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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

Dear Members of the CSA,

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

We are writing in response to the invitation in the CSA Notice and Request for Comment to provide our perspective on the proposed changes to the Form and Guidelines.

We believe that it is appropriate for regulators to review the regulatory approach to corporate governance matters from time to time in light of accumulated experience and the evolution of corporate governance practices over time, and we commend the CSA for initiating a review to consider updates to the diversity disclosure requirements for senior leadership roles to encompass other diversity considerations in addition to the representation of women. It is past time to take the next step with respect to disclosure of diversity in Canada. As we have noted in our annual reports on Diversity Disclosure Practices from 2015 to 2022, there has been progress in increasing the representation of women on boards and in executive officer roles of Canadian issuers, but the representation of other underrepresented groups is far below their demographic levels in Canada. We have also noted in our reports the interest by regulators, investors and others in diversity characteristics beyond gender.

However, it is unfortunate that the CSA was unable to agree on a harmonized approach to revising the Form and the Guidelines. We strongly support a coordinated regulatory approach to the review of corporate governance disclosure, and guidance that reflects a consensus view of all of Canada's securities administrators. We note that companies

incorporated under the *Canada Business Corporations* Act (CBCA) are subject to diversity disclosure requirements under that statute, and a subset of CBCA companies that are listed on the NASDAQ stock exchange are also subject to the board diversity disclosure rules of that exchange. As an issuer can already be subject to multiple mandatory diversity disclosure requirements, we believe it is important that the CSA agree on a harmonized approach. We also believe that the approach should afford an issuer the flexibility to describe its approach to diversity, should not conflict with other diversity disclosure requirements to which the issuer may be subject and should include prescribed quantitative data on specified diversity characteristics so that investors can make an informed assessment of an issuer's approach and practices relative to other issuers and for the same issuer over time.

In our comment letter, we first respond to the specific questions raised in the CSA Notice and Request for Comment and then provide a number of additional 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 expect such disclosure is unlikely to raise confidential or competitively sensitive concerns as many issuers already provide such disclosure, whether in the form of a skills matrix or otherwise. The requirement in the Form should be limited to identifying the key skills, experience, competencies and attributes in order to avoid voluminous or boilerplate disclosure in response to this item.

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.**

As noted above, we believe issuers should have flexibility to disclose their approach to diversity on the board and in executive officer positions, including their approach to the identification of any groups in addition to women which the issuer has determined are relevant to it and the practices it has adopted to achieving or maintaining representation of such groups. This would include disclosure of any targets adopted by the issuer with respect

to any group or combination of groups and the progress made towards achieving the targets. However, to provide investors with the statistical information necessary for them to assess the issuers' practices and (where applicable) to make investment decisions, all issuers should be required to provide numerical data relating to the representation of prescribed designated groups. This data facilitates the comparison of issuers to one another and the assessment of the same issuer over time.

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 believe such disclosure provides useful information to investors. In particular, we note that some institutional investors and proxy advisory firms have stated that they expect issuers to have some representation from visible minorities on the board or senior management and to provide disclosure relating to their practices in enhancing or maintaining such representation.

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")***

Issuers should be required to disclose data about the level of representation of specified designated groups based on self-identification. The disclosure should include not only the number of individuals who are members of more than one designated group, but also the number of individuals who chose not to self-identify as a member of any designated group. Providing data about the representation of specified designated groups enhances comparability across issuers and provides investors with a basis on which to assess the efficacy of the issuer's adopted diversity practices over time. For this data to be most meaningful, it should be provided for each designated group individually and not all of the designated groups collectively.

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.

Yes, a tabular format is desirable. Provided disclosure is based on self-identification and includes details on the number of individuals who chose not to self-identify, we do not expect the disclosure to raise any significant concerns for issuers.

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.

It should be possible for issuers to comply with both the CBCA requirements and the amended securities law disclosure requirements. With respect to groups other than women, both Form A and Form B require disclosure of the issuer's approach to enhancing diversity, including the adoption of any targets and the level of representation achieved by such groups on a collective basis. By contrast, the CBCA requires disclosure in respect of each designated group individually (rather than all designated groups collectively). This provides specific disclosure with respect to the level of representation of visible minorities, Indigenous peoples and persons with a disability for these issuers. We believe disclosure for each designated group individually will be more meaningful but, to avoid creating a conflict for CBCA-incorporated issuers, the Forms should not mandate disclosure for all specified groups on a collective basis and, at a minimum, should permit issuers to choose whether to provide disclosure for specified groups on a collective or group-by-group basis.

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 would support a substantially scaled down diversity disclosure requirement for venture issuers to provide meaningful information to investors without imposing undue burdens on venture issuers. For example, a requirement to explain the venture issuer's approach to diversity on the board and in executive officer positions, plus data on the representation of each designated group on the board and among the executive officers.

Other Comments

(a) Requirement to disclose whether there is a written policy respecting the nomination process or, if not, explain how the board carries out the nomination process.

The proposed disclosure requirement contemplates a level of rigid formality that is not typical in our experience. Canadian issuers have not adopted such policies. In any event, we expect disclosure in response to this proposed requirement will need to contemplate flexibility in approach and will tend to be boilerplate and provide little or no meaningful information to investors.

