many businesses. As part of this shift, many issuers are already reviewing and enhancing their diversity initiatives and policies, and demonstrating their willingness to take concrete actions to address diversity so that they are best prepared to navigate the changing legal, social and business landscape. As such, we do not expect that the adoption of Form A will ultimately result in a lack of meaningful diversity disclosure and initiatives in the long-term, as this trend is already well under way and is bound to increase in the coming years.

An issuer's diversity initiatives are likely to shift and evolve over time. For example, an issuer with extensive operations in areas with large concentrations of Indigenous residents may appropriately have a particular focus on hiring, retaining or promoting Indigenous persons. Once

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its objectives in this area are being met, the issuer might focus on other areas of diversity as a priority. All such initiatives are likely to be worthwhile and, from a corporate law perspective, it is the board of directors, working with management, which should determine a corporation's policies and priorities. Form A better accords with the imperatives of corporate law, with the worthy aim of promoting the consideration of diversity in the human resources practices of Canada's reporting issuers. Encouraging a focus by market participants on reductive categories of diversity may obscure, detract from or undermine issuers' particular goals, objectives and long-term efforts, which can take years to begin evidencing marked improvements, particularly in the executive ranks of reporting issuers.

### ***Alignment with Stakeholder Interests***

Form B contemplates a prescribed list of designated groups that are reflective of the current Canadian demographic landscape. However, a significant number of Canadian issuers have international operations and need to consider a range of both local and international stakeholders. Furthermore, an issuer may operate in certain sectors or jurisdictions that require a particular focus on specific objectives, strategies and groups of individuals. As such, issuers require the flexibility to compose their boards and executive teams in a manner that is representative of their specific stakeholders and the communities in which they operate. Issuers have a more nuanced understanding of their stakeholders' demographics. Form A would enable them to develop and disclose diversity policies and initiatives that are compatible with their geographic and socioeconomic environments and best aligned to serve their business, strategy, employees, communities, customers and suppliers, and other stakeholders.

### ***Development of Forward-Looking Diversity Policies***

Form B suffers from a static formulation focused on a prescribed list of designated groups. In an increasingly multicultural society with evolving social norms and demographics, reflecting evolving conceptions of identity and gender, issuers will benefit from diversity policies that are adaptable and forward-looking. The check-the-box exercise prescribed by Form B may be less likely to foster deep consideration of long-term diversity objectives. Form A would allow issuers the flexibility to adapt their diversity policies to our ever-changing society and environment, focusing on more targeted or broader diversity goals, depending on the issuer. Form A should also lead to a more thoughtful approach to diversity from issuers as opposed to simply ticking boxes and populating standardized tabular disclosure.

### ***Privacy Concerns and Challenges of Self-Identification***

The prescriptive categorization of Form B poses challenges for individuals who may not wish to self-identify or who do not conform with a prescribed list of designated groups. Alternative definitions or categories may better describe their particular circumstances. In some cases, confidentiality concerns – or even safety concerns, depending on the geographic location of the issuer's operations – may motivate directors and officers to wish to opt out of disclosure, particularly since the small size of many corporate boards and executive teams poses anonymization difficulties. If declining to disclose membership in identified categories of diversity becomes a prevalent practice due to privacy or safety concerns, it will defeat the purpose of the legislation and deprive investors of meaningful comparative metrics.

The inherent weaknesses of unverified self-identification also cast doubt on the statistical validity of the data and the comparability of disclosure, which is the stated principal advantage of Form B. With no method to compel self-identification and the reality that individuals may

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abstain from self-identification or may erroneously report their status, we would argue that the tabulated data in Form B would in many cases not be statistically reliable. As with any other mandatory disclosure requirement, there is also the risk of giving rise to potential liability for reporting issuers forced to report under Form B, but with no ability or legal right to verify the information that they are reporting. We would argue that the risks and lack of reliability of providing such tabular data outweigh the benefits extolled by the proponents of Form B.

### Summary

For the foregoing reasons, we believe that securities regulators should adopt Form A under the Proposed Amendments and Changes. Consideration could be given to amending some of the specific requirements under Form A in order to further promote diversity beyond women on boards and in executive officer positions. Nonetheless, we believe that it is critical to adopt an approach similar to Form A that gives boards of directors the broadest latitude to administer the corporations that they oversee, and provides issuers with the flexibility to be forward-looking, is responsive to changing societal norms and demographics, and is considerate of the composition and location of the various stakeholders and communities that an issuer serves.

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The following lawyers at our firm participated in the preparation of this comment letter and may be contacted directly should you have any questions regarding our submissions.

Brett Seifred  
416.863.5531  
bseifred@dwpv.com

Robin Upshall  
416.367.6981  
rupshall@dwpv.com

Matthew Sherman  
416.367.7617  
msherman@dwpv.com

Yours very truly,

DAVIES WARD PHILLIPS & VINEBERG LLP