



Forooghian+Co

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

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Re: Comment Letter on Proposed Changes to NI 58-101 and NP 58-201

This letter is submitted in response to the CSA Notice and Request for Comment (Request for Comment) regarding proposed amendments to National Instrument 58-101 *Corporate Governance Disclosure* and National Policy 58-201 *Corporate Governance Guidelines* (together, the Corporate Governance Disclosure Regime) issued by the Canadian Securities Administrators (the CSA) on April 13, 2023.

This letter reflects the views of Amandeep Sandhu, Principal of Sandhu ESG Law, and Farzad Forooghian, Principal of Forooghian + Company Law Corporation, both of whom are securities and corporate law counsel with extensive experience in Canadian capital markets and emerging environmental, social and governance matters (we).

This letter is divided into three parts:

- Part 1 – Background and Investor Expectations
- Part 2 – Commentary on Form A Versus Form B
- Part 3 - Recommendations for Additional Disclosure

In this letter, we use the term “BIPOC” (Black, Indigenous, and other people of colour) when discussing board diversity beyond gender.

PART 1 – BACKGROUND AND INVESTOR EXPECTATIONS

BIPOC on Canadian Boards

As outlined in the Request for Comment, the proportion of board seats held by women has increased from 11% to 24% during the eight-year period since the gender disclosure rules came into effect in 2014. However, looking beyond gender, the homogeneity of Canadian public company boards of directors is undeniable.

As part of its Learning Academy series, the TSX reports the following based on data collected by MarketIntelWorks¹:

Since July 2020 when the diversity disclosure rules went beyond gender for issuers subject to the CBCA, the percentage of BIPOC on boards at all TSX companies (not just those under CBCA) went from 5.2% to 7.5% in 2021 and from 4.2% to 7.7% in 2021 at S&P/TSX Composite Index companies.

In June 2023 we reviewed the current board makeup for all S&P/TSX 60 constituent companies. Our research shows the proportion of BIPOC board members is only slightly higher at 14%. However, it appears that ten of the S&P/TSX 60 constituent companies have zero BIPOC board members.

To put this into context, Statistics Canada reports that according to the 2021 Census² approximately 25% of Canadians are part of a racialized group, and approximately 6% of the Canadian population reports Indigenous ancestry, putting the percentage of BIPOC in Canada at 31%.

¹ <https://www.tsx.com/company-services/learning-academy?id=608&lang=en>

² <https://www150.statcan.gc.ca/n1/daily-quotidien/221026/dq221026b-eng.htm>

Homogeneity and its Effects on Canadian Boards

The homogeneity of Canadian boards is not surprising. Rima Halabi, in an article entitled “Gender Diversity in the Boardroom: Raising Questions About the “Comply or Explain” Model and Targets in Canada”³, puts forward some reasons for this homogeneity:

Boards look for candidates within their own social and professional networks to maintain collegiality among members. The unintended consequence of this approach is that individuals may be chosen despite the fact that they may not be effective on a particular board or fill a current gap in skill. Consequently, Canadian non-venture issuers have homogeneous boards made up of individuals with the same attributes, including gender, racial background, age, sexual orientation, educational background and career experiences. [footnotes omitted]

Commentators in the United States have written about the homogeneity of corporate boards, as well as the homogeneous attitudes and ingroup bias that result. Antony Page, in an article entitled “Unconscious Bias and the Limits of Director Independence”⁴ states:

Today directors still tend to have relatively strong ties and similarities, as they tend to be fairly homogeneous. More generally, groups that are essentially self-selecting will often have homogeneous attitudes, since people naturally tend to form relationships with those who are similar. Overall, Cox and Munsinger conclude that “powerful psychological factors are at work within the boardroom, creating a cohesive, loyal, conforming ingroup that will support its members ... under low and high levels of motivation and group values.” [footnotes omitted]

Page cites James D. Cox and Harry L. Munsinger from their seminal work, “Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion”⁵.

