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September 29, 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

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Dear Sirs/Mesdames,

Re: Comments with respect to the Canadian Securities Administrators 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 the request for comments on the proposals outlined in the Canadian Securities Administrators ("**CSA**") Notice and Request for Comment – 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* (the "**Proposed Amendments**").

Before we respond to each of the questions posed in the Proposed Amendments, we begin with the following, which help guide our responses:

- a summary of McMillan LLP's ("**McMillan**" or our "**Firm**") commitment to equity, diversity and inclusion ("**EDI**");
- an overview of the historical background of the disclosure regime concerning the representation of women on boards and in executive officer positions as set out in NI 58-101;
- a discussion of why we believe the amendments to Form 58-101F1 relating to diversity disclosure have failed to achieve the desired results and cannot alone work to achieve gender parity on boards or increase diversity in a meaningful way; and
- a brief overview of other approaches that could be followed to not only achieve gender parity but to better position public companies to improve diversity on boards and in executive officer positions; as a result of such review, we conclude that deeming a director who reaches a specified term limit to be not independent for purposes of securities and corporate law could best promote diversity on boards.

The views, opinions and recommendations expressed in this letter are solely those of the lawyers whose names are set out at the conclusion of this letter and are not made on behalf of McMillan or its clients.[1] We would be pleased to provide further insight and additional details with respect to our submissions and would welcome the opportunity to engage further with the CSA.

McMillan's Commitment to Equity, Diversity and Inclusion

As a Firm, we put EDI at the heart of our efforts, which allows us to better serve our clients and to be a better place for our people. At McMillan, we believe deeply that these values are not only a moral imperative, but are central to how we will continue to grow and prosper as a Firm. We see these values at work for our clients too. Our experience supports the conclusion that putting in place structures that allow for the hiring, retention and promotion of the best qualified people without regard to biases not relevant to the ability to perform the

[1] This letter was prepared with the assistance of the following articling students: Veronica Russo, Fengge Sun, and Micah Zierer-Clyke, and the following summer students: Ryan Ejim, Marie Liang and Meena Shanmuganathan.

job naturally leads to a more diverse and productive workforce and is a more sustainable approach to increasing diversity.

Research shows diversity makes for better advice and decisions and, indeed, that has been our experience. Our commitment to EDI is key to the Firm's goal to build a diverse and inclusive team of the best legal talent in Canada, which is reflective of the communities we live in and focused on the needs of our clients.

That being said, the authors of this letter have significant concerns about the Proposed Amendments (particularly Form B) and whether this approach is effective and will bring about the desired results it is meant to achieve.

History of Diversity Disclosure in NI 58-101

Below we review the genesis of the disclosure regime pertaining to representation of women on boards and in executive officer positions as set out in NI 58-101.

In December 2009, the United States Securities and Exchange Commission (the "**SEC**") approved a number of rules relating to corporate governance disclosure, including substantial amendments to its proxy disclosure rules that included requirements to disclose diversity considerations in the director nomination process.[2] The SEC did not define what constituted "diversity," and in explaining its reasons, stated:

> "We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result we have not defined diversity in the amendments."[3]

Around this timeframe, a similar push for reform was happening in Canada, where the issue of women representation on boards was gaining attention; one Canadian senator sponsored four substantially identical bills from 2009 to 2014, all of which were aimed at establishing gender parity on corporate boards (although none would progress to a third reading).[4] In or

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[2] U.S. Securities and Exchange Commission, News Release, 2009-268, "SEC Approves Enhanced Disclosure About Risk, Compensation and Corporate Governance" (16 December 2009), online: <https://www.sec.gov/news/press/2009/2009-268.htm>.

[3] *Proxy Disclosure Enhancements*, 74 Fed Reg 68334 (2009) at 68344 [*Proxy Disclosure Enhancements*].

[4] See Bill S-238, *An Act to establish gender parity on the board of directors of certain corporations, financial institutions and parent Crown corporations*, 2nd Session, 40th Parl, 2009 (first reading 2 June 2009); Bill S-206, *An*

around 2012, a series of studies undertaken by Catalyst, TD Economics and the Canadian Board Diversity Council demonstrated that boards of Canadian companies were behind those of other countries in terms of gender diversity.[5] In response, the federal government committed to increasing opportunities for women to serve on boards and in its 2012 Economic Action Plan, announced the creation of an advisory council of leaders from private and public sectors (the "**Advisory Council**") with a goal to "promote the participation of women on corporate boards and champion their leadership."[6] This council was introduced on April 5, 2013 by the then Minister for Status of Women, Rona Ambrose.[7]

Against this political backdrop, the Government of Ontario delivered its annual budget in May 2013, which included a statement that it would be working with several organizations, including the Ontario Securities Commission (the "**OSC**"), to "consider the best way for firms to disclose their approaches to gender diversity, with a view to increasing the participation of women on boards and in senior management."[8] Subsequently, on June 14, 2013, Ontario's then Minister of Finance and then Minister Responsible for Women's Issues requested that the OSC undertake a consultation process regarding disclosure requirements for gender diversity.[9] In response, the OSC released OSC Staff Consultation Paper 58-401: *Disclosure Requirements Regarding Women on Boards and in Senior Management* (the "**2013 Consultation Paper**") on July 30, 2013, which sought feedback from investors, issuers, other market participants and advisors on the proposed model of disclosure requirements to inform its recommendations to the then Minister of Finance and then Minister Responsible for Women's Issues. Later that year, the OSC also convened a public roundtable regarding the

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Act to establish gender parity on the board of directors of certain corporations, financial institutions and parent Crown corporations, 3rd Session, 40th Parl, 2011 (consideration in committee 3 February 2011); Bill S-212, *An Act to modernize the composition of the boards of directors of certain corporations, financial institutions and parent Crown corporations, and in particular to ensure the balanced representation of women and men on those boards*, 2nd Session, 41st Parl, 2013 (first reading 27 November 2013); and Bill S-217, *An Act to modernize the composition of the boards of directors of certain corporations, financial institutions and parent Crown corporations, and in particular to ensure the balanced representation of women and men on those boards*, 2nd Session, 41st Parl, 2014 (second reading 19 June 2014).

