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Borden Ladner Gervais

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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
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Dear Sirs/Mesdames:

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

We are pleased to provide the following comments in response to the Notice and Request for Comment (the **Request**) published by the Canadian Securities Administrators (the **CSA**) on April 13, 2023 with respect to proposed amendments (the **Proposed Amendments**) to Form 58-101F1 *Corporate Governance Disclosure* (**Form 58-101F1**) and National Policy 58-201 *Corporate Governance Guidelines* (**NP 58-201**).

We thank you for the opportunity to comment on the Proposed Amendments. This letter represents the general comments of certain individual members of the Securities and Capital Markets practice group of Borden Ladner Gervais LLP (**BLG**) and individual lawyers at AUM Law Professional Corporation (**AUM**), as set out below.[1] Our comments are not those of BLG or AUM generally or any client of our respective firms. Our comments are being submitted without prejudice to any position taken or that might be taken in the future by BLG or AUM on our own behalf or on behalf of any client.

Where our comments are in response to specific questions posed in the Request, we have included the text of the question for ease of reference. Capitalized terms used in this letter that are not defined have the meanings attributed to them in the Request.

**Part A - General Comments**

We are generally supportive of increased disclosure of diversity on boards and in executive officer roles for reporting issuers because we believe that harmonized disclosure of aspects of diversity beyond the representation of women will positively impact Canadian capital markets for the following reasons.

***1. The CBCA already requires expanded diversity disclosure for some issuers***

We strongly support consistent and harmonized disclosure for all non-venture reporting issuers. Currently, "distributing corporations"[2] incorporated under the *Canada Business Corporations Act* (the **CBCA**) are required to disclose information and statistics with respect to non-gender-based diversity of their boards of directors and senior management to their shareholders and Corporations Canada on an annual basis. As a result, 536 corporations were required to disclose prescribed information with respect to designated groups (women, Indigenous persons, persons with disabilities and members of visible minorities)[3] in 2022. While this represents a significant proportion of the reporting issuers in Canada, a majority of reporting issuers are not incorporated under the CBCA and therefore have no disclosure obligations related to diversity beyond gender diversity. The Proposed Amendments would level the playing field among non-venture reporting issuers and provide greater comparability and transparency for stakeholders.

[1] AUM is a wholly owned subsidiary of BLG. Each of AUM and BLG operate and carry on business as separate law firms. They are not one partnership or corporation. AUM provides legal services to its clients as part of the suite of managed and advisory services known as BLG Beyond.

[2] A "distributing corporation" is defined in the Regulations to the CBCA as "(a) a corporation that is a reporting issuer under any legislation that is set out in column 2 of an item of Schedule 1; or (b) in the case of a corporation that is not a reporting issuer referred to in paragraph (a), a corporation (i) that has filed a prospectus or registration statement under provincial legislation or under the laws of a jurisdiction outside Canada, (ii) any of the securities of which are listed and posted for trading on a stock exchange in or outside Canada, or (iii) that is involved in, formed for, resulting from or continued after an amalgamation, a reorganization, an arrangement or a statutory procedure, if one of the participating bodies corporate is a corporation to which subparagraph (i) or (ii) applies.

[3] Corporations Canada, "Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations 2022 Annual Report", available at: https://ised-isde.canada.ca/site/corporations-canada/en/data-services/diversity-boards-directors-and-senior-management-federal-distributing-corporations-2022-annual#s31.

### *2. Institutional investors require increased diversity disclosure and data*

The proxy voting guidelines published by several institutional investors in Canada generally indicate that they require broad diversity on an issuer's board of directors and increased disclosure.

- **Alberta Investment Management Corporation (AIMCo)** will vote for boards comprised of at least 30% female directors and at least one director from another underrepresented group, except where there is a market requirement, or acceptance for a different threshold as exhibited by local country corporate governance code/guidelines or related regulatory requirements. Where this is not the case, AIMCo may vote against or withhold a vote from the chair and/or members of the nominating committee (or other relevant board committee).[4]

- **Ontario Teachers' Pension Plan (OTPP)** encourages and expects greater diversity on boards and in management and notes that for investors to understand a board's progress on diversity, reporting should be separated between gender diversity on the one hand and other forms of diversity on the other. With respect to non-gender-based dimensions of diversity, boards should set and disclose timebound targets to increase the number of directors identifying as a member of an underrepresented group and to report on the achievement against those targets. OTPP's voting guidelines state that it relies on publicly available information which is ultimately best informed by self-identification and related disclosures and that "[d]isclosure is the key to better understanding workforce diversity".[5]