In the responses received to its initial proposal on gender diversity disclosure, the Ontario Securities Commission noted that “[m]ost stakeholders agreed that having a diversity of views and avoiding “group think” at the board and in senior management represent good corporate governance practices.”⁶

Halabi elaborates on the link between homogeneous boards and group think ⁷:

The danger with homogeneous boards, comprised of like-minded individuals, is the tendency for “groupthink” to form. Groupthink is defined as “a mode of thinking where pressure for unanimity overwhelms motivation to appraise the alternative course of action realistically.” When individuals think in the same way, they are

³ Western Journal of Legal Studies, 2019 CanLIIDocs 1748, <https://canlii.ca/t/sj90> (Halabi, page 3)

⁴ University of Illinois Law Review, Vol. 2009, No. 1, 2009
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392625

⁵ Duke Law, Law and Contemporary Problems, Volume 48, Number 3 (Summer 1985)
<https://scholarship.law.duke.edu/lcp/vol48/iss3/>

⁶ OSC Report 58-402 – Report to Minister of Finance and Minister Responsible for Women's Issues – Disclosure Requirements Regarding Women on Boards and in Senior Management (December 18, 2013)

⁷ Halabi, page 8

more likely to agree to solutions that are not ideal. The tendency to go along with the group is pervasive because it occurs unconsciously. Diversity is an effective strategy for avoiding groupthink because less homogeneous groups will have different ideas and ways of thinking about issues that may lead to more innovative and creative results. [footnotes omitted]

The U.S. Securities and Exchange Commission (SEC) recently approved⁸ Nasdaq rule changes that (i) require each listed company to have, or explain why it does not have, at least two members of its board of directors who are diverse, including at least one director who self-identifies as female and at least one director who self-identifies as an underrepresented minority or LGBTQ+, and (ii) provides certain listed companies with one year of complimentary access to a board recruiting service, which would provide access to a network of board-ready diverse candidates for companies to identify and evaluate (the Nasdaq Diversity Proposals).

In its submission to the SEC regarding the Nasdaq Diversity Proposals, Nasdaq referred to the following 2009 statement from the SEC itself⁹:

A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity. Such a policy may encourage boards to conduct broader director searches, evaluating a wider range of candidates and potentially improving board quality. To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate directors who have fewer existing ties to the board or management and are, consequently, more independent. To the extent that a more independent board is desirable at a particular company, the resulting increase in board independence could potentially improve governance. In addition, in some companies a policy of increasing board diversity may also improve the board's decision making process by encouraging consideration of a broader range of views.

Nasdaq stated the following about the impact of board diversity on decision making¹⁰:

Nasdaq agrees with the Commission's suggestion that board diversity improves board quality, governance, and decision making. Nasdaq is concerned that boards lacking diversity can inadvertently suffer from "groupthink," which is "a dysfunctional mode of group decision making characterized by a reduction in independent critical thinking and a relentless striving for unanimity among members."

Institutional Investors and Diversity beyond Gender

When it comes to whether board diversity beyond gender is something that should be promoted and encouraged, Canada's largest and most influential institutional investors take a different view than the CSA. As evidenced from their proxy voting guidelines, such institutional investors believe boards should diversify their ranks beyond gender, and that

⁸ <https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf>

⁹ Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,355 (Dec. 23, 2009)

¹⁰ <https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf> (page 36)

such diversity leads to better corporate governance, improved board decision making and in some cases enhanced company performance:

| Institutional Investor | Extract from Proxy Voting Guidelines |
|--|--|
| British Columbia Investment Management Corporation (BCI) | <p>Diversity and Inclusion — nominating and/or governance committees should ensure that boards are inclusive of a diversity of perspectives that will ultimately lead to better decision-making. There is mounting regulatory and investor pressure to boost gender diversity in particular and recent regulatory changes to the Canada Business Corporations Act, effective January 2020, introduce disclosure requirements beyond gender to also include Indigenous peoples, visible minorities, and persons with disabilities. Boards and executive management have a role to play in promoting and fostering diversity and inclusion, including disclosure, setting goals and timelines, and to report against them. We believe that boards should consider all forms of diversity in the director recruitment process. We expect boards to adopt and disclose a formal diversity policy that includes targets and timelines to increase levels of diversity at both the board and senior management level.</p> <p>Voting Guideline: BCI will vote AGAINST the chair of the nominating/governance committee if a board lacks adequate female representation, and we will consider mitigating factors, such as a policy with targets and timelines, where practical. Currently BCI expects a minimum of 30 per cent of the board to be represented by females, which aligns with our commitment to the 30% Club.¹ BCI began considering diversity more broadly starting in the United States in 2021 and will expand to Canada in 2023. We will expand to other markets as disclosures permit. The gender guideline will be applied generally except where it is impractical.</p> |

