

Me Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
Fax : 514-864-6381
consultation-en-cours@lautorite.qc.ca

July 7, 2014

**Multilateral CSA Notice of Publication and Request for Comment
Proposed Amendments To Form 58-101F1 *Corporate Governance*
Disclosure of National Instrument 58-101 *Disclosure of Corporate*
Governance Practices.**

<http://nssc.novascotia.ca/sites/default/files/docs/Request%20for%20Comments%20NI%2058-101%20July%203,%202014.pdf>

We welcome the opportunity to participate in this important consultation. Kenmar Associates are strong believers in diversity; over 50% of our Associates are female and over 40 % are ethnically diverse.

By way of introduction, Kenmar Associates is an Ontario- based not-for-profit organization focused on retail investor education and protection via on-line research papers hosted at www.canadianfundwatch.com publishing *the Fund OBSERVER* on a bi-weekly basis discussing investor protection issues , routinely submitting comments and ALERTS on proposed regulatory changes that could impact Main Street. Additionally, Kenmar's Intervenor Service assists retail financial consumers with their complaints.

Kenmar is also involved in a number of shareholder rights issues including but not limited to nomination of directors, mutual fund governance, and securities lending rules re voting rights of loaned securities. In particular we feel securities lending practices can thwart diversity reforms by decoupling ownership from voting rights and long term shareholders. We would also like to see the CSA investigate concerns raised by investor advocates about the transparency, efficiency and accountability of the prevailing proxy voting system. We believe there is a need for greater regulatory involvement in the review of the proxy voting system so as to identify specific concerns and potential solutions that may require regulatory action. Improvements in this area would support diversity initiatives. Easing the rules for the nomination of directors and tightening the rules on who can vote loaned securities could be powerful support mechanisms for accelerating board diversity.

We would like to make a few additional points:

The diversity issue requires a holistic approach by the CSA and TSX. Board nomination committees have “competitors”. These include dissident shareholders, institutional investors, hedge funds, activists, takeover bidders, AGM floor nominations, controlling shareholders etc. All can make their own Director nominations per their own agenda. The regulations must therefore try to balance diversity objectives with shareholder rights, investor protection and corporate democracy. Not an easy task. Only a legislated quota system would thwart these legitimate “competitors” but the price could be very high.

It is our fundamental belief, as investor advocates, that shareholders, not regulators, should determine who they want as Directors. That being said, we can understand the CSA’s willingness to delve into social engineering regarding women on Boards. Although we are certainly not in favour of a quota system we recognise the need to accelerate progress. A priority for our society is to continue addressing residual barriers to female participation– for example, by embedding effective mentoring and flexible working patterns in Canadian workplaces and other initiatives.

An August 2012 report from Credit Suisse Research Institute

Gender diversity and corporate performance:

http://www.calstrs.com/sites/main/files/file-attachments/csri_gender_diversity_and_corporate_performance.pdf

suggests female participation on Boards is a positive for corporations. The report notes: *While it is difficult to demonstrate definitive proof, no one can argue that the results in this report are not striking. In testing the performance of 2,360 companies globally over the last six years, our analysis shows that it would on average have been better to have invested in corporates with women on their management boards than in those without. We also find that companies with one or more women on the board have delivered higher average returns on equity, lower gearing, better average growth and higher price/book value multiples over the course of the last six years.* For us, this is no surprise nor do we believe such proof is necessary. Boards should nominate and shareholders should vote the best people as Directors without regard to gender, ethnicity, race, colour or any other characteristic that divides humanity.

Kenmar recommend that, if this social engineering intervention is to take place, the gender diversity issue be broadened to include diversity in general. Kenmar's perspective is that if regulatory changes regarding increased board diversity are to achieve improved governance, Board performance, and corporate performance all potential benefits of increased diversity, then the Director identification process should go beyond diversity focused solely on gender. Policies regarding diversification should include the identification of board candidates that will represent a wide range of attributes including not only gender but other characteristics, such as age, ethnicity and cultural background, in addition to the conventional skills, experience and education.

This is more inclusive and we believe has the potential to assist Canadian companies with global growth initiatives. Given trends in globalization, immigration and demographics, the composition of the Canadian workforce is likely to look very different in the long run. Greater diversity suggests a change in the working environment in order to adapt to the needs of different people. Companies that can do this better are more likely to attract the best talent, no matter who that talent is. And that should be a strategic advantage for that company. Depending on the industry and Company strategy, a diverse Board has the potential to assist in formulating and making better globalization and other decisions with a 360 degree perspective. We therefore recommend that the CSA broaden the scope of the proposal now as momentum already exists calling for an approach well beyond gender diversity.

Kenmar can relate to the goal of the CSA proposal to improve transparency regarding the representation of women on boards and the comply-or-explain approach to the proposed disclosure requirements. However, certain aspects of the CSA approach may not provide companies with sufficient flexibility to address gender diversity in the most appropriate manner for their organization. For example, the proposed disclosure of whether the company has adopted director term limits may not be the most effective mechanism to increase the flow of female talent onto Canadian boards. Instead, the focus should be on performance evaluations for members of boards of directors, a key element of corporate governance.

Consideration should be given to the constraints on small TSX listed companies (say with less than \$50 million in sales) with small boards and limited administrative resources in complying with this CSA proposal. Piling on more reporting and administration may be counter-productive. In order to reduce regulatory burden, we recommend an exemption for these companies.