- **BlackRock** asks boards to disclose how diversity is considered in board composition, including professional characteristics, such as a director's industry experience, specialist area of expertise and geographic location, as well as demographic characteristics such as gender, race/ethnicity, and age.[6]

- **Institutional Shareholder Services (ISS)** will, beginning in 2024, vote against or withhold a vote from the chair of the nominating committee (or similarly tasked committee) of S&P/TSX Composite Index issuers where the board has no apparent racially or ethnically diverse members. In its 2023 Proxy Voting Guidelines, ISS states "[i]t appears to be the view of many investors that boards should aim to reflect the company's customer base and the broader societies in which they operate by including directors drawn from racial and ethnic minority groups, and also support the expectation for disclosure from companies on racial/ethnic diversity at the board level

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[4] AIMCo, "Proxy Voting Guidelines & Corporate Governance Principles" (February 2023), available at: https://assets.ctfassets.net/lyt4cjmefjno/Lal6WL1d2ipuWqqlVYL6j/955597ef1ac07e7132d06e631b62f7f5/Proxy_Voting_Guidelines_Feb_2023.pdf.

[5] Ontario Teachers' Pension Plan, "Good Governance is Good Business; 2023 Proxy Voting Guidelines", available at: https://www.otpp.com/content/dam/otpp/documents/OTPP%20Proxy%20Voting%20Guidelines%202023%20EN.pdf.

[6] BlackRock, "Investment Stewardship Proxy Voting Guidelines for Canadian Securities" (January 2023), available at: https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-canada.pdf

and hold the belief that all companies should disclose this information to the fullest extent possible."[7]

The information to be disclosed pursuant to the Proposed Amendments should address Institutional investor's calls for increased data about board and executive diversity and assist investors in making investment decisions based on the factors that are material in today's capital markets.

***3. Increased diversity disclosure will increase market efficiency and foster the formation of capital in Canadian capital markets***

The purposes of the *Securities Act* (Ontario) (the **OSA**), as set out in section 1.1 of the OSA include (i) fostering fair, efficient and competitive capital markets, and (ii) fostering capital formation. Further, one of the stated purposes of National Policy 58-201 *Corporate Governance Guidelines* is to "achieve a balance between providing protection to investors and fostering fair and efficient capital markets and confidence in capital markets." As noted above, a significant number of reporting issuers in Canada are already required to annually disclose broader diversity statistics pursuant to the CBCA. Requiring the remainder of non-venture reporting issuers to do the same would contribute to fairness in Canadian capital markets. In addition, we believe that increased diversity disclosure would also contribute to efficiency and capital formation in Canadian capital markets. Efficiency would be increased as market participants would not be forced to spend time doing research on each issuer to determine whether that issuer meets the market participant's expectations for diversity. Capital formation would be increased as we understand that investors are looking for increased diversity in corporate leadership and are making investment decisions on that basis. In short, better information leads to better investment decisions and standardized disclosure assists investors to make informed investment decisions.

<u>Concerns</u>

While we are generally supportive of increased diversity disclosure requirements for reporting issuers, we expect the CSA to address the following concerns.

***1. Regulators should not lose focus on the need to continue to increase the number of women on boards and in executive roles***

In the nine years since the adoption of disclosure requirements with respect to the representation of women on boards and in executive officer positions, the number of board seats occupied by women has increased from 11% to 24%.[8] Increasingly, board vacancies are being filled by women and the majority of non-venture issuers have at least one woman on their boards. The progress made to increase the number of women in corporate leadership positions is evidence that a disclosure-based model can effect change. However, we cannot forget that it has taken nearly a decade of disclosure to achieve this progress and still only 5%

[7] ISS, "Canada Proxy Voting Guidelines for TSX-Listed Companies Benchmark Policy Recommendations", (December 2022), available at: https://www.issgovernance.com/file/policy/active/americas/Canada-TSX-Voting-Guidelines.pdf?v=1.
[8] CSA Multilateral Staff Notice 58-314 *Review of Disclosure Regarding Women on Boards and in Executive Officer Positions – Year 8 Report* (October 27, 2022) [Staff Notice 58-314].

of issuers have a woman CEO, 7% of issuers have a women chairperson and only 24% of board seats are occupied by women. Women still do not represent 30% of board members in Canada. While it is important to increase opportunities for and representation of members of other diverse groups in public company leadership, there remains significant room for improvement with respect to the representation of women. The need to continue increasing the number of women on boards should not be hampered in pursuit of a new goal, even if the new goal is equally important.

