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The Secretary
Ontario Securities Commission
20 Queen Street West
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Toronto, Ontario
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Via email

**Re: OSC STAFF CONSULTATION PAPER 58- 401
DISCLOSURE REQUIREMENTS REGARDING WOMEN ON BOARDS AND IN SENIOR MANAGEMENT**

Methodology

The following reflects, in no particular order: (i) my work in advising regulators and governmental bodies (e.g., OSFI, OSC, AGCO, FICOM, Senate, others) in respect of governance (including director competencies and gender diversity); (ii) interviews with male and female directors concerning diversity; (iii) my advice and assessment of award winning boards including those known for leading diversity practices; and (iv) my advisory work with governance reforms in a variety of companies, including improving director recruitment, assessment and retirement practices. The data collection has included individual director interviews and observing the board in action.

I will proceed by answering the five bullet point questions on page 20 of the Consultation Paper.

Consultation Questions

1. What are effective policies for increasing the number of women on boards and in senior management?

Gender diversification of Boards should not be seen in isolation because augmenting women on Boards of a relatively fixed size has less chance of occurring without addressing the lack of board renewal, independence standards for Directors, and shareholder ability to propose and remove Directors.

Policies that other regulators and/or effective Boards have considered, that may increase the likelihood of greater women on Boards, and that the Ontario Securities Commission should also consider, include:

- Limiting director tenure to 9 years, beyond which independence needs to be re-established. A recent study found an inverted U curve between director tenure beyond nine years and firm value.[1] Regulators in the UK, Australia, India, Hong Kong and Singapore have proposed or adopted a similar policy;

- Limiting the number of directorships for executive Directors and/or non-executive Directors. Stanford researchers find "consistent and convincing" results that busy boards with busy directors (three or move boards) tend to have worst long-term performance and oversight;[2]

- Limiting director interlocks;[3]

- Augmenting director independence standards to include a reasonable person test, and have Boards assess director independence with the assistance of a third party;[4]

- Requiring an independent third party every 2-3 years to facilitate the assessment of the Board and individual Directors; identifying the third party; and linking the results of this review directly to the re-nomination of Directors;[5]

- Requiring 'clean' majority voting policies, such that if a Director does not garner a majority of "for" votes, he or she shall be required to promptly resign from the Board, without having the Board reject the resignation; and

[1] S. Huang, "Zombie Boards: Tenure and Firm Performance," July 2013, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302917 .
[2] D. Larcker and B. Tayan, *Corporate Governance Matters* (Pearson, 2011) at page 153, citing Fich and Shivdasani, 2006.
[3] The Financial Reporting Council in the UK is currently consulting on whether director interlocks on compensation committees should be restricted. Interlocks introduce reciprocity and diminish independence.
[4] The Canadian Securities Administrators proposed a more objective or perceived independence standard in 2008, and this should be revisited in a subsequent review. My interviews and board assessments reveal how Directors can and are captured by Management, in the views of peer Directors, including but not limited to: gifts, vacations, entertainment, social and personal relationships and friendships, donations, jobs for directors' children, and the provision of a company office and resources. Directors on a board know which directors have been captured, but are reluctant to say so unless an anonymous channel is provided (third party).
[5] This is a requirement in the UK and introduces objectivity into a self-assessment. The UK requires FTSE 350 companies to have an externally facilitated board review occur every 2-3 years, and the external facilitator should be identified. See page 16 here: http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.pdf

- Making it easier for Shareholders to propose, communicate with, and remove Directors.

2. What type of disclosure requirements regarding women on boards and in senior management would be most appropriate and useful?

