NORTON ROSE FULBRIGHT

June 22, 2023

Norton Rose Fulbright Canada LLP
1 Place Ville Marie, Suite 2500
Montréal, Quebec H3B 1R1 Canada

F: +1 514.286.5474
nortonrosefulbright.com

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

To the attention of:

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
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: 514-864-8381
E-mail: consultation-en-cours@lautorite.qc.ca

Comments on the CSA 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

1 INTRODUCTION

This letter is submitted in response to the CSA Notice and Request for Comment (the **Notice and Request for Comment**) on *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* (the **Proposed Amendments**) issued by the Canadian Securities Administrators (the **CSA**) on April 13, 2023. This letter reflects the views of a working group consisting of issuers having a combined market capitalization of more than $150 billion (the **Working Group** or **we**).

Members of the Working Group welcome the CSA's initiative to consult on disclosure requirements pertaining to diversity on boards and in executive officer positions, beyond women. With a view to contributing to these efforts, we provide herewith comments in respect to the Proposed Amendments and our responses to the specific questions asked by the CSA in its Notice and Request for Comment. We thank you for affording us the opportunity to comment on this important matter, and we trust that the CSA will consider the views expressed in this letter in finalizing the Proposed Amendments.

NORTON ROSE FULBRIGHT

2 GENERAL COMMENTS

The Working Group believes that decision-making generally benefits from a diversity of opinions and viewpoints. This diversity is enhanced when leadership roles are filled with qualified individuals who have different professional experiences, industry-specific expertise, education, skills and individual qualities and attributes. Hence, the Working Group generally supports the proposal to enhance the quality of the disclosure related to diversity, as it believes it is another step to accelerate progress toward greater diversification on boards and in senior management positions across the country.

After studying the Proposed Amendments, the Working Group is of the view that Form A would be a more appropriate tool to bring awareness and transparency to diversity issues, while allowing non-venture issuers to fix goals in line with the realities of their businesses. Moreover, Form A is more adaptable to investors' information needs. Indeed, its requirements are flexible enough to allow issuers to provide the information in a way that makes sense within their organization, industry and geographical presence.

3 SPECIFIC QUESTIONS OF THE CSA

Please find below the answers of members of the Working Group to the questions posed in the Notice and Request for Comment. The comments and suggestions contained therein aim at further refining the Proposed Amendments so as to contribute to this general effort based on the Working Group members' practical experience.

3.1 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.

The Working Group recognizes that several issuers disclose the skills, knowledge, experience, competencies and attributes of candidates that are considered when evaluating any given candidate (in the abstract). The Working Group does believe, however, that there may be certain limited scenarios where confidentiality of competitively sensitive information could be an issue; for example, an issuer may consider expanding into a different industry and may seek to have directors with specific expertise or experience in said industry without the market having necessarily been informed of such a potential expansion.

Furthermore, the Working Group notes that the current drafting of the proposed amendment to Item 6(g) of Form 58-101F1 may suggest that certain information specific to a particular candidate would have to be disclosed, which may lead to certain privacy concerns especially as it relates to "attributes of candidates". We recently performed a benchmarking exercise of TSX 60 issuers and identified that 7 out of 60 issuers mention privacy or similar reasons, in their management information circular, as a justification not to provide certain confidential information. The Working Group wishes to stress that information reported on either a mandatory or voluntary basis must be based on voluntary self-disclosure and comply with applicable privacy requirements. The Proposed Amendments should provide exemptions in such cases.

3.2 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.

Certain investors are increasingly seeking information regarding an issuer's approach to diversity and the representation of historically under-represented groups on boards and in executive officer positions.

Against this background, the Working Group recognizes that both Form A and Form B seek to provide greater transparency on issuers' practices with respect to board and executive-level diversity, albeit through different means.

In theory, the prescriptive nature of Form B may provide a greater possibility for comparability. However, in practice, such a disclosure framework may not appropriately capture how an issuer embraces diversity (and its evolving permutations) in its culture and how it incorporates diversity into its decision process, which the Working Group believes represents the intrinsic value of diversity disclosure. Hence, in the Working Group's view, Form A appears to be better formulated to elicit meaningful disclosure. Furthermore, it appears to achieve a better balance between providing protection to investors and fostering fair and efficient capital markets, while recognizing that corporate governance is evolving.

Moreover, it ought to be highlighted that in principle, disclosure under securities laws should focus on material information. The Working Group believes that by pursuing Form B, which mandates certain information which may not be material to certain issuers, the CSA may be diverting from its core purpose. Form A, on the other hand, would allow issuers a reasonable level of discretion to determine which "identified groups" are most relevant to their strategic considerations.

3.3 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.

Granular disclosure with respect to executive officer positions, as put forward in Form B, may increase the regulatory burden for several issuers without a corresponding benefit for investors. Our review of the disclosure of TSX 60 issuers and the guidelines of various shareholder representatives indicates that diversity disclosure is more of a priority, at this time, with respect to the composition of the board. With respect to executive officer positions, issuers still need flexibility in developing policies that are well adapted to their own circumstances and stakeholder expectations.

