



Women's Legal  
Education and  
Action Fund

Fonds d'action et  
d'éducation juridiques  
pour les femmes

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2 September 2014

Dear Sirs/Mesdames:

**Re: Disclosure of Corporate Governance Practices**

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The Women's Legal Education and Action Fund (LEAF) is pleased to make this submission in response to the call by securities regulatory authorities in Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Northwest Territories and Nunavut (the Participating Jurisdictions) for comment upon proposed amendments to Form 58-101F1 Corporate Governance Disclosure (Form 58-101F1) of National Instrument 58-101 *Disclosure of Corporate Governance Practices* (NI 58-101) (the Proposed Amendments). These amendments were previously published for comment by the Ontario Securities Commission (OSC) on January 16, 2014.

LEAF is a national, non-profit organization dedicated to challenging discrimination through litigation, public legal education and law reform. LEAF has intervened in dozens of cases on substantive equality since its founding in 1985 and is the only national organization in Canada that exists to advance the constitutional equality rights of women and girls under the law.

LEAF welcomes the Proposed Amendments, since they would require all TSX-listed issuers and other non-venture issuers reporting in the Participating Jurisdictions and in Ontario to make disclosure regarding the representation of women on their boards and in their executive officer positions using a “comply or explain” approach.

In October 2013, LEAF made a submission to the OSC in response to its public consultation process regarding disclosure of corporate governance practices.<sup>1</sup> We included a list of potential disclosure requirements and a list of recommended best practices for increasing the number of women on boards of directors and in executive roles.

In our October 2013 submission LEAF supported the imposition of disclosure requirements on public issuers, such as:

- Reporting on gender composition on the board;
- Reporting what, if any, gender diversity policies are in effect;
- Reporting on how gender diversity is taken into account during the board selection process.<sup>2</sup>

LEAF also recommended a list of best practices for public issuers, including:

- Reviewing workplace policies, practices and decision-making processes to identify factors resulting in systemic discrimination. Identifying direct and indirect discrimination that may be part of a hiring system – for example how decisions are made, and the practices and policies or the culture of the organization;
- Providing research and resources to address systemic barriers, which can be defined as situations, policies and/or practices that unfairly exclude women and members of other underrepresented groups from being appointed to boards or senior management positions;
- In industries where women historically have not participated, actively cultivating in women the skills and technical knowledge required to create a qualified pool of candidates going forward;
- Term limits for directorship positions in order to facilitate greater turnover in the composition of boards of directors, thereby increasing the likelihood of a public issuer looking beyond its usual candidate pool when searching for potential directors and executives;

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<sup>1</sup> Women’s Legal Education and Action Fund, “Re: Improving Representation of Women on Boards and in Senior Management Positions” (4 October 2013) online: [http://origin.library.constantcontact.com/download/get/file/1100520459480-357/com\\_20131004\\_58-401\\_womlegaledfund-1.pdf](http://origin.library.constantcontact.com/download/get/file/1100520459480-357/com_20131004_58-401_womlegaledfund-1.pdf) [“LEAF Letter”].

<sup>2</sup> *Ibid* at 2.

- Discussing at the annual general meeting the issue of what the corporation is doing regarding gender diversity concerns, thereby highlighting the importance of the issue in the presence of shareholders;
- Publicly posting notices of all board vacancies and encouraging women to apply.<sup>3</sup>

As noted in LEAF's 2013 submission to the OSC, we endorse such disclosure requirements and best practices recognizing that:

- There is an underrepresentation of women on boards of directors and in senior management positions of Canadian corporations.
- This underrepresentation is not due to a lack of women who have the qualifications and credentials to hold such positions.
- Measures need to be taken to increase the representation of women on boards and in senior management positions for at least two reasons:
  - 1) There is a public interest in advancing the role of women in the higher echelons of the private sector; and
  - 2) Corporations benefit from having board members and senior managers who hold a wide array of skills and perspectives; meeting this objective is facilitated increasing the representation of women in those positions.
- Securities regulators, as the bodies responsible for fostering fair and efficient capital markets and confidence in capital markets, have a role to play in increasing the representation of women on boards and in senior management positions.
- The appointment of directors and members of senior management should be done on a merits-based basis, with due regard for the proven benefits of diversity on the board, including gender.

LEAF has reviewed the Proposed Amendments and provides the following responses to the questions posed by the OSC earlier in 2014:

*1. Are the scope and content of the Proposed Amendments appropriate? Are there additional or different disclosure requirements that should be considered? Please explain.*

The contents are appropriate. However, the scope is insufficient in that it does not sufficiently address the need for programs aimed at increasing the number of qualified and meritorious women who are open to pursuing, and actively pursue, appointment to boards of directors or executive positions. The importance of mentorship programs in achieving this goal is addressed below.

*2. Should the Proposed Amendments be phased in, with only larger non-venture issuers being required to comply with them initially? If so, which issuers should be required to comply with the*

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<sup>3</sup> LEAF Letter, *supra* note 1, at 4.