[5] Liz Mulligan-Ferry, Morgan Friedrich & Sabra Nathanson, *2011 Catalyst Census: Financial Post 500 Women Board Directors* (Catalyst, 2012); Beata Caranci, Leslie Preston & Andrew Labelle, *Get on Board Corporate Canada: Greater transparency needed for gender diversity on Canadian Boards* (TD Economics, 2013); and Canadian Board Diversity Council, *2012 Annual Report Card* (Canadian Board Diversity Council, 2012).

[6] Department of Finance Canada, *Jobs Growth and Long-Term Prosperity: Economic Action Plan 2012* (Ottawa: Department of Finance Canada, 29 March 2012) at 144, online: <www.budget.canada.ca/2012/plan/pdf/Plan2012-eng.pdf>.

[7] Status of Women Canada, News Release, "Harper Government Increasing Participation of Women on Boards" (5 April 2013), online: <https://www.canada.ca/en/news/archive/2013/04/harper-government-increasing-participation-women-boards.html>.

[8] Ontario, Ministry of Finance, *A Prosperous & Fair Ontario: 2013 Ontario Budget* (Toronto: Ministry of Finance, 2013) at 291, online: <www.archives.gov.on.ca/en/historical_documents_project/12-16/ONTARIO_2013_BUDGET.pdf>.

[9] *Disclosure Requirements Regarding Women on Boards and in Senior Management*, OSC Staff Consultation Paper 58-401 (30 July 2013) at 3 [*2013 Consultation Paper*].

disclosure requirements and issued a survey related to gender diversity to approximately 1,000 issuers listed on the Toronto Stock Exchange (the "**TSX**").[10]

The 2013 Consultation Paper cited several studies pointing to the slow growth of the level of representation of women on boards and in senior management in public companies, noting that Canada trailed behind international standards, with the percentage of women directors on Canadian boards stagnating at approximately 12% since 2009.[11] It also referred to the ongoing efforts by the federal government at resolving the issues of gender diversity on boards, quoting Minister Ambrose, who noted:

> "Board diversity is not about quotas or tokenism. Board diversity is about better corporate decisions, better responses to market demographics, and better financial performance. It is also about the future, and having more women in key leadership positions to serve as role models for young women and girls."[12]

In discussing the purpose of the 2013 Consultation Paper, the OSC indicated that its focus was specifically the consideration of a "comply or explain" disclosure regime relating to board and senior management gender diversity policies for reporting issuers listed on the TSX.[13] For instance, a TSX-listed reporting issuer would be required to disclose whether it had a policy regarding the representation of women on its board or in senior management and if it did not, to explain why not. The focus was specifically on non-venture issuers due to concerns regarding the potential regulatory burden for venture issuers.[14]

On January 16, 2014, the OSC published for comments the proposed amendments (the "**2014 Proposed Amendments**") to Form 58-101F1, which would require non-venture issuers to provide annual disclosure in the following areas:[15]

- director term limits;
- policies regarding the representation of women on boards;
- the board's or nominating committee's consideration of the representation of women in the director identification and selection process;

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[10] *Proposed OSC Amendments to Form 58-101F1 - Corporate Governance Disclosure of National Instrument 58-101 - Disclosure of Corporate Governance Practices - Proposed Disclosure Requirements Regarding the Representation of Women on Boards and in Senior Management*, OSC Request for Comments, (2014) 37 OSCB (Supp-1) at 2-3 [*2014 Proposed Amendments*].
[11] *2013 Consultation Paper*, *supra* note 9 at 5.
[12] *Ibid* at 6.
[13] *Ibid* at 3.
[14] *Ibid*.
[15] *2014 Proposed Amendments*, *supra* note 10 at 1.

- the issuer's consideration of the representation of women in executive officer positions when making executive officer appointments;
- targets regarding the representation of women on boards and in executive officer positions; and
- the number of women on boards and in executive officer positions.

On the same day that the OSC released the 2014 Proposed Amendments, Teresa Piruzza, Ontario's then Minister Responsible for Women's Issues, stated:

> "Our government is making significant progress on the issue of gender diversity on boards and in senior management positions. These recommendations represent another step toward breaking through barriers and creating a more representative corporate Ontario."[16]

Charles Sousa, Ontario's then Minister of Finance, highlighted:

> "Ontario is a global leader in diversity. Taking action to enhance gender representation on company boards and in senior management will also help attract new investment and grow our economy."[17]

The stated purpose of the 2014 Proposed Amendments was to "encourage more effective boards and better corporate decision making by requiring greater transparency for investors and other stakeholders."[18] This type of desired corporate governance, the OSC believed, could be flexibly and effectively addressed through a "comply or explain" disclosure model.[19] Moreover, through its consultations with stakeholders, the OSC had concluded that individual issuers were best situated to determine policies associated with board diversity and therefore did not propose disclosure requirements with an explicit target or that would mandate the contents of an issuer's diversity policy:

> "We agree with stakeholders that aspirational targets adopted by issuers can result in a higher level of representation of women on boards and in executive officer positions. We also believe that it is the interest of issuers to set their own targets so that they

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[16] Ontario Government, News Release, "Supporting More Women in Senior Roles" (16 January 2014), online: <https://news.ontario.ca/en/release/28136/supporting-more-women-in-senior-roles>.
[17] *Ibid*.
[18] *2014 Proposed Amendments*, *supra* note 10 at 6.
[19] *Ibid* at 7.