3.4 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.

The Working Group believes the rule-making authority of the CSA does not extend to identifying "designated groups" as put forward in Form B. Form A is more in line with the CSA's traditional approach on corporate governance and acknowledges that each issuer is best positioned to determine which "identified groups" to report on. Moreover, the broad and adaptable approach in Form A may prove to be more relevant over time as norms about diversity are continuously evolving.

The Working Group recognizes that the "designated groups" identified in Form B, rather than being prescriptive, could nonetheless be used as a general guiding tool under the model proposed in Form A to inform issuers' determination of "identified groups" most relevant to their diversity strategies, as suggested in the instructions under Form A.

3.5 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.

Reporting data in a standardized tabular format may appear to promote consistency, clarity and comparability of disclosures for investors and other stakeholders. However, reducing disclosure to standardized metrics may distract from more meaningful discussions on issuers' approaches to diversity.

Diversity practices and policies are highly contextual and may not be accurately captured by metrics which, despite the possibility for narrative disclosure, would easily become the focal point for the investor community and other stakeholders. Moreover, as mentioned above, it ought to be emphasized that

information reported on either a mandatory or voluntary basis must be based on voluntary self-disclosure by directors and executive officers and comply with applicable privacy law requirements. The Working Group is worried that defaulting to standardized metrics may inappropriately pressure issuers to ask directors and executive officers to self-identify, which for some may prove to be an uncomfortable process and have a chilling effect. Hence, an exemption process should be developed to cover that aspect.

Against this background, requiring more nuanced and substantive disclosure under Form A, combined with a recognition of privacy issues, may encourage meaningful and disciplined reflections about issuers' diversity, equity and inclusion practices and policies.

3.6 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.

The Proposed Amendments under Form B are generally consistent with the CBCA. Such general alignment between Form B and the CBCA requirements may limit the regulatory burden on the approximately 30% of TSX-listed issuers who are incorporated under the CBCA and who are accustomed to surveying diversity levels with respect to the "designated groups".

However, a notable addition under Form B to the list of "designated groups" under the CBCA are LGBTQ2SI+ persons. We note that such a designated group is not currently defined, as are other designated groups, under the *Employment Equity Act* (**EEA**) to which the CBCA refers in its definition of "designated groups". A recent EEA review consultation considered the question of adding other populations, including LGBTQ2+ (as opposed to LGBTQ2SI+) communities, to the definition of "designated groups", which suggests that the concept of "designated groups" will evolve over time, thereby highlighting the need for flexibility in defining the specific groups for which information ought to be disclosed. Moreover, such an addition as proposed under Form B may stand out to some as a more personal and invasive category for issuers to survey. Members of the Working Group have expressed concerns related thereto.

It also ought to be questioned whether widespread alignment between the CBCA and securities regulations should be pursued and favored. The risk for future amendments and therefore misalignment could lead to impracticalities. Such a model also risks being misaligned with the rapidly evolving expectations of the investing community and the general public. For instance, certain proxy advisory firms have recently changed their voting guidelines with respect to the representation of women on the board, expanding their expectations to the representation of "gender diverse" individuals, being women *and* individuals who identify with a gender other than male or female. Similarly, certain shareholder representatives have asked that other diversity factors be considered, such as linguistic minorities.

The Working Group believes a principle-based alignment should be favored as opposed to a rules-based alignment. Such an approach would more appropriately capture the respective domains of corporate legislators, on the one hand, and securities regulators on the other.

3.7 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.

The Working Group believes that, to the extent diversity disclosure may provide useful information to investors of venture issuers, the same rationale should justify imposing certain disclosure requirements for venture issuers in a second phase of the project. However, adjustments to the disclosure requirements which would otherwise be applicable to non-venture issuers would be necessary to reflect the different stages of development and circumstances of venture issuers. It should be noted that certain proxy advisory

firms similarly have less onerous expectations for venture issuers as compared to non-venture issuers, in line with their investor clients' views.

As such, the Working Group believes that disclosure requirements applicable to venture issuers should be limited to a discussion on how diversity, equity and inclusion considerations, if any, are factored in the board nomination process otherwise described pursuant to Section 5 of Form 58-101F2 C*orporate Governance Disclosure (Venture Issuers)*.

4 CONCLUSION

Thank you again for allowing us to provide comments on the Proposed Amendments. Members of the Working Group appreciate the efforts of the CSA at increasing transparency about diversity, including diversity beyond women, on boards and in executive officer positions, and providing guidance to issuers on corporate governance practices related to diversity. We hope that the comments and suggestions set forth in this letter will further contribute to provide meaningful information to the market.

Yours truly,

(signed) Norton Rose Fulbright Canada LLP