The requirement to "Comply or explain" is potentially useful and not inconsistent with current practice related to other aspects of corporate governance. It should enable investors and shareholders to form their own opinions with respect to an issuer's practices and policy intentions. The ability of an issuer to increase the diversity of its board will depend on many factors, particularly the ability to identify and attract suitably qualified and experienced director nominees, provide adequate compensation and D&O insurance. Some reporting issuers may have valid reasons for not currently adopting defined policies regarding the representation of women on the Board and such issuers should be given the opportunity to discuss, in their annual disclosures, the reasons and rationale for not adopting such policies and/or practices. A "comply or explain" approach does not preclude reporting issuers from adopting and disclosing diversification policies in the future as business conditions change. We caution however that, "Comply or explain" runs the danger of leading to quotas which have a checkered history of success. If quotas and sanctions ultimately result from this disclosure initiative, this could be a negative for corporate democracy and we believe, Canadian corporate performance.

"Quotas", which are a dangerously close relative of "targets", have some major downsides:

1. Quotas discriminate against the individual men who happen to be running against a woman for a seat.
2. If women are employed through quotas, they will be seen as "token", will be less respected and will have less power.
3. Quotas set women against each other, competing for a certain number of "women's seats", which might destroy co-operation and unity.
4. Implementing a quota might lend businesses to view them as a ceiling rather than a floor on the number of women, stalling progress on equality and best person for the job selection in the long run.

The code of corporate governance contains the fundamental principle that each company must be led by an effective board. This means that the structure and composition of the board must enable the company to achieve this goal of collective effectiveness. A fixed requirement (quota) to appoint board members on the basis of their gender, or some other characteristic, would, in our view, risk undermining a Board's ability to achieve this objective.

This feared migration to a quota system is one key reason why we have some reservations of the CSA proposal. The unintended consequences need to be well understood and managed to the greatest extent possible.

We do not believe the CSA should be getting involved with any aspect of executive management diversity. This is regulatory creep and outside the scope of traditional Securities Acts. We believe the Provincial labour code, human rights laws and Boards should be left to deal with operational management/HR issues. Kenmar's view is that more emphasis should be placed on voluntary adoption of diversity goals and a systematic approach to talent pipeline planning and development than on specific targets if reporting is to be required. Executive recruitment and promotion decisions are complex and fact-dependent and should not be rushed or subject to intrusive government regulation or the undue influence of proxy advisory firms.

In certain parts of the world, whether we like it or not, gender is a big issue. If executive management are stationed in such locales, Boards should be given the leeway to make decisions in the best interests of the corporation.

Most larger and medium sized companies already have some form of diversity policy. A corporate diversity policy should be a driver of real change within an organization and not merely adopted to address a disclosure requirement. Adopting a diversity and inclusion approach that is data-driven as well as closely linked to the organization's business strategy and culture will make it more effective in creating

real change. In our view, a Board diversity policy is the more appropriate vehicle to address diversity matters specifically and would not have the potential unintended consequences of term limits.

We believe that term limits can potentially be a useful way to keep a board fresh and open opportunities for women and others. We are not in a position however to predict whether disclosure of term limits will encourage an appropriate level of board renewal or not. However, disclosure of terms limits might allow investors to assess a key aspect of board governance, a practice that might be useful to some investors. We agree with the CSA that boards which adopt director term limits should have the flexibility to set limits which take into account their particular circumstances. An alternative approach to achieving board rejuvenation would be one centered on rigorous, continual evaluation of Board effectiveness. Of course, Director Independence would need to be verified each year.

Based on experience, "Targets" in effect become quotas. Disclosure of targets will cause pressure for companies to aim for similar targets within industries, effectively creating de facto quotas. With respect to "targets", we caution that disclosure that is focused strictly on gender diversity targets may result in a narrow or distorted view of an issuer's governance policy intentions, and ask that further consideration be given to this requirement. In addressing board composition, for example, there are a myriad of factors that a nominating committee will consider as it sets out to recruit new members for a board. Best practice requires a competency assessment and a skills matrix, for the board as a whole to be considered. A potential board member's gender, abilities or cultural and ethnic background can be important to nomination, but are not the only or even the most important considerations. It would be unfortunate if the disclosure requirements for gender diversity "targets", framed as they are in a very narrow way, would mischaracterize an issuer's strategic governance intentions as to board and senior management composition.

Kenmar recommends a CSA rule that the boards of all Canadian public issuers adopt a majority voting Policy .This, together with an elimination of slate voting, would help lubricate the path for worthy individuals to get elected rather than let entrenched Boards remain in place.

We hope the comments prove useful to the CSA.

Permission is granted for public posting.

Ken Kivenko P.Eng.

President, Kenmar Associates

Additional references

We provide here two additional research references that provide an indication that Board diversity can be a net positive for an organization. In the interest of full disclosure however, during the course of our research, we did find some papers that suggested that diversity in certain situations and in certain types of businesses may not lead to improved performance and in fact may turn out to be a disruptive force in disturbing established working relationships and teamwork.

- *The Diversity of Corporate Board Committees and Firm Financial Performance*
http://www.fma.org/Prague/Papers/TheDiversityofCorporateBoardCommittees1-28-2008_UNC_.pdf The researchers concluded that board diversity has a positive effect on financial performance as measured by Tobin's q. The evidence on board committees indicates that gender diversity has a positive effect on financial performance primarily through the audit function of the board and ethnic diversity impacts financial performance through all three functions of the board investigated, audit, executive compensation, and director nomination.
- *Ethnic Diversity on Boards and its Implication for Financial Performance*
<http://www.sosyalarastirmalar.com/cilt1/sayi4/sayi4pdf/marimuthu.pdf> The researchers found strong evidence that "ethnic diversity on boards is more likely to lead to superior financial performance".

Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Nova Scotia Securities Commission
Office of the Superintendent of Securities, Newfoundland and Labrador
Office of the Superintendent of Securities,
Government of the Northwest Territories
Legal Registries Division, Department of Justice, Government of Nunavut