> can effect change through means best suited to their particular circumstances."[20]

The "comply or explain" model was widely supported by stakeholders, with most recognizing the value of diversity and believing that now was the time to take action.[21] Few believed that quotas should be implemented; at the roundtable discussion in October 2013, Pamela Jeffery quoted from the Canadian Board Diversity Council's research which demonstrated that of the 62% of FP500 corporate directors who did not favour the *status quo*, only 8% favoured quotas, while 54% supported a "comply or explain" model.[22]

In June 2014, the Advisory Council issued its report, which made summary recommendations to the federal government, including the adoption of a "comply or explain" regime for publicly traded companies and the development of a national approach to attaining gender balance on boards through working with provincial and territorial governments.[23] The report noted as follows:

> "There was consensus among Advisory Council members that at least one seat on every corporate board in Canada must be held by a qualified woman. There are no longer any reasons, especially from a business perspective, not to proceed in this direction.
>
> Drawing on best practices, Advisory Council members agree that a goal of **30% over five years** (2014 – 2019) is a reasonable national threshold to aspire to, with the longer term goal being gender balance on boards. Recognizing that some sectors may not be in the same place today as others, tailored sectoral goals and strategies will be important."[24]

On October 15, 2014, the CSA announced that the 2014 Proposed Amendments were to be adopted by the securities regulatory authorities in Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Québec and Saskatchewan.[25] The final amendments came into force on December 31, 2014 and these

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[20] *Ibid* at 9.
[21] *Ibid* at 5.
[22] *Roundtable Discussion Re Women on Boards and Senior Management*, OSC Transcript (16 October 2013), at 37.
[23] Canada, Advisory Council for Promoting Women on Boards, *Good for Business: A Plan to Promote the Participation of More Women on Canadian Boards* (Ottawa: Status of Women Canada, June 2014) at 1-2, online: <https://central.bac-lac.gc.ca/.item?id=SW21-162-2014-eng&op=pdf&app=Library> [*Good for Business*].
[24] *Ibid* at 10.
[25] *Multilateral CSA Notice of Amendments to National Instrument 58-101 Disclosure of Corporate Governance Practices*, OSC Notice (15 October 2014), at 1.

disclosure requirements remain in effect today.[26] On December 15, 2016, the Alberta Securities Commission also announced its adoption of the 2014 Proposed Amendments.[27]

In or around December 2014, ahead of the amendments coming into force, then Chair of the OSC, Howard Wetston highlighted, "[w]hen you have greater transparency, there is a greater likelihood that a greater number of stakeholders will take an interest in what the company is doing and what it is trying to achieve. […] Gender diversity, simply put, is good corporate governance."[28]

The OSC made it clear that diversity-related disclosures were implemented as a response to the provincial government's request to seek ways to increase gender diversity on boards.[29] In this regard, Wetston stated "we exercised our authority under the comply or explain regime." Yet, approximately six months following the adoption of the 2014 Proposed Amendments, Wetston acknowledged that ultimately, the better solution for increasing diversity on boards may well be through legislative action, claiming that "the government may say"[30] the results of the review of the regime are "not good enough" and that legislation may be needed if "we don't see the needed change."[31]

Have the Goals of the 2014 Proposed Amendments and Advisory Council Report Been Met?

Canadian Experience

As noted above, the Advisory Council believed that "a goal of 30% over five years (2014 – 2019) is a reasonable national threshold to aspire to, with the longer term goal being gender balance on boards."[32] However, while the representation of women on boards in Canada has steadily improved, it has failed to meet the initial 30% target set by the Advisory Council.[33] As of 2023, a gender gap persists in Canadian corporate boardrooms and executive suites. The annual report cards published by organizations monitoring diversity metrics underscore

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[26] *Notice of Ministerial Approval of Amendments to National Instrument 58-101 Disclosure of Corporate Governance Practices and Form 58-101F1 Corporate Governance Disclosure*, OSC Notice (2014), 37 OSCB 10929.

[27] *ASC to Adopt Disclosure Requirements Regarding The Representation Of Women On Boards And In Senior Management*, ASC News Release (15 December 2016).

[28] Linda Nguyen, "Will new rules get more women on corporate boards?" (19 December 2014), online: <https://www.ctvnews.ca/business/will-new-rules-get-more-women-on-corporate-boards-1.2155277>.

[29] Barbara Shecter, "It's simply not good enough: OSC chair warns legislation may be needed to get more women on boards" (10 June 2015), online: <https://financialpost.com/news/fp-street/its-simply-not-good-enough-osc-chair-warns-legislation-may-be-needed-to-get-more-women-on-boards> [*Shecter*].

[30] *Ibid*.

[31] *Ibid*.

[32] *Good for Business*, *supra* note 23 at 10.

[33] *Ibid.* See also Canada, *Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations – 2022 annual report* (Ottawa: Corporations Canada, 2022) at 3 online: <ised-isde.canada.ca/site/corporations-canada/en/now-available-2022-annual-report-diversity-boards-directors-and-senior-management-federal>. The report notes that women only hold 19% of board seats.

the slow pace of change.[34] If the "comply or explain" model has not achieved the desired goal for women representation on boards, it is highly unlikely that it can do so for other underrepresented groups, many of whom are likely to face greater systemic barriers.

The most recent CSA staff review of disclosure regarding women on boards and in executive officer positions found that the proportion of board seats held by women in TSX and non-venture companies increased from 11% to 24% during the eight-year period since the 2014 Proposed Amendments came into effect.[35] We have no doubt that if this was expanded to include venture issuers, the percentage would be significantly lower. In 2022, 7% of the board chairs were women, up from 6% the year before. More encouragingly, approximately 45% (196) of board seats that were vacated during the calendar year 2022 were filled by women, representing an increase of 10% from 2021.[36]

According to data from Statistics Canada, 25.2% of board seats of publicly traded corporations were held by women in 2020 compared to 24.4% in 2018.[37] Another survey by the Canadian Prosperity Project found "women held 21.5% of all TSX-listed companies board seats and 31.5% of S&P/TSX 60 companies board seats, as of July 31, 2020."[38]

Global Perspective

While there has been an upward trend, Canada still lags behind several other developed nations when it comes to gender-diverse boards.

