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September 29, 2023

By email:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon
Superintendent of Securities, Nunavut

Re: Proposed changes to Form 58-101F1 *Corporate Governance Disclosure* (Form 58-501FP) and National Policy 58-201 *Corporate Governance Guidelines* (NP 58-201)

Dear Staff:

We are writing in response to your request for comment dated April 13, 2023 regarding proposed changes to Form 58-501F1 and NP 58-201 (Proposed Amendments).

These comments are provided by the lawyers of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

Our comments are provided in the context of the stated primary objectives of the Proposed Amendments, which are to:

- Increase transparency about diversity, including diversity beyond women, on boards and in executive officer positions;
- Provide investors with more meaningful information that enables them to better understand how diversity ties into an issuer's strategic decisions to make better informed investment and voting decisions; and
- Provide issuers with clearer and more streamlined guidance in respect of board nominations, board renewal and diversity.

1. Approach to Diversity Disclosure

Proxy advisory firms, and the institutional investors they advise, have been focused on board composition, and in particular the inclusion of women on boards, for many years. Starting in 2024, Canadian S&P/TSX Composite Index constituents who do not have at least one racially or ethnically diverse director will risk a negative voting recommendation from Institutional Shareholder Services (ISS) for the relevant committee chair (or board chair if there is none). Shareholder proposals in Canada calling for more transparency concerning racial equity (including Indigenous reconciliation and inclusion) are among the top-scoring proposals in 2022 and in 2023 to date. And issuers listed on NASDAQ (a popular exchange for many cross-listed Canadian companies) are required to publish annual board-level diversity data, including with respect to specified demographic traits.

Regardless of any broadening of the current diversity disclosure requirements in Canada, it is clear that the diversity practices of reporting issuers in Canada (particularly at the board and management level, but also throughout the organization) will continue to be scrutinized by the market.

Against this backdrop, market participants may question whether securities regulators need to wade further into this topic. The same question was, of course, raised over a decade ago when the gender diversity disclosure rules were first proposed. At that time, many acknowledged that gender was an important first step and that other forms of diversity, reflective of the broad pool of Canadian talent, also needed to be considered.

We believe that the CSA's approach to gender diversity disclosure has fostered meaningful positive changes in issuers' approaches to board recruitment, development and governance in a thoughtful manner that values experience, skills and contribution. This has not been a limited pursuit of "good statistics". We see no reason why expansion of the diversity disclosure characteristics would have less favourable and constructive outcomes in support of good governance and, in fact, it is a natural and predictable extension of the gender diversity disclosure rules that have been a feature of the Canadian capital markets since 2014.

To promote the stated objectives of the Proposed Amendments, we believe that any broadening of the current disclosure rules should have the following features:

- To meet investor needs, there should be easy-to-locate, clear and structured information about board-level diversity characteristics, diversity policies, targets and other measurable objectives (if any), and progress against stated targets and other measurable objectives.
- To facilitate comparability and assist issuers in compiling and presenting this disclosure, there should be consistent definitions of "designated groups" and a required tabular format for the presentation of diversity disclosures. The absence of consistent definitions for designated groups could create complexity, impose costs on issuers, and make it difficult for them and the market to compare their diversity strategies and outcomes with those of their peers.
- Issuers should continue to have the flexibility to supplement this data with additional tabular diversity data and/or narrative discussion of diversity matters, or discussion of board or management competencies, relevant to their governance or strategy. This could be made clear in any final rule adopted. For example, issuers with a meaningful presence in Québec might choose to address whether board members' or executives' French language skills are important to their strategy and/or investor base.
- Disclosure rules that defer to issuers on identifying the groups relevant to their diversity strategy and require disclosure of demographic information (beyond current requirements relating to women) only

if the issuer chooses to collect that information do not, in practical terms, go beyond maintenance of the status quo.