2. ***A disharmonized approach that is based on geography will be detrimental to Canadian capital markets***

In the Proposed Amendments, two different disclosure forms have been published for comment. While each approach has merit, we strongly encourage the members of the CSA to adopt a harmonized approach to the disclosure requirements. To the extent that the CSA conclude that different approaches are warranted, we believe that the distinction in approach should be based on an issuer's characteristics (for example, based on size, market capitalization, venture status, etc.) rather than geography.

**Part B - Response to CSA Questions**

Board Nominations

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.***

We do not anticipate that the general disclosure of the skills, knowledge, experience, competencies and attributes of candidates (as a group) that are considered and evaluated, as set out in the Proposed Amendments, will be competitively sensitive or confidential to issuers as the requirements are general in nature. In addition, a significant number of issuers already provide disclosure about these considerations through skills matrices and narrative without concern about privacy or competition. In our view, disclosure of this information by all issuers will lead to increased credibility of boards as investors will have a better understanding of why board nominees have been proposed and the processes which a board and its committee(s) have undertaken to propose a slate of director nominees. If through this consultation process the CSA determines that this information could be considered competitively sensitive or confidential, we do not believe that the requirement should be removed but rather that issuers should be provided with an opportunity to indicate that such information cannot be disclosed.

Notwithstanding our support for this disclosure requirement, we believe that the specific disclosure requirement proposed in Form A (section 6(g)) and Form B (section 6(g)) could be clarified to indicate whether this information should relate to specific nominees or whether the disclosure can be of a general nature as it relates to the general pool of candidates. The latter would be preferred.

Approach to Diversity

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.***

Taking into account the concerns of investors, issuers and other capital market participants as a whole, we believe that Form B is preferable to Form A. While Form A may appear to provide issuers with enhanced flexibility and autonomy to determine the governance approach that is best suited for them, we believe that Form A represents the status quo. If the CSA's goal is to provide investors with additional information about diversity beyond gender diversity, we believe that Form A will not achieve this result.

We support the adoption of Form B (as opposed to Form A) on the following basis:

- Form B is a more clear and efficient disclosure model. To comply with the disclosure requirements of Form A, issuers will need to spend significant time, money and effort to determine which "identified groups" are relevant to their strategy. Consequently, it may be as expensive, if not more expensive, to comply with Form A than with Form B.

- Form B would provide for consistency and comparability of information as between issuers and will facilitate investment decision making for investors, ultimately creating efficiencies in Canadian capital markets.

- Issuers who wish to voluntarily disclose diversity statistics currently can do so even though NI 58-101 *Disclosure of Corporate Governance Practices* only specifically requires statistics and other disclosure with respect to gender diversity. In this respect, non-CBCA reporting issuers are already operating in a "Form A" environment.

- Form B does not preclude an issuer from participating in good governance exercises – the issuer could still define which categories of diversity are most important to its organization and provide fulsome disclosure as to how such categories would advance the issuer's business.

- We have concerns that Form A will not result in meaningful disclosure:

    - On the one hand, issuers may choose not to report on any "identified groups" and may only report on gender diversity as this would be a prescribed disclosure requirement. There could be an increase in boilerplate disclosure about why an issuer has not identified any groups relevant to their diversity strategy as we have seen with respect to the disclosure about whether issuers have adopted a diversity policy. Again, Form A would represent the status quo.

- On the other hand, issuers may initially identify a few groups relevant to their diversity strategy and then after one proxy season has passed and they can review peer group disclosure, add additional groups based on their peers' disclosure. In this scenario, issuers may include data about "identified groups" that are not material to their strategy in an attempt to keep up with their peers.

- We believe that voluntary, self-declared data disclosed in an issuer's own disclosure, as would be required by Form B, is preferable to information gathered by third parties that some institutional investors currently purchase and rely upon.

In addition to preferring Form B, we support an added requirement of narrative to further describe the data in the Form B table. Narrative would encourage a meaningful approach to diversity. We believe that a narrative requirement would reduce concerns of Form B representing a "check the box" approach and will require issuers to focus on their processes and considerations in nominations and appointments.

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?***

It is unclear to us why Form A and Form B would take a different approach on disclosure of the consideration of diversity when making executive officer appointments and further why there would be a distinction between board nominations and executive appointments. Fundamentally, disclosure with respect to executive officer positions is useful to investors. This information can assist investors in determining whether boards are exercising good judgment in fulfilling their executive search and appointment processes, as well as succession planning. Board policies will generally address both board nominations processes and executive appointment and succession planning. Omitting information about executive officer positions provides an incomplete disclosure record.

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***.