According to data from the Organization for Economic Cooperation and Development ("**OECD**"), an international public policy organization comprising of 38 advanced economies, women represented 25.1% of board directorships in 2021 for publicly listed companies, up from 20% in 2017 and 14.5% in 2013. In 2021, the OECD noted that women accounted for at least a third of board members in 20 of the 50 jurisdictions, and only four jurisdictions had at least 40% women representation at the board level (France, Iceland, New Zealand and Norway).[39]

Europe, where many countries have legal requirements for minimum representation of women on corporate boards, leads the world. Women hold the largest percentage of board seats in companies on the European stock index, particularly in Norway, Finland and France (35.5%,

[34] The Prosperity Project, *The Prosperity Project 2023 Annual Report Card on Gender Diversity and Leadership: The Zero Report* (Toronto: The Prosperity Project, 2023).
[35] *CSA Multilateral Staff Notice 58-314: Review of Disclosure Regarding Women on Boards and in Executive Officer Positions (Year 8 Report)*, OSC CSA Multilateral Staff Notice (October 27, 2022), at 4.
[36] *Ibid* at 6.
[37] Statistics Canada, *Representation of women on boards of directors, 2020*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 29 May 2023) at 3; Statistics Canada, *Representation of women on boards of directors, 2019*, Catalogue No 11-001-X (Ottawa: Statistics Canada, 18 May 2022) at 2.
[38] The Prosperity Project, *The Prosperity Project 2021 Annual Report Card on Gender Diversity and Leadership: The Zero Report* (Toronto: The Prosperity Project, 2021) at 6.
[39] Emeline Denis, "Enhancing Gender Diversity on Boards and in Senior Management of Listed Companies" (2022) OECD Corporate Governance Committee, Working Paper No 28, at 6, online: <www.oecd-ilibrary.org/deliver/4f7ca695-en.pdf?itemId=%2Fcontent%2Fpaper%2F4f7ca695-en&mimeType=pdf>.

29.9%, and 29.7% respectively)[40], which are all countries with government-legislated quotas for advancing women.

However, the UK has seen significant gains in women's representation without the use of quotas. Since 2011, women's representation on FTSE 350 boards has more than doubled.[41] As per 2023 data from FTSE Women Leaders Review,[42] 40.2% of all FTSE 350 board positions are held by women; 55 women now hold the role of chair of the board (almost one in six FTSE 350 companies), there are no longer any all-male boards, and there was only one company with only one woman on the board.[43] The progress in the UK is not limited to only FTSE 350 companies; data gathered by Women on Boards, a nonprofit aiming to have women sit in half of public company board seats, demonstrated that companies listed on the FTSE SmallCap Index (companies outside of the FTSE 350 index) increased their women board representation to 37% in 2023[44] from 31% in 2021.[45]

In the U.S., where there are no quotas at the federal level, notable progress has been made with respect to women's representation on S&P 500 boards. According to data from the 2022 U.S. Spencer Stuart Board Index, all S&P 500 boards had at least one woman director and 98% of boards included two or more women directors, compared to 61% in 2012.[46] Further, there was also improvement seen in the number of women independent directors. In 2021, 30% of the S&P 500 independent board directors were women compared to 18% in 2015.[47]

Is There Another Approach That Would Positively Impact Diversity?

While there has been progress, it is clear that the goal earmarked by the Advisory Council of increasing the representation of women on boards in Canada to 30% has not been achieved through diversity disclosure, and there are no reasonable grounds to believe that a "comply or explain" regime that is expanded to include other underrepresented groups will be successful. A more robust legislative approach may well be more effective and could more directly address the problem. It is our view that the then Chair of the OSC was correct when he noted, soon after the 2014 Proposed Amendments were implemented, that the better solution for increasing diversity on boards is through legislative action, claiming that the

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[40] Catalyst, *Gender Diversity on Boards in Canada: Recommendations for Accelerating Progress* (Toronto: Catalyst, 2016) at 16-17 [*Catalyst 2016 Study*].
[41] UK, *Women on Boards: 5 Year Summary (Davies Review)* (London: Davies Review, 2015) at 2.
[42] The FTSE Women Leaders Review, launched in 2021, is an independent five-year initiative supported by the UK government which is aimed at improving the representation of women on boards, and in leadership teams, of the UK's biggest companies.
[43] FTSE Women Leaders, *FTSE Women Leaders Review: Achieving Gender Balance* (London: FTSE Women Leaders, 2023) at 48, 65.
[44] Women on Boards UK, *Hidden Talent – the Expertise Listed Company Boards are Lacking* (London: Women on Boards UK, 2023) at 30.
[45] Women on Boards UK, *Hidden Truth 2022 - Board diversity in the FTSE All-Share ex350* (London: Women on Boards UK, 2022) at 8.
[46] Spencer Stuart, *2022 U.S. Spencer Stuart Board Index* (Spencer Stuart, 2022) at 7.
[47] Olivia Wakefield, Ira T Kay & Paige Patton, Pay Governance LLC, "U.S. Corporate Journey Towards Gender Diversity" (6 December 2021), online: <https://corpgov.law.harvard.edu/2021/12/06/u-s-corporate-journey-towards-gender-diversity/>.

government may find the results of the review of the regime to be "not good enough" and that legislation may be needed if "we don't see the needed change."[48]

Quotas

Although the response to legislative action in this field is often to seek quotas, we are reluctant to recommend this approach. In this regard, we note that the Advisory Council did not believe that quotas should be implemented,[49] and quotas have been rejected in Canada from a practical and political perspective.[50] More importantly, if we look at jurisdictions where quotas have been implemented, they have not necessarily achieved their intended effects. For example, studies of the effects of the board diversity quotas in Norway indicate that mandates caused a decline in company performance and reduced shareholder value.[51] According to one study, some companies chose to go private rather than comply with Norway's board diversity mandate.[52] In France, one study found that gender quotas had no impact on firm profitability, but found a negative effect on productivity.[53] Further research has also suggested that new women directors under such regimes had fewer board responsibilities.[54] In the Netherlands, mandatory quotas presented difficulties for some companies, which led to companies using a more flexible interpretation of the legal requirements in order to achieve compliance.[55]