- To avoid regulatory friction (which imposes burdens on investors and issuers), we recommend that the definitions of designated groups be aligned, to the extent practicable, with applicable Canadian regulatory standards that currently exist or that are in development. We believe, however, that the definitions of designated groups in proposed Form B are preferable to the comparable definitions in the CBCA disclosure requirements, which are considered by many commentators to include outdated terminology. Although any mis-alignment between these requirements is unlikely to be significant or lead to inconsistent disclosures, it could presumably be addressed in time by the CBCA accepting disclosure made in accordance with Canadian securities legislation as sufficient for CBCA compliance purposes (as is the case, for example, for proxy circular disclosure). In addition, ideally, the definitions of designated groups would be flexible enough to allow for evolving definitions in the Canadian landscape.
- We believe that voluntary self-identification by individuals, with the inclusion of a "prefer not to say" option (which responses could be identified in a footnote to the tabular disclosure) would provide issuers with the information required to comply with the disclosure requirements. Voluntary self-identification also complies with legal requirements, respects individuals' privacy and addresses potential concerns about unwanted exposure in other business or cultural environments (even where diversity disclosure is aggregated rather than attributed to any particular individual). Individuals who are part of these designated groups will, in reality, have significant lived experience that grounds their self-identification. To the extent that these individuals, or issuers, believe that there is a need for additional guidance on the characteristics of membership in a designated group, the Companion Policy could identify potential resources. Importantly, the Companion Policy could highlight that the regulators' expectation is for "good faith" compliance by issuers based on individuals' self-identification through a process developed by the issuer appropriate to its circumstances (certain issuers already gather diversity information from employees and, to a lesser extent, directors), with no requirement for independent confirmation.
- We would also strongly encourage the CSA to adopt a single form for diversity disclosures across Canada. Most reporting issuers raise capital across Canada and, given the nature of this topic, we think it is important that the securities regulators find common ground.

In short, we believe that a comply-or-explain disclosure regime that incorporates a common set of defined designated groups, that is based on voluntary self-identification and that permits issuers to supplement required disclosures with additional tabular or narrative information strikes an appropriate balance between clarity, comparability and flexibility. Both investors and issuers should benefit from clear disclosure standards and the generation of data that can be compared across issuers and over time.

2. Approach to Executive Officer Diversity Disclosures

- Similar to the disclosure rules relating to women, we would expect consistent disclosure requirements to be adopted for both board and management level diversity. This would encompass comply-or-explain disclosure requirements with respect to how an issuer considers diversity (including with respect to women and designated groups) when making executive officer appointments and with respect to its approach to talent management for executive officers. Issuers should also provide tabular disclosures about the inclusion of designated groups at the executive officer (or, as we suggest below,

senior management) level. We would not expect this disclosure requirement to create additional burden for issuers and we expect this would be relevant information for investors when assessing an issuer's overall diversity strategy.

- We note that the definition of an "executive officer" can be narrow and not consistently applied across the issuer community. As a result, some issuers choose to provide diversity disclosures that capture more than executive officers in order to provide a more meaningful snapshot of the diversity of the issuer's management team. In recognition of the varied approach that has been taken in the market, we think issuers should be given the option to use the existing definition of "executive officer" or define for themselves the parameters of the group that makes up their senior management, so long as they use the same definition from year to year.

3. Venture Issuers

We would not expect the proposed comply-or-explain model of diversity disclosures (in either form) to be particularly burdensome for issuers. A more prescriptive form may, in fact, be less burdensome as issuers will be able to follow a template for their disclosures instead of expending resources to customize disclosure. We would also note that CBCA issuers (including venture issuers) are already subject to enhanced diversity disclosure requirements. However, to address any concerns about increased burden for venture issuers, as with other major policy developments, a phased-in approach could be adopted giving venture issuers more time for compliance.

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Once again, we appreciate the opportunity to comment on the Proposed Amendments and would be happy to discuss any of our comments set out above with you by phone or by email.

Yours truly,

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