September 28, 2023

By E-mail

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

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario
M5H 3S8
Fax: 416-593-2318
Email: comment@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec)
G1V 5C1
Fax: 514-864-6381
Email: consultation-en-cours@lautorite.qc.ca

Dear colleagues:

Re: Comment Letter regarding Proposed Revisions to National Instrument 58-101 and National Policy 58-201

We write in response to the Canadian Securities Administrators' (CSA) request for comments on proposed revisions to National Instrument 58-101 and National Policy 58-201. This letter reflects our own individual positions, not those of our respective universities. Any reference to our respective universities is solely for identification purposes.

Sarah Kaplan is Distinguished Professor of Gender and the Economy and Professor of Strategic Management at the Rotman School of Management, University of Toronto. She is the Founding Director of the Institute for Gender and the Economy and co-author with Peter Dey of the 2021 board governance guidelines, *360° Governance: Where are the Directors in a World on Fire?* Aaron Dhir is Professor of Law at the University of Connecticut School of Law. He is the author of the book *Challenging Boardroom Homogeneity: Corporate Law, Governance, and Diversity*, published by Cambridge University Press. We both have direct experience with the regulatory provisions at issue, as well as related provisions, having participated as invited experts in consultations hosted by the Ontario Securities Commission and having testified before the House of Commons Standing Committee on Industry, Science & Technology regarding the diversity-related provisions found in the *Canada Business Corporations Act* (CBCA). Further, in our forthcoming paper in the *Seattle University Law Review*, titled "Corporate Governance and Gender Equality: A Study of Comply-or-Explain Disclosure Regulation" (with Maria Arabella Robles), we study Canada's experience with comply-or-explain diversity disclosure to date.

This submission deals primarily with the second aspect of the CSA's Notice and Request for Comment; i.e. the optimal "approach to diversity". As set out in the Notice and Request for Comment, two proposals are currently under consideration for diversity-related corporate disclosure going forward – Form A and Form B. Form B requires reporting on the representation of women, racialized persons, Indigenous persons, persons with disabilities, and LGBTQ2SI+ persons in Canadian corporate boardrooms and executive suites. Form A, on the other hand, requires disclosure only with respect to women. It otherwise leaves issuers to report on other diversity categories as they see fit. In our view, we stand at a pivotal moment in terms of the diversification of Canadian corporate governance and Form B is the preferred approach.

Gender equality in organizational governance is of the utmost importance and we believe that over the last approximately 9 years the current regulatory regime has facilitated helpful, though incomplete, work on that front. The reality, however, is that Canada is a deeply multifaceted, pluralistic society with a range of sociodemographic communities whose presence in corporate governance is lacking. Form B takes a holistic, inclusive approach to diversity. It invites corporate Canada to continue its focus on gender and also to extend its efforts to other historically underrepresented groups and to consider their place in the organizational setting. As things stand, their representation levels do not reflect Canada's diverse population or meet evolving societal expectations. The 2021 census tells us, for example, that approximately one-quarter of Canadians is a member of a racialized group. And yet, according to Corporations Canada's "2022 Annual Report on Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations," members of these groups hold only 6 percent of CBCA board seats (based on Corporations Canada's review of 450 proxy circulars of distributing corporations). Even more disheartening, according to Osler's 2022 Diversity Disclosure Practices report and Statistics Canada, Indigenous people represent approximately 5 percent of the population, LGBTQ2SI+ people more than 4 percent, and people with disabilities 24 percent, but none of these groups has more than 1 percent of board seats.

In addition to promoting a more meaningful understanding of what diversity entails, the Form B approach also prioritizes policy coherence. Regulatory fragmentation and inconsistency is avoided under Form B, which brings securities regulation in step with Canadian corporate law as reflected in the CBCA, which many issuers are already subject to. Indeed, the only material difference would be the inclusion of LGBTQ2SI+ persons under the Form B approach, and this difference could very

well have the effect of causing corporate law policymakers to update their approach in due course. Of particular note, Form B prudently calls out Indigenous representation as its own category, thus assuring that Indigenous peoples are noted for their special position as rights holders.