A 2020 U.S. study found evidence that under a quota system, U.S. market participants tended to view women on boards as tokens if the board only met the minimum quota requirement.[56] In Norway, findings of ongoing research suggest that quotas have become a new ceiling for women as once quotas are met progress tends to stagnate.[57]

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[48] *Shecter*, *supra* note 29.
[49] *Good for Business*, *supra* note 23 at 10.
[50] Hansell LLP, "Ontario Securities Commission Staff Consultation Paper 58-401-Disclosure Requirements Regarding Women on Boards and in Senior Management: Summary of Comments Submitted to October 4, 2014" at 3, online (PDF):<https://www.hanselladvisory.com/content/uploads/17-Commentary-OSC-Staff-Consultation-Paper-58-401-Gender-Diversity.pdf>.
[51] Kenneth R Ahern & Amy K Dittmar, "The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation" (2012) 127:1 QJ Econs 137.
[52] Mari Teigen, *Gender balance on Company Boards: A Summary From a Research Project about the Impact of the Norwegian Gender Quota Legislation* (Oslo: Institute for Social Research, 2015) at 15-16.
[53] Simona Comi et al, "Where Women Make a Difference: Gender Quotas and Firms' Performance in Three European Countries" (2020) 73:3 ILR Rev 768 at 790.
[54] Antoine Rebérioux & Gwenaël Roudaut, "The Role of Rookie Female Directors in a Post-Quota Period: Gender Inequalities within French Boards" (2019) 58:3 Inst for Research on Lab & Employment.
[55] Rutger Sterk & Bas Vletter, "How Dutch Companies Are Responding to the Gender Diversity Requirement for Supervisory Boards" (17 April 2023), online (blog): <https://www.gtlaw-amsterdamlawblog.com/2023/04/how-dutch-companies-are-responding-to-the-gender-diversity-requirement-for-supervisory-boards/>.
[56] Jessica M Rixom, Mark Jackson & Brett A Rixom, "Mandating Diversity on the Board of Directors: Do Investors Feel That Gender Quotas Result In Tokenism or Added Value for Firms?" (2022) 182:3 J Bus Ethics 182:3 at 679.
[57] Cathrine Seierstad & Morten Huse, "Gender Quotas on Corporate Boards in Norway: Ten Years Later and Lessons Learned" in Cathrine Seierstad, Patricia Gabaldon & Heike Mensi-Klarbach, *Gender Diversity in the Boardroom* vol 1 (Palgrave Macmillan Cham, 2017) at 26, 28.

Term limits

As noted above, the most recent CSA staff review of disclosure regarding women on boards and in executive officer positions found that approximately 45% (196) of board seats that were vacated during the calendar year 2022 were filled by women, representing an increase of 10% from 2021. This supports the view that the imposition of term limits might be a more effective means to increase diversity than a "comply or explain" disclosure requirement.

The Capital Markets Modernization Taskforce's final report ("**Taskforce Report**") also supported the imposition of term limits with the following recommendation[58]:

> "Amend Ontario securities legislation to set a 12-year maximum tenure limit for directors of publicly listed issuers, with an exception for: (a) 15-year maximum tenure limit for the Chair of the board; (b) non-independent directors of family-owned and controlled businesses, where such nominees represent a minority of the board; and, (c) no more than one other director who will be deemed not to be independent, and will still have a 15-year limit. Issuers must implement this recommendation within three years of this amendment taking effect. This is aimed to encourage an appropriate level of board renewal. The issue of board entrenchment and board renewal is a concern from a governance perspective as continued refreshment of the board helps to ensure that independent, fresh and diverse perspectives and skills are brought into the boardroom."

A 2016 study from Catalyst, commissioned by the Government of Ontario, looked at the relationship between term limits and gender diversity and board composition of S&P/TSX composite issuers in 2011 and 2015.[59] The study found that issuers with the highest board renewal rates had nearly six more directors joining their board than issuers with the lowest renewal rates. Those issuers with the highest renewal rates increased the percentage of women directors at almost double the rate (9% vs. 5%) of those with the lowest renewal rates over five years.[60]

The same Catalyst study further found that issuers (50% of S&P/TSX composite) who had term limit policies in place had a more diverse board, with those issuers who had both term limits and a high renewal rate having the most diverse boards.[61] Even among issuers with the lowest board renewal rates, board tenure limits, for the issuers that imposed them, still had

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[58] Capital Markets Modernization Taskforce, *Final Report: Capital Markets Modernization Taskforce* (Toronto: Capital Markets Modernization Taskforce, 2021) at 65.
[59] *Catalyst 2016 Study*, *supra* note 40 at 18.
[60] *Ibid* at 19.
[61] *Ibid* at 20.

a positive impact on gender diversity.[62] The Catalyst study, while applauding the OSC's "comply or explain" model, also recommended that the government take up a number of initiatives to accelerate progress. One of those recommendations was to encourage the use of director term limits and/or age limits to facilitate board renewal.[63]

The findings of the Catalyst study are supported by a 2018 report from leadership consulting firm Spencer Stuart which found that, while women and minorities composed half of incoming S&P 500 directors, "the chronic low rate of director turnover is bringing about only gradual shifts in the overall complexion of U.S. boards."[64] Additionally, a 2022 survey from PricewaterhouseCoopers ("**PwC**") of more than 700 public company directors reported that 67% of directors said their board replaced a retiring director with one who increased the board's diversity.[65] This statistic suggests that where the rate of board turnover could be increased through term limits, many boards would seek to fill these vacancies with diverse candidates.

The same PwC survey also found that 78 boards in the S&P 500 expanded their board size to add one or more women directors, and 88 did the same to add racial/ethnic diversity.[66] These figures suggest that some corporate boards did see the value in increasing diversity, even where they do not have the opportunity to do so through a one-for-one replacement of an outgoing director.