*Proposed Amendments initially? Should the test be based on an issuer's market capitalization or index membership? When should smaller non-venture issuers be required to comply with the Proposed Amendments?*

Initially, the Proposed Amendments should be phased in to apply to larger issuers only. The test for phasing in the Proposed Amendments should be based on the issuer's market capitalization. The United Kingdom imposed different quota targets for London Stock Exchange (FTSE) 100 and FTSE 350 companies, which has resulted in 19% of board members being women.<sup>4</sup> This result provides a good model for Ontario.

Smaller non-venture issuers should not be exempt from compliance with such disclosure requirements for too long of a period, as this may lead to issues of non-compliance. A one year delay period is the maximum that LEAF recommends.

LEAF also proposes that the Proposed Amendments be phased in, to allow issuers time to implement mentorship programs aimed at increasing the interest of qualified women to pursue board and executive positions. Such mentorship programs will help to cultivate larger pools of interested and qualified candidates in advance of the imposition of the proposed new disclosure requirements. This would minimize fears surrounding "tokenism" in the event the implementation of new disclosure requirements and the "comply or explain" approach results in a noticeable increase in the representation of women on the boards of issuers.

*3. Do you agree that the Proposed Amendments requiring non-venture issuers to provide disclosure regarding term limits will encourage an appropriate level of board renewal?*

A disclosure requirement regarding existing term limits alone is insufficient to encourage or effect an appropriate level of board renewal. Only the imposition of term limits will actually ensure that turnover in the composition of boards occurs regularly. As such, LEAF has previously recommended that there be term limits set out for directorship positions.

*4. In support of disclosure regarding director term limits, should there be greater transparency regarding the number of new directors appointed to an issuer's board and whether those new appointees are women? Specifically, should there be an additional disclosure requirement that non-venture issuers disclose: (i) the number of new directors appointed to the issuer's board at its last annual general meeting and (ii) of these new appointments, how many were women?*

There should be greater transparency regarding the number of new directors appointed to an issuer's board. This should include the number of new directors appointed to the issuer's board at its last annual

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<sup>4</sup> Bryce Covert, "UK Reaches Highest Number of Female Board Members Ever While the US Stagnates" [UK], *ThinkProgress*, (13 November 2013). Online: <http://thinkprogress.org/economy/2013/11/13/2933671/women-boards/>

general meeting and the number of new appointments that are women. The number of vacancies on the issuer's board that will be filled at its next annual general meeting should also be disclosed.

Disclosure should also include the nature of the policies and programs implemented by an issuer to increase the participation of qualified and meritorious women in the board nomination process and the number of women involved in such programs. This process will ensure not only sufficient transparency regarding the current number of women in directorship positions, but also transparency with respect to steps being taken to increase this number as appropriate.

*5. Item 11 of the Proposed Amendments requires disclosure of policies regarding the representation of women on the board or an explanation for the absence of such policies. The term "policy" can be interpreted broadly. Should the proposed disclosure item explicitly indicate that the term "policy" can include both formal written policies and informal unwritten policies? What are the challenges for non-venture issuers reporting publicly on informal unwritten policies adopted by their boards?*

The term "policy" must refer to a formal written policy, otherwise it will be challenging to check compliance and to ensure that changes are made in a manner consistent with the Proposed Amendments. Additionally, these policies should include mentorship programs to ensure women are and continue to be included in the pool of qualified and interested candidates for directorship positions.

The model of disclosure requirements set out in the Consultation Paper did not include requirements to disclose:

- whether the issuer has adopted term limits for the directors on its board, nor
- whether the issuer has adopted targets regarding the number or proportion of women on its board or in executive officer positions of the issuer.

LEAF recommended both of these policies to the OSC in our October 2013 letter. LEAF continues to recommend that there be disclosure requirements regarding term limits and targets regarding the number or proportion of women on boards or in executive officer positions. However, disclosure alone is insufficient to address the serious underrepresentation of women in board and executive positions. Steps such as mentorship programs and term limits will help achieve the goal of increasing the participation and representation of women in the governance positions of Canadian issuers.

LEAF welcomes the Securities Regulators' initiative to address the systemic problem of women's underrepresentation in board and executive officer positions. Increasing women's representation in these

positions has been shown to be a wise investment.<sup>5</sup> We will all benefit from taking action to ensure that these changes occur.

All of which is respectfully submitted,

The Women's Legal Education and Action Fund

cc. Mr. John Stevenson, The Secretary  
Ontario Securities Commission  
20 Queen Street West  
22<sup>nd</sup> Floor  
Toronto, Ontario M5H 3S8  
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<sup>5</sup> Catalyst, *The Bottom Line: Corporate Performance and Women's Representation on Boards* (2007) <http://catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards>. The study showed higher financial performance for companies with higher representation of women board directors in three important measures: return on equity, return on sales, and return on invested capital. On average, companies with the highest percentages of female board directors outperformed those with the least by 53 percent (return on equity), 42 percent (return on sales) and 66 percent (return on invested capital).