(b) Requirement to disclose how any conflicts of interest that arise or could arise during the nomination process are handled.

It is not clear what is meant by conflicts of interest arising during the nomination process. When considering potential nominees for director, issuers will consider whether a potential nominee may have a relationship that could give rise to an actual or perceived conflict of interest with their fiduciary responsibility as a director. But any such conflict of interest is not one that arises "during the nominating process". If the intent is to describe how conflicts of interest more generally are handled as part of the nomination process, we expect that disclosure provided in response to this requirement will tend to be boilerplate and provide little or no meaningful information to investors.

(c) Written strategy on diversity vs a written policy on diversity

Form B references a written strategy regarding achieving or maintaining diversity on the board, of which a written policy is only a component. The distinction Form B seeks to draw between a written policy on board diversity and a written strategy for achieving board diversity appears to be a distinction without a purpose.

(d) Necessity for comparative data

Form A provides flexibility to the issuer to determine which groups it considers to be relevant when considering diversity on the board and in executive officer roles. It then requires disclosure of targets and data regarding those "identified groups". But if the issuer has not specified any identified groups, then no disclosure of targets and data is provided except with respect to the representation of women.

To provide investors with information that enables them to make a meaningful assessment of the efficacy of an issuer's approach to diversity beyond women, including assessing the issuer's year-over-year progress and its relative performance compared to other issuers, there should be some level of mandated disclosure of data on specified groups.

With respect to targets, if an issuer has not adopted a target for women, the issuer should provide an explanation. An issuer should also provide an explanation if it has not adopted a target for any group other than men and women, even if the issuer has adopted a target for women.

(e) Composition of Designated Groups

As the first step in providing disclosure for groups other than women, we support mandating disclosure of data on the representation of designated groups as specified under the CBCA, and retaining the ability of issuers to provide disclosure in respect of additional designated groups on a voluntary basis. Extending disclosure to such designated groups somewhat limits the burden of compliance as over 25% of the companies subject to diversity disclosure requirements under Form 58-101F1 are CBCA companies and are already providing such disclosure.

Determining which diversity characteristics should be the subject of disclosure is not easy since a focus on certain categories or characteristics necessarily means that others will not receive attention. The decision respecting which groups to include as the mandatory designated groups under the CBCA was subject to political debate by members of Parliament. Since the capital markets mandate of the CSA is different and does not include matters of social policy, a decision to extend mandatory diversity disclosure requirements to other defined groups should be made on clear evidence from investors that information on such groups would be valuable when making investment decisions.

(f) Board seats filled during the year

In Form B it is unclear how an issuer is to count the number of board seats filled during the year, especially as TSX listed issuers are required under TSX listing rules to submit all directors for election annually. If the intention is to indicate the number of directors who are standing for election for the first time at the applicable meeting (for example, as a result of an increase in board size or as a result of a vacancy on the board as a result of a retirement or other departure of an existing director), that requirement should be made clear.

(g) Changes to National Policy 58-201

When it was adopted, National Policy 58-201 was intended to articulate generally recognized corporate governance best practices. The initial list reflected the outcomes of the Toronto Stock Exchange Report on Corporate Governance, which reflected an extensive and broad-based consultation process, and subsequent reports on corporate governance and feedback from the director community.

The changes proposed to National Policy 58-201 do not appear to have been preceded by a similar consultative process. And while some of the recommendations reflect the evolution of corporate governance best practices over time as set out in company disclosure, governance ratings systems and reports on corporate governance practices outside of Canada, there are a number of recommendations which are unduly prescriptive or for which such support is lacking.

We are concerned that including such recommendations may subject issuers and their boards to a standard that is not appropriate and which at least those issuers will be unable to (or perhaps for other issues, will choose not to) meet, and at best will be distracting at best and at worst may be leveraged in litigation against the issuer and its board to the detriment of investors. More generally, we question the necessity and the advisability of adopting so many changes to National Policy 58-201.

With respect to certain of the proposals, we note that:

(i) although the proposed amendments to the Guidance state that boards should adopt a written policy respecting the director nomination process, the adoption of such a policy is not a recognized best practice;

(ii) the proposed amendments to the Guidance state that recommendations for appointments to the board should be based on objective criteria. However, such decisions should be made by the board in the exercise of its business judgement and such criteria may be only one of many factors considered in exercising that judgment;

(iii) if an issuer establishes term limits, the proposed amendments to the Guidance list factors that may be considered but does not specify the purpose for which the factors are being considered;

(iv) Form B states that the succession plan for directors should provide a transparent process for director replacement, but does not articulate to whom it should be transparent;

(v) many of the details recommended to be included in a written diversity policy specified in Form B are unnecessary (such as the reminder that legal requirements must be met) or contain unnecessarily prescriptive detail; and

(vi) many of the details recommended to be considered in assessing the appropriateness of adopted targets specified in Form B are unnecessarily prescriptive.

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We are pleased to have had an opportunity to provide you with our comments. If you have any questions regarding our comments or wish to discuss them with us, please contact Andrew MacDougall (416-862-4732) or John Valley (416-862-5671).

Yours very truly,

"Osler, Hoskin & Harcourt LLP"