However, we believe that in the Canadian marketplace, the imposition of a strict term limit may cause unintended consequences. One can imagine several reasons why strict adherence to such a rule could be problematic, including:

- forcing founders/family members off boards, thereby resulting in them effectively governing from the sidelines, which would result in transparency concerns;
- failing to take into account characteristics of controlled companies with the existence of a majority shareholder maintaining board and chair positions being integral for a company's success;
- limiting the ability of the board to effectively oversee management succession;
- loss of valuable talent, which can be especially damaging if it occurs in the middle of a crisis or a fundamental change in strategy; and

[62] *Ibid* at 20.
[63] *Ibid* at 29
[64] Spencer Stuart, *2018 U.S. Spencer Stuart Board Index* (Spencer Stuart, 2018) at 1.
[65] PwC, *Charting the court through a changing governance landscape: PwC's 2022 Annual Corporate Directors Survey* (PwC, 2022) at 13.
[66] *Ibid*.

- possibly serving as an anti-competitive jurisdictional burden.[67]

We expect that a modified approach to term limits may achieve the desired goal while avoiding negative consequences. In this regard, it is relatively more common practice in Europe, compared to Canada and the U.S., to establish a maximum tenure for board members to be considered independent.[68] The link between length of service and lack of independence is logical. Studies have shown that while long service on a corporate board allows a director to become knowledgeable about the specific company and its business, it may also cause increased familiarity between the board and management, leading to weaker or biased monitoring from the board, undermining the effectiveness of corporate governance and resulting in a decrease in overall firm value.[69] Moreover, Institutional Shareholder Services ("**ISS**") has started to include director tenure in their company governance ratings. In its governance scoring guidelines, QuickScore 2.0, ISS notes that "[l]imiting [non-executive] director tenure allows new directors to the board to bring fresh perspectives. A tenure of more than nine years is considered to potentially compromise a director's independence and as such QuickScore will consider tenure > 9 years excessive."[70]

Other studies suggest that directors with longer board service are more likely to have a friendly relationship with executives and management, which is developed over time.[71] Findings suggest that management is more likely to be in a position to use power to influence the nomination process of directors.[72] Moreover, outside directors with strong personal relationships to management are more likely to be re-appointed and remain directors for longer terms. Those directors will cease to operate independently. Richard Koppes, former general counsel of CalPERS, stated "it is easier for a longer-tenured director to begin to operate as an insider."[73]

According to a 2021 report by the OECD, approximately 28 of the countries surveyed have set a maximum tenure, in the range of five to 15 years, at which point the director either is deemed not independent or must provide an explanation justifying his or her continued independence.[74]

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[67] Based on commentators' responses to the Capital Markets Modernization Taskforce, *Consultation Report: Capital Markets Modernization Taskforce* (Toronto: Capital Markets Modernization Taskforce, 2020).
[68] Darren Rosenblum & Yaron Nili, "Board Diversity by Term Limits?" (2019) 71 Alabama L Rev 211 at 249.
[69] Cesare Fracassi & Geoffrey Tate, "External Networking and Internal Firm Governance" (17 January 2012).
[70] Institutional Shareholder Services, "ISS Governance QuickScore 2.0: Overview and Updates" (January 2014) at 11.
[71] Nikos Vafeas, "Length of Board Tenure and Outside Director Independence" (2003) 30:7-8 J Bus Fin & Acct 1043 at 1043-1062.
[72] See Lucian Arye Bebchuk, Jesse M. Fried, & David I. Walker, "Managerial Power and Rent Extraction in the Design of Executive Compensation" (2002) U Chi L Rev Chicago Law Review, 69, at 767. See also Lucian Arye Bebchuk & Jesse M. Fried, "Executive Compensation as an Agency Problem" (2003) 17:3 JEP at 74-75.
[73] Judy Canavan, Blair Jones & Mary Jo Potter, "Board Tenure: How Long is Too Long?" (2004) 28:2 Directors & Boards 39 at 40.
[74] Organization for Economic Co-operation and Development, *OECD Corporate Governance Factbook 2021*, (2021) at 145-146.

In the UK, the Corporate Governance Code (the "**Code**") applies to companies with a premium listing on the London Stock Exchange and companies must follow the principles of the Code through a "comply or explain" model.[75] Under Section 2 of the Code, directors who have served on a board for more than nine years from the date of their first appointment are no longer considered independent. Where the board considers the director to still be independent, it must provide a clear explanation to support that position.[76] Since the guidance was first instituted in 2010, the representation of women on FTSE 100 corporate boards has risen from 12.5% to 34% in 2021, with 41% of all available roles going to women.[77] It should be noted that Section 3 of the Code requires that diversity of gender, among other factors, be considered in appointments and succession planning, as well as annual evaluations of board composition.[78] Further, the Code stipulates that the annual report should describe the board's approach to succession planning and supporting the development of a diverse pipeline of candidates, including the gender balance of senior management and their direct reports.[79]

For these reasons, we support the implementation of a maximum tenure limit in order to address the independence of directors and effectively promote diversity on boards. We support a term limit based on deeming a director that reaches the term limit to be considered not independent for purposes of securities and corporate law. We have no definitive view as to the length of such term; however, in considering the limits imposed by other jurisdictions, we believe a term of anywhere between nine and 12 years could be considered. We note that some commentators on the consultation paper of the Capital Markets Modernization Taskforce were also supportive of this idea.[80]

Finally, on this point and notwithstanding the above, we do not support the term limit proposal under the Taskforce Report as, despite the exceptions, we believe that in the Canadian marketplace, the imposition of a strict term limit may be harmful.

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[75] Financial Reporting Council, *The UK Corporate Governance Code* (July 2018), online: <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf> [*UK Corporate Governance Code*].

[76] *Ibid* at 6-7.

[77] Financial Times Stock Exchange, *Women on Boards February 2011*, (FTSE, February 2011) at 3; Financial Times Stock Exchange Women Leaders, *FTSE Women Leaders Review: Achieving Gender Balance* (FTSE Women Leaders, 2023) at 12.

[78] *UK Corporate Governance Code*, *supra* note 75 at 8.