The following disclosure requirements would be most appropriate and useful:

- Disclosing the competency and skills matrix on a Director-by-Director basis (see section 3.12 and 3.14 of National Policy (NP) 58-201);

- Defining and disclosing each competency and skill used in the matrix and the scale used to assess each of the Directors;

- Disclosing when and how each competency or skill was developed by each Director, at the Board and Committee levels. See pages 10-21 of Prudential Financial's 2012 proxy statement as a good example;[6]

- Disclosing the "origination" of each new or proposed Director, namely how that Director came to be known to the Board. Many Directors originate from personal referrals but there is evidence that this practice undermines director ability to be independent from each other and address affective conflict;[7]

- Disclosing how the competency matrix assessment results in a gap analysis and director profile for prospective Directors;

- Disclosing the nomination and selection process for prospective Directors, namely the following:

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[6] Available here: http://www3.prudential.com/annualreport/report2012/proxy/HTML2/default.htm

[7] Recruiting Directors previously known to the board may be at variance with the Board's ability to push back (constructively challenge) against each other and Management:

> "Boards with more directors that didn't have prior relationships with other directors tend to address affective conflict more quickly than boards where directors had prior relationships. I believe this is because of the deleterious impact on extra-boardroom relationships – directors with prior relationships don't address affective conflict because they don't want their behavior "corrections" to impact the prior business dealings (or relationship) they have outside the boardroom." (S. Charas, PhD candidate, email to the author, whom the author is supervising (disclosure)) …

"A prior study published in the HBR has found that teams that have women on them out-perform those that don't for overall team effectiveness." (ibid., S. Charas, email to the author, 28 September, 2013) (http://hbr.org/2011/06/defend-your-research-what-makes-a-team-smarter-more-women/).

- What the prospective Director profile was that resulted from the competency matrix review, i.e., desired competencies and skills (see section 3.12 and 3.14 of NP 58-201);
- How advertising, solicitation and candidate pool development occurred;
- Whether prospective Directors who were not known to the Board were considered;
- Whether prospective Directors without board experience were considered;
- How prospective Directors were screened and assessed for desired competencies and skills (section 3.14 of NP 58-201);
- Whether, and if so, how, long lists of prospective Directors were developed;
- Whether, and if so, how, interviews and short list or ranking of prospective Directors occurred; and
- Whether, and if so, how, background, credential and reference checks for prospective Directors occurred;

* Disclosing the assessment process for incumbent Directors, namely when and how each Director is assessed, and evidence that the results are acted upon;

Overall, the Ontario Securities Commission should consider providing greater guidance, in the form of principles and practices that achieve the objective of the principles, to support sections 3.12-3.14 of NP 58-201 (the recruitment of individual Directors).

There is evidence that absent proportionate guidance, companies will be free to define competencies in a manner, such as "CEO" or "experience," which has a negative impact on women and which the evidence does not support.[8] No regulator, to my knowledge, has used "CEO" or "experience" as a qualification for directorship. The focus has been on "expertise," (e.g., OSFI, others), which can (and should) be acquired and developed through knowledge, education, training and study, as well as through experience. "Competency" and "skill" (NP 58-201) have also been used. A competency or skill should be: measureable, able to be developed by training, and performance-related.

The Ontario Securities Commission should consider being more prescriptive and proportionate so far as director qualifications are concerned and the expertise possessed by Directors, or a portion of Directors on a particular Board, to ensure board effectiveness and adequate control of Management. Other financial regulators (DICO, OSFI) have been more prescriptive, offering competency matrixes and, in OSFI's case, requiring that a portion of the Board possess relevant

[8] A preference for CEO directors is not evidence-based, including the views of directors themselves: CEOs are seen as dominant, poor listeners, and stretched, and 80% of directors do not believe active CEOs are better directors than non-CEOs. See page 2 and 5 here: "Are Current CEOs the Best Board Members? CGRP-18," Stanford University, 2011, available here: http://www.gsb.stanford.edu/sites/default/files/documents/CGRP18-CEODirectors.pdf . Directors who are retired CEOs are not seen as better than average board members by a majority of other directors (ibid.).

financial industry and risk expertise.[9] There is no requirement within NP 58-201, for example, that any Director of a public company have relevant industry expertise in which the company operates, or even be financially literate before initially serving on an Audit Committee (section 3.8 of NI 52-110). There are a number of boards that I have assessed, including boards that have failed and where shareholders have lost money, where Boards have been deficient in industry and risk expertise. The academic evidence has been that director independence is a necessary but not a sufficient condition for effective governance and firm performance.

There is opaqueness in what is understood should be a transparent, rigorous and formal director recruitment and retirement process. The Ontario Securities Commission should consider offering greater guidance here, as there are best recruitment practices that Directors can adopt, or not, to achieve a principle of a transparent and effective director selection and assessment process.