As we have noted above, Form A effectively represents the current regime when it comes to diversity disclosure. Issuers (other than those incorporated under the CBCA) are currently only required to disclose data about women but may still disclose information about other identified groups to the extent that they think this information will be relevant to their stakeholders. There is currently no prohibition on issuers disclosing broader diversity information with respect to boards and senior leadership, yet they do not do so. Assuming that issuers should be responsive to investor requests for information and that materiality should guide disclosure, under the current disclosure regime, issuers should already be providing broader information. However, they do not. Without a specific disclosure obligation, issuers may not conclude that any particular facet of diversity is relevant, and they may not collect the relevant data, particularly as the data may be seen to be sensitive in nature.

We have heard from issuers that some struggle to explain to their boards, executive officers and broader employees why diversity data is being collected in the absence of a specific statutory requirement to do so. Mandating disclosure provides issuers with a basis for collecting information and initiating a conversation with their directors, officers and employees about the importance of this information and a diverse workforce more generally.

Notably, Form B, which sets out specific "identified groups", does not preclude an issuer from selecting additional criteria on which to report. Form B would create a disclosure floor and not a ceiling.

There should be a concurrent requirement to explain how diversity is meaningful to the organization – which categories (designated or otherwise) have the biggest impact. What value does diversity bring to the organization.

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.***

We support a tabular disclosure format with related narrative discussion. We believe that requiring disclosure of diversity data in a common tabular format is helpful to issuers as it provides a clear path to compliance. A common tabular format also creates efficiency for investors who can easily find the relevant information and compare such information across issuers.

We also note that CSA guidance[9] and the Guidelines published by Corporations Canada[10] encourage issuers to present the diversity statistics/data in a tabular format.

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.***

We do not anticipate any issues or challenges in reporting under both the CBCA and the CSA requirements proposed under Form A or Form B and believe that Form B provides for disclosure that is more closely aligned with the CBCA. On the whole, the categories of diversity proposed in Form B generally overlap with the "designated groups" in the CBCA requirements, other than LGBTQ2SI+ and we are aware of the potential that the CBCA will be further amended to require reporting with respect to the LGBTQ2SI+ community. However, we note that certain of the defined terms used in the Proposed Amendments are not the same as those in the CBCA. For example, the CBCA uses the terms "Aboriginal peoples" and "members of visible minorities" while the Proposed Amendments use "Indigenous peoples" and "racialized persons". While we acknowledge that the appropriate terms to describe these groups of people have evolved, we encourage the CSA to work with other arms of government to ensure consistency among these terms and definitions. Again, we reiterate that there will be greater consistency and efficiency in the market if all issuers are reporting on a similar standard.

[9] CSA Multilateral Staff Notice 58-314 *Review of Disclosure Regarding Women on Boards and in Executive Officer Positions – Year 8 Report* (October 27, 2022) [Staff Notice 58-314].

[10] Corporations Canada, "Diversity of boards of directors and senior management - Guidelines", (February 7, 2022), available at: https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/diversity-boards-directors-and-senior-management#s3.

Application to Venture Issuers

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 acknowledge concerns that venture issuers will tend to have smaller boards of directors and less resources resulting in a decreased ability to attract and retain diverse board members and executive officers. We also acknowledge that because of the foregoing, additional disclosure requirements can become burdensome for venture issuers. However, we strongly support consistent disclosure across all issuers. As such, we would prefer phasing in diversity disclosure obligations for venture issuer at a later stage rather than water down any requirements that would apply to non-venture issuers.

**Part C - Additional Comments – Form B**

*Section 1.1 – "LGBTQ2SI+ persons"*

In our view, the proposed definition of "LGBTQ2SI+ persons", while inclusive, is too narrow, particularly given how language and human identity have evolved and continue to evolve, and how the acronym is intended to encompass both sexual orientation and gender identity which are extremely complex concepts. In addition, the current definition does not acknowledge the "+" in the acronym which is intended to include additional sexual orientations and gender identities under the LGBTQ2SI+ umbrella. As such, we would propose defining the term not with respect to the persons included but rather those who are excluded: "LGBTQ2SI+ persons means any persons who do not identify as heterosexual or cisgender and includes, but is not limited to, persons who are any of the following: lesbian, gay, bisexual, transgender, 2-spirit, queer or questioning".

*Section 6(g) – Board Nominations*

As noted above, we believe that the language used in section 6(g) of Form B should be revised to clarify that this disclosure is not with respect to individual candidates but rather board candidates as a group to avoid any actual or perceived privacy concerns.

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Thank you for the opportunity to comment on the Proposed Amendments. Please do not hesitate to contact any of the undersigned if you have any questions with respect to our comments above or wish to discuss.

Sincerely,

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