[79] *Ibid* at 8-9.

[80] See Milla Craig, Millani, "Re: Millani's response to the consultation report on Capital Markets Modernization Taskforce" (3 September 2020) via e-mail [communicated to Capital Markets Modernization Taskforce]; Sonia Baxendale, Global Risk Institute in Financial Services, "Submission by the Global Risk Institute in Financial Services (GRI)" (2 September 2020) via e-mail [communicated to Capital Markets Modernization Taskforce]; Gary Retelny & Debra L Sisti, Institutional Shareholder Services, "Re: Consultation – Modernizing Ontario's Capital Markets" via e-mail [communicated to Capital Markets Modernization Taskforce]; Desjardins, "Commentaires du Mouvement Desjardins portant sur le Rapport de consultation du Groupe de travail sur la modernisation des marchés financiers de l'Ontario" (September 2020) [communicated to Capital Markets Modernization Taskforce].

Response to CSA Request for Comments:

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. (Please refer to the table entitled "Board Nominations" in Annex A for a description of this proposed requirement).

We do not believe that this requirement should raise concerns for issuers regarding disclosure of confidential or competitively sensitive information. Many issuers already maintain and disclose skills matrices used to assess the current board, recruitment needs and director candidates; such disclosure can be provided in a manner that does not impact a company's competitive position.

Such disclosure is also consistent with various U.S. securities laws and proxy voting guidelines. The SEC requires applicable issuers to provide detailed biographical information, including particular qualifications, attributes, skills, or experience that led the board to conclude that a candidate should serve as a director.[81] In 2014, the Council of Institutional Investors noted:

> "Shareholders value disclosures that highlight the relevant skills, experience and attributes that each director nominee brings to the boardroom, without unnecessary or boilerplate information."[82]

Glass Lewis maintains that board skills matrices should be disclosed as they can be a "valuable tool for assessing a board's mix of skills and experience"[83] and would be meaningful to shareholders. Similarly, the Canadian Coalition for Good Governance recommends the use of a skills matrix in order to identify the key skills required of directors and confirm that these skills are being accounted for.[84]

In summary, the disclosure of the skills, knowledge, experience, competencies and attributes of director candidates that are considered and evaluated is information that is largely already being provided by many issuers. We do not believe that the provision of this disclosure in the past has raised confidentiality or competitive issues and we would not expect the proposed disclosure in Item 6 of Form 58-101F1 to raise such concerns or result in the disclosure of competitively sensitive information.

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[81] *Proxy Disclosure Enhancements*, *supra* note 2.
[82] Council of Institutional Investors, *Best Disclosure: Director Qualifications & Skills* (Washington: Council of Institutional investors, 2014) at 2, online: <https://www.cii.org/files/publications/governance_basics/04_28_14_best_disclosure.pdf>.
[83] Glass Lewis, *Board Skills* (2020) at 1.
[84] Canadian Coalition for Good Governance (2022), *Best Practices for Proxy Circular Disclosure*, at 19.

2. We are consulting on two alternatives with respect to the requirements 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.

To the extent an issuer's approach to diversity impacts voting or investment decisions, we believe that Form A best meets the needs of investors for making such decisions.

Form A affords issuers with the flexibility necessary to best inform investors compared to the "one-size-fits-all" approach outlined in Form B. Form A allows issuers to outline their "approach to achieving or maintaining diversity" that would be "most beneficial to that issuer in advancing its business and strategy", which may vary from issuer to issuer and include factors beyond those enumerated by Form B. In order to be effective and foster efficient and competitive capital markets, diversity policies should support and align with an issuer's business strategies. Effective diversity disclosure extends beyond the quantitative presentation of metrics. The narrative aspect of disclosure plays a crucial role in elucidating an issuer's commitment to diversity and inclusion. A flexible approach allows issuers to articulate their strategies, policies and initiatives aimed at fostering an inclusive environment.

Issuers of various sizes and across different industries have diverse needs of boards and senior management. Investors' interests also vary across industries, and a one-size-fits-all approach to diversity and disclosure may lead to information overload or the omission of crucial details. Form A provides issuers with the flexibility to prioritize and report on the diversity dimensions that are most relevant to their business needs and industry while providing investors with pertinent information that can better guide their investment decisions.

Form B seeks to impose a "one-size-fits-all" approach which can lead to a "check-the-box" mentality, where issuers prioritize meeting regulatory requirements without fundamentally integrating diversity and inclusion into their corporate culture. The focus on meeting specific disclosure mandates might detract from a more holistic approach to fostering diversity and inclusion within organizations. Further, a prescriptive approach to diversity disclosure may not adequately accommodate the nuances of different industries and organizational contexts. The corporate governance landscape is diverse, and rigid regulations might fail to capture the intricate challenges and opportunities associated with achieving genuine diversity and inclusion.

We also do not see how either Form A or Form B would increase the rate at which issuers increase diversity at the board and senior management level in a meaningful way. While the CSA proposal does not impose any form of quotas on issuers and is similar to recent changes

to NASDAQ Rule 5605(f) and 5606(a), as noted above, we question the underlying assumption of the existence of any causal association between prescriptive disclosure regulations and increase in diversity on boards.

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. (Please refer to the table entitled "*Approach to Diversity – Executive Officer Positions*" in Annex A for a description of this proposed requirement).

We would suggest that whatever approach is adopted for directors should also be adopted for executive officers. It is not clear to us why there should be a difference. The fact that Form B would not require disclosure on the consideration of diversity when making executive officer appointments because of concerns regarding regulatory burden may speak to bigger concerns with the approach under Form B.

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. (Please refer to the table entitled "*Concept of Diversity*" in Annex A for a description of "designated groups" and "identified group").

As noted above, to the extent disclosure is helpful, we believe the flexibility offered by Form A is preferable to Form B.