3. Are the proposed scope and content of the model disclosure requirements appropriate? Are there additional or different disclosure requirements that should be considered? Please explain.

There is a paucity of evidence that requiring companies on a discretionary basis to proffer a policy on gender diversity with (or without, as the case may be) measureable objectives will, in and of itself, have an expected or intended effect of developing or augmenting women on boards or in senior management. Evidence from Australia is that such diversity policies are "perfunctory" only.[10] This is the case for the simple reason that the choice of words and/or measureable objectives within an internally generated policy can be overly general. A number of policies that were reviewed by me in preparing this letter are of this nature. It is the exception for a policy, charter, or other governance guideline to be robust when drafted by company Management in my experience. The experience with the competency matrix sections within NP 58-201 and my interviews and work with managers who administer the matrix confirms that "gaming" can and does occur (e.g., using the matrix to justify, rather than affect, director selection).

Diversity can be defined in the broadest sense to be diversity of "perspective," "viewpoint" or "background". A company Board or senior Management can claim to be diverse in this regard.

Diversity can be defined downward such that a pro forma policy can be complied with, to give maximum degrees of freedom, and even permit if not promote self interest, with the result that gender diversity can be trumped by less relevant considerations.

Unless women are biologically unqualified or unfit to be public company Directors or senior Managers, and do not possess the very minimal qualifications of being over 18, not bankrupt and not insane, the proposition is that women do possess skill parity with men. It would be disingenuous to suggest otherwise absent any evidence. There is less need to broaden the scope

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[9] See the bottom of page 5 here: http://www.osfi-bsif.gc.ca/app/DocRepository/1/eng/guidelines/sound/guidelines/CG_Guideline_e.pdf

[10] See page 3: Blackrock, "Glacial Change in Diversity at ASX 200 Companies," 2013, available here:
http://www.blackrockinvestments.com.au/content/groups/australiansite/documents/literature/change-diversity-asx-200.pdf

or focus on gender with skills, background, viewpoint, geography, or any other attribute or pre condition. The focus on women necessarily includes skill set, competency and expertise. Competencies and skills are specifically addressed within NP 58-201.

I am therefore making two points: First, that the Ontario Securities Commission should focus specifically on the content of a model gender diversity policy and measureable objectives that would give effect to a policy and be useful to Shareholders and other Stakeholders (such as consumers, creditors and suppliers), rather than leaving it discretionary; and second, that the OSC should be proportionate, in offering practices that achieve the objective of greater gender diversity on boards. Companies can be free to comply or explain which best industry practices work for them.

4. What type of statistics, data and/or accompanying qualitative information regarding the representation of women in their organization should non-venture issuers be required to disclose? Should such disclosure be reported for the non-venture issuer only or for all of its subsidiary entities also?

The Ontario Securities Commission could require non-venture issuers to disclose any of the following statistics, data and/or accompanying qualitative information, all of which would shine a light on the treatment of gender diversity within the Company:

- Whether a policy regarding the representation of women on the board and in senior management (Gender Diversity Policy) has been reviewed and recommended by the Nominating Committee and approved by the Board of Directors;

- Whether the efficacy of the Gender Diversity Policy is reported: to the full Board by the Nominating Committee; and to Shareholders annually;

- Whether an independent Board Chair should report to Shareholders on company culture;

- Whether an independent employee engagement and satisfaction survey has been last undertaken (including, in no particular order, assessing workplace inclusiveness, the treatment of child or elder care responsibilities, and the advancement of women); and, if so, whether the results of this survey were reported to the Board of Directors;

- Whether an independent third party has been consulted on the Gender Diversity Policy and its efficacy and results (to determine unintended effects of the Policy, to assess any systemic bias in qualification identification and application, and to benchmark diversity ratios against peers and best practices);

- A comparison of gender diversity ratios and performance vis-à-vis industry peers;

- Whether gender representation and diversity ratios are measured within the "hire, incentive and retirement pipeline," within the Company, including initiatives and measurable objective such as the following:

- Employee candidate pool and short list identification and development by gender;
- Leadership, development and promotion by gender;
- Management bands by gender;
- Board of directors and leadership roles by gender;
- Pay equity and compensation by gender and role level;
- Employee turnover by gender;
- Communication and education on the Gender Diversity Policy; and
- Whether compliance with the Gender Diversity Policy is a condition of employment or contracting with the Company,

such that Shareholders and other Stakeholders can view and track gender diversity progress. Asserting that the foregoing measureable objectives are neither relevant, nor useful, nor reflective of how a Company oversees and takes reasonable steps to address, promote and ensure equal treatment of women within the Company should be borne by the proponent of the assertion. There is literature and best practices to suggest that the above measurements are relevant to a culture of workplace inclusivity and parity of gender treatment. In addition and more importantly, practically, "what gets measured gets managed."

- Whether, and if so, how, gender diversity performance metrics are included in executive compensation, promotion and tenure; and

- Whether, and if so, how, the Nominating Committee and Board of Directors oversee and receive reporting on the foregoing and provide direction to reporting Management to cure defects or deficiencies.

In regards to whether subsidiary gender diversity should be reported, for subsidiaries that exist for tax or geographical presence purposes, or in emerging markets where gender roles and the rights of women may be diminished, this strikes me as useful information. The recent proposed CEO to worker pay ratio in the US applies to all company employees and in foreign entities, with an accommodation made by the regulator for appropriate statistical sampling so as to limit the cost and complexity of data collection. It seems a similar allowance can be made in the case of gender diversity. Otherwise, there could be less measurement and accountability for subsidiary governance of gender diversity.

5. What practices should we recommend for facilitating increased representation of women on boards and in senior management? For example, should we recommend that non- venture issuers have a gender diversity policy? If so, should we set out recommended content for the policy? Should non- venture issuers be required to comply with the recommended practices or explain why they have not complied (i.e. a "comply or explain" model of disclosure)?

Companies left to their own devices are expected to – given the experience in other jurisdictions (United States and Australia), sections 3.5, 3.12-3-14 and 3.18 of NP 58-201, and sections 3, 6 and 9 of National Instrument 58-101 – offer perfunctory policies and minimalist or opaque disclosure.[11] A company has a gender policy whether it is explicit or not. Requiring companies to draft a Gender Diversity Policy absent guidance on its content, and comply or explain against whether it has done so, is an important first step. However, a better step is to offer guidance on the content of a model policy, including measureable objectives, and have companies comply or explain against the content and the measureable objectives.

Many jurisdictions have devised and adopted a principles and practices approach to corporate governance, whereby there is a rich tapestry of practices that are regularly updated from which companies can choose to comply or explain.

What the Canadian Securities Administrators has is a series of largely "binary" guidelines (four pages in total: NP 58-201) that have not been updated since the financial crisis, unlike other jurisdictions and peer regulators. If the OSC is going to recommend practices to achieve the objective of greater gender diversity on boards and in senior management, and require non-venture issuers to comply with the recommended practices or explain why they have not, then this would be anomalous as compared to NP 58-201, and an ideal time to update NP 58-201. NP 58-201, which has not been updated since its inception in 2005, should be updated to reflect a similar principle and practices approach, using the "comply or explain" regime, as other jurisdictions have done. This gives companies maximum flexibility, but at the same time reflects regularly updated industry practices.

Conclusion

I have specifically avoided the discussion as to whether increasing the number of women on Boards increases company performance. Other associations and groups can address whether this is the case. The academic evidence is mixed, but is becoming more positive. I also do not think establishing this relationship, which is very difficult to show for boards themselves, of either gender, should be a precondition for addressing gender diversity.

I hope my commentary has been useful.

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[11] See e.g., page 3 by the Canadian Securities Administrators: "Over half of the issuers reviewed were required to make prospective enhancements to their corporate governance disclosure. We view the level of non-compliance with the disclosure requirements of the Corporate Governance Instrument to be unacceptable." Available here: http://www.osc.gov.on.ca/documents/en/Securities-Category5/csa_20101203_58-306_2010-corp-gov-disclosure.pdf CSA Staff Notice 58-306 2010 Corporate Governance Disclosure Compliance Review, December 2, 2010.