What is more, the Form A approach has the potential to promote unnecessary inefficiencies. Unlike Form A, Form B reduces uncertainly for issuers in that they need not spend time and resources determining what diversity categories to report on. Form B would specify which categories must be considered at a minimum, though firms will, of course, be able to extend their reporting beyond the required categories if they so choose. In this way, while regulators will play a key role in deciding the normative content of "diversity", firm level flexibility to go beyond regulatory requirements is preserved under Form B. Furthermore, all information reported will be based on voluntary self-disclosure by corporate executive officers and directors, thus ensuring that confidentiality is preserved.

The Form B approach will also bring Canada closer to emerging international best practices under which issuers are required to meet diversity targets under a comply-or-explain framework. By way of example, in 2021 the U.S. Securities and Exchange Commission (SEC) approved a proposal submitted by the Nasdaq Stock Market seeking permission to adopt a board diversity disclosure requirement for its listed companies. That rule requires companies to have at least 2 diverse board members or to explain why they do not. This includes at least 1 director who self-identifies as a woman and 1 who self-identifies as an underrepresented minority or an LGBTQ+ person. Underrepresented minority is defined as "an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities." Similarly, in 2022, the U.K.'s Financial Conduct Authority adopted a comply-or-explain approach to diversity in which at least 40 percent of the boards of companies subject to the new rules should be women and at least 1 board member should be from an ethnic minority background. If the relevant companies do not meet these diversity goals, they need to explain why not. As is well known, a number of European countries already have quotas for women on boards in place. Therefore, the approach anticipated in Form B remains a softer form of regulation than the approach found in many of Canada's peer jurisdictions in that it does not specify targets or quotas to be met by issuers.

Is it possible that the Form A approach will, in and of itself, lead to broader diversity disclosures beyond gender and that representation levels for historically underrepresented groups will increase organically? We are skeptical. The current gender-focused disclosure regime has been in effect for approximately 9 years and Canada has not seen meaningful change beyond gender. The initial years of the SEC's approach to diversity disclosure in the U.S. is also instructive. Beginning in 2010, the SEC required publicly-traded firms to report on whether they consider "diversity" in identifying director nominees and, if so, how. But the agency opted not to define "diversity" in its rule, leaving it to corporations to give the term meaning. In *Challenging Boardroom Homogeneity*, Professor Dhir analyzed the disclosures that the S&P 100 submitted to the SEC from 2010 to 2013. Over the 4 years of his study, almost all firms complied with the SEC rule by disclosing that they consider diversity when appointing their boards. However, only approximately half defined diversity in terms of race, ethnicity, or gender. For the other half, when defining diversity without regulatory guidance, they were inclined to refer to directors' prior experience, rather than to their socio-demographic characteristics.

It should also be noted that institutional investors are already asking for diversity information of the

kind anticipated by Form B and preparing this information should assist firms in being responsive to investor expectations. Failing to advance in our disclosure regime may risk Canadian companies becoming increasingly uncompetitive in global capital markets.

As we hope the above makes clear, we strongly support the Form B approach going forward.

Finally, we would like to emphasize that that goal of disclosure, rather than more stringent regulation such as quotas, is to make transparent issuers' diversity performance and practices. In the current proposal, the anticipated disclosures will simply be included in the Information Circulars. This leaves to the investor the task of extracting this information and comparing it with company peers. Given that there is no standardized location for the diversity disclosure, this task is quite arduous. Form B takes a step in the right direction by specifying the form of the table in which the diversity information should be included, thus making comparability across companies easier, though it does not provide guidance on the "explanation" portion of the regulation. We believe that achieving the goal of transparency means making the information easily accessible and comparable across peers. We foresee two options for this. The first is to be more specific about how and where the information should be included in the circular so that a computer could extract the information into a database that could be accessed by investors. Alternatively, issuers could be required to enter the numerical and narrative information into a webform that would automatically populate a searchable database (here, we are thinking of a database similar to that available through the Ontario *Public Sector Salary Disclosure Act*).

We thank the CSA for its efforts to involve stakeholders in this reform initiative and look forward to further engagement as the process continues. Please do not hesitate to contact us should you have any questions or require further information.

Sincerely,

[redacted]
Aaron A. Dhir
Professor of Law
University of Connecticut School of Law
[redacted]

[redacted]
Sarah Kaplan
Distinguished Professor of Gender and the Economy
Professor of Strategic Management
Founding Director, Institute for Gender and the Economy
Rotman School of Management
University of Toronto
[redacted]