

October 4, 2013

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**Attention: The Secretary**



Avocats et agents de brevets et de marques de commerce

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Gentlemen and Mesdames:

**OSC Staff Consultation Paper 58-401: *Disclosure Requirements Regarding Women on Boards and in Senior Management* (OSC Consultation Paper)**

This letter is submitted in response to the OSC Consultation Paper published on July 30, 2013. It reflects the views of the undersigned exclusively and does not reflect the views of Norton Rose Fulbright Canada LLP or its other partners.

**General**

While I am a strong supporter of gender and other forms of diversity in business organizations generally, not-for-profit and other organizations, including all levels of government and their agencies, I do not believe it is appropriate for the Ontario Government to use the OSC's rule making capabilities to legislate gender diversity into the governance model and disclosure requirements for public reporting issuers subject to the jurisdiction of the OSC.

As a general comment on the "comply or explain" disclosure regime proposed by the OSC (OSC Proposal), I am of the view that even though it does not introduce mandated quotas or other binding requirements, the peer pressure exerted on reporting issuers would coerce many into adopting board and senior management gender diversity policies and guidelines, in order to be in a position to provide socially acceptable disclosure. It is difficult to imagine a public reporting issuer simply putting out a "comply or explain" disclosure to the effect that in the absence of compelling evidence of increased shareholder returns from such policies, this issuer has determined to not adopt gender diversity policy or guidelines.

The OSC Proposal will necessarily entail additional costs to public reporting issuers for outside consultants, legal advisors and internal resources to design, implement and monitor gender diversity policies and provide disclosure in information circulars in this respect initially and annually thereafter.

**1. OSC departure from its mandate**

The OSC is a regulatory body responsible for overseeing Ontario's capital markets. Its mandate is to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets.

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There is no indication in the OSC Consultation Paper as to how the proposed “comply or explain” disclosure regime on gender diversity fits within the mandate of the OSC.

The OSC Consultation Paper makes it clear that the OSC Proposal is in response to a May 2, 2013 Ontario Government initiative included in its budget speech to strongly support broader gender diversity of major businesses, not-for-profit and other large organizations.

Using securities regulation to advance a cause such as gender diversity, notwithstanding its universal appeal, but which falls clearly outside the mandate of the OSC, creates a bad precedent for other societal or political causes to be regulated onto public reporting issuers. Emboldened by this precedent, will other Canadian securities regulators determine that it is appropriate to impose “comply or explain” disclosure requirements on public reporting issuers with respect to other worthy causes, such as measures to reduce greenhouse gas emissions, and slow global warming? It is worthwhile to remember that the US Government has imposed reporting requirements with respect to compliance with prohibitions on trading with Iran; policies with respect to conflict minerals, and other matters that have no clear relation to shareholder returns or the fairness or efficiency of capital markets.

## **2. OSC Proposal not responsive to pre-existing investor concerns**

The ISS 2013 Canadian Proxy Voting Guidelines for TSX-Listed Companies (December 19, 2012) does not list gender diversity with respect to board structure and independence. Board accountability, responsiveness to shareholder concerns, independence and capabilities are key fundamental criteria against which boards are assessed by ISS when determining voting recommendations on director nominees in uncontested elections. It is generally understood that ISS’s proxy voting guidelines are reflective of the concerns of ISS’s constituency. ISS’s constituency consists of Canada’s institutional investors and investment funds and their investment managers who subscribe to ISS’s services and use ISS voting recommendations and analysis when expressing votes in respect of management and dissident proxy circulars of Canadian reporting issuers.

Over the years, the following shareholder proposals have been presented to one or more of Canada’s large cap public reporting issuers, which shareholder proposals dealt in one way or another with gender diversity on boards of directors, were included in management proxy circulars at the request of their proponents, and received the following low levels of shareholder support:

Date of AGM	Proposal	Submitted by	% In Favour(*)
Spring 1998	Systematic increase in number of women on board to one-third	M. Rousseau	Less than 8%
Spring 2001	Representative character of board of directors, including gender diversity	APEIQ	Less than 15%
Spring 2007	Increase to one-third the percentage of women on the board of directors	MÉDAC	Less than 5%
Spring 2008	Parity between men and women on the board of directors	MÉDAC	Less than 8%
Spring 2009	Presence of women on boards of directors (50% of new candidates be women)	MÉDAC	Less than 7%
Spring 2011	Critical mass of qualified women on the board of directors	MÉDAC	Less than 11%
Spring 2013	Gender equality in executive positions to be achieved within five years	MÉDAC	Less than 6%

(\*) Voting results from one unnamed large cap reporting issuer. I believe these results to be representative of support levels at other issuers at whose AGMs the same proposals were voted on.



**3. OSC Proposal unfairly targets public reporting issuers**

While the Ontario Government proposed budget speech initiative encompassed major businesses generally, not-for-profit firms and other large organizations, I am not aware of initiatives from the Ontario Government targeting the above, other than publicly listed issuers (excluding venture issuers) covered by the OSC Proposal.

Public reporting issuers are currently facing a plethora of disclosure requirements which result in lengthy and complex disclosure in information circulars and the OSC Proposal will add to this burden, with additional compliance costs for public reporting issuers subject to the OSC's jurisdiction.

Other large business organizations, not-for-profit and other large organizations, including the Ontario Provincial Government and its agencies do not appear to be the subject of similar additional disclosure obligations and compliance costs.

This is probably the result of expediency: the regime for the regulation of information circulars of public reporting issuers subject to the OSC's jurisdiction is in place, with other "comply or explain" disclosure requirements. There does not appear to be another ready platform for similar rules to be applied to other types of major businesses, not-for-profit or other large organizations.

**4. Is the Ontario Government using the OSC to export its public policy agenda beyond its borders?**

The shares of most Canadian reporting issuers are listed on the Toronto Stock Exchange, making them subject to the jurisdiction of the OSC. A significant proportion of these reporting issuers do not have their head offices in the Province of Ontario and their principal securities regulator is not the OSC.

The OSC should not be moving ahead with its proposed policy, as a response to the Ontario Government's recently stated budget speech objectives, without consultation or participation of the other Canadian securities administrators. This is not consistent with a unified consensus-based national regime of securities regulation.

Thank you for allowing me to comment on this subject.

Yours truly,



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Regional Chair for Québec,  
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