The usage of "designated groups" as proposed in Form B presents many problems. Firstly, the prescriptive, "one-size-fits-all" approach used in Form B may not adequately accommodate the nuances of issuers in different industries and organizational contexts, especially in today's globalized market. Genuine diversity is achieved through integration into an issuer's culture and such integration will depend on the development of a diversity profile that is reflective of the unique characteristics and needs of any particular organization, its business strategies and its various stakeholders. "Diversity" is much broader than what the "designated groups" would suggest and can be extended to a range of attributes including, among others, age, religion, financial status, educational background and geographic location.

The average board size in Canada is ten members[85], which makes it nearly statistically impossible for a single board to accommodate all possible aspects of diversity. Mandating a limited number of "designated groups" for an entity to disclose information about may obscure the true diversity within that entity and overlook the underrepresented groups that a specific issuer may wish to promote and support. In contrast, the "identified groups" approach

[85] Institute for Governance of Private and Public Organizations, "The quest for diversity of boards of directors and in senior management of public corporations" (March 2021) at 13-14, online: <https://igopp.org/wp-content/uploads/2021/03/IGOPP_Rapport_Diversite_2021_EN_WEB_v6.pdf>.

proposed in Form A would provide the opportunity for issuers to determine what aspects of diversity best suit their particular circumstances.

Rather than engendering a thoughtful, holistic approach to diversity, requiring disclosure of "designated groups" may instead lead issuers to hire individuals solely for diversity disclosure purposes – thus allowing them to "check the box". This not only detracts from good governance practices but also results in disclosure that is not actually indicative of genuine diversity. Growing research indicates that diversity can substantially benefit boards only when moving beyond mere representation.[86] One study showed that effective integration of diverse individuals led to more collaborative decision-making, resulting in better firm performance and shareholder relations – however, this only occurred in firms where underrepresented groups were fully integrated, whereas the boards with less integrated individuals made poorer governance decisions.[87] An approach that is meant to foster true diversity needs to be flexible and should avoid prescribing arbitrary expectations that are not reflective of an issuer's reality.

Further, a "check-the-box" exercise oftentimes creates the risk or perception of tokenism, which is counter to the objectives of the Proposed Amendments. In our opinion, issuers should be left to determine their own approach to diversity and the data that they deem most appropriate, meaningful and beneficial for investors.

In addition, privacy concerns surrounding self-identification and public disclosure of an individual's association with a certain group would likely arise through Form B. We also have this concern regarding Form A. While the Proposed Amendments are premised on voluntary self-identification, there are many reasons why a director or executive officer would choose or prefer not to self-identify as a member of one or more of the designated groups. We also query if pressures to disclose, whether explicit or implied, would result from the Form B approach whereby issuers would feel obligated to "check the box" while individual directors or executive officers may not feel comfortable publicly disclosing certain affinities. This may be particularly true if they belong to a designated group that has been traditionally subject to discrimination or hate crimes.

Instead, we believe that issuers and investors would benefit from disclosing data about women only and the identified groups for which issuers collect data, consistent with the approach in Form A. This approach provides issuers with the flexibility to establish diversity profiles that are relevant to them and allows them to reflect internally and create strategies best suited to their specific circumstances. Ultimately, it is not clear to us that the current *Canada Business Corporations Act* ("**CBCA**") approach is effective nor do we feel the categorization of designated groups is an appropriate mandate of securities regulatory authorities.

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[86] Randall S Peterson & Heidi K Gardner, "Is Your Board Inclusive — or Just Diverse?" (28 September 2022).
[87] *Ibid*.

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.

Although we understand the inclination to believe that standardized disclosure is helpful, it is not clear to us that this will achieve the desired goal. It is essential to view diversity and inclusion as ongoing and evolving processes, rather than a one-size-fits-all solution for all issuers regardless of size, industry, jurisdiction and other considerations. Consistent with our response to question 4 above, we believe that a tabular format may result in a mere "check-the-box" exercise when it should be more substantive and a reflection of the issuer's culture, practices, policies and long-term goals. We would also note that according to Corporations Canada, the percentage of overall board seats of CBCA companies filled by women and members of visible minorities actually decreased slightly from 2021. In 2022, women held 19% of board seats (down from 20% in 2021), members of visible minorities held 6% (down from 7% in 2021) of board seats, indigenous people held 0.6% (a slight increase from 0.4% in 2021) and persons with disabilities held 0.4% (which has not changed since 2021) of the board seats of public companies incorporated under the CBCA. This trend does not suggest that the adoption of common tabular formats is helpful to the overall goal of achieving greater diversity.[88]

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

We anticipate that CBCA-incorporated issuers would be in a position to complete the disclosure in Form A with little additional effort since the adaptable definition of "identified group" under Form A would enable CBCA issuers to continue reporting on the categories of designated groups defined under the CBCA for whom they already collect data.

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.

No, we believe that disclosure requirements similar to the Proposed Amendments should not be imposed on venture issuers. In our experience, venture issuers face unique challenges, many of which may impact their ability to comply with such disclosure requirements. In particular, venture issuers typically have smaller board sizes and a slower turnover of board seats, in part because of the difficulty in recruiting independent directors who are both willing and have the background and expertise necessary to serve on the board. Additionally, senior officers are often founders, as opposed to externally recruited candidates, and small senior management teams are not uncommon. We believe that imposing additional disclosure

[88] Canada, *Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations – 2022 annual report* (Ottawa: Corporations Canada, 2022) at 3.

requirements on venture issuers could be unduly arduous in consideration of the unique challenges they face and be detrimental to our relatively small Canadian capital markets. Consistent with the 2013 Consultation Paper, we do not believe that venture issuers should be subject to these regulations due to concerns regarding the potential regulatory burden.[89]

Further, we would strongly advocate that the CSA wait and gather data on the impact of the CBCA requirements on CBCA-incorporated venture issuers, in addition to non-venture issuers, before any further consideration of imposing enhanced disclosure requirements on venture issuers.

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If you wish to discuss any aspect of this letter, we encourage you to contact any one of the following lawyers who would be pleased to speak to you at your convenience:

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[89] *2013 Consultation Paper*, *supra* note 9 at 3.