| Institutional Investor | Extract from Proxy Voting Guidelines |
|---|--|
| Alberta Investment Management Corporation (AIMCO) | <p>Definition: The attribute of board diversity is inclusive of skills, experience, gender, ethnicity and age.</p> <p>Principle: Diversity, inclusive of gender, ethnicity, experience and age is a core attribute of a well-functioning board. Diverse boards offer a wide range of perspectives, competencies and valuable insights, fostering a higher quality of board governance overall. It is incumbent upon boards to ensure their composition is sufficiently diverse. AIMCo encourages companies to adopt diversity targets, policies, and board term limits to encourage refreshment and greater diversity.</p> |
| Ontario Teachers' Pension Plan (OTPP) | <p>Ontario Teachers' believes diversity – defined as the full spectrum of human attributes, perspectives, identities, and backgrounds – has positive impacts on the effectiveness of a board of directors and on the performance of an organization.</p> <p>The diversity discussion is evolving to include diversity beyond gender, including (but not limited to) race, age, ethnicity, sexual orientation, gender identity, abilities, diversity of thought, experience and other “non visible” qualities. These discussions have also included promoting more diverse, equitable and inclusive cultures across organizations.</p> <p>We believe companies that embrace diversity in all its forms and focus on fairness of access, opportunity and advancement for all within an organization create an inclusive culture that is beneficial to the overall success and performance of the organization. Creating this inclusive culture requires eliminating barriers and root causes that have prevented underrepresented groups from full participation within the workplace.</p> <p>...</p> <p>We support, encourage, and expect greater diversity on boards, in management, and across organizations because we believe in the benefits of more diverse, equitable and inclusive organizations.</p> |

| <p style="text-align: center;">Institutional Investor</p> | <p style="text-align: center;">Extract from Proxy Voting Guidelines</p> |
|--|--|
| <p>Canada Pension Plan Investment Board (CPP Investments)</p> | <p>We believe that companies with diverse and inclusive boards and executive management teams are more likely to achieve superior financial performance. Diversity should be considered in all its forms, including but not limited to gender, ethnicity, race, age and disability. The appointment and inclusion of directors with diverse experiences, views and backgrounds ensures the board as a whole applies diverse perspectives to meaningfully and effectively evaluate management and company performance. We strongly encourage boards to disclose the diverse attributes of their directors where appropriate and where directors have granted permission to do so, to allow shareholders to fully and accurately evaluate board diversity holistically.</p> <p>Guideline: In Canada, the United States, developed Europe, Australia, New Zealand and South Africa, we will oppose the election of the chair of the board committee responsible for director nominations if the board has less than rounded 30% female directors, provided there are no extenuating circumstances. In all other markets, we will oppose the election of the chair of the board committee responsible for director nominations if the board has less than two female directors, provided there are no extenuating circumstances. We will consider voting against the entire committee responsible for director nominations, or, where appropriate, all incumbent directors, if sufficient progress on gender diversity has not been made in subsequent years. We support diversity with accountability; we hold all directors accountable for their board responsibilities. We will continue to reevaluate these threshold expectations and consider updates to our expectations for board diversity over time.</p> |

Fiduciary Duties and Consideration of Stakeholder Interests

The Supreme Court of Canada's decision in BCE made it clear that the fiduciary duty of corporate directors in Canada is to the corporation, not just shareholders, is a broad, contextual concept, not confined to short-term profit or share value, and is mandatory and looks to the long-term interests of the corporation.

In considering what is in the best interests of a corporation, the Supreme Court of Canada stated that "directors may look to the interests of, inter alia, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions."

The federal government codified this list of potential stakeholders in its 2019 amendments to the CBCA, and it added retirees and pensioners to the list of stakeholders.

While the CSA is responsible for regulating securities law in Canada, it cannot do so without being aware of the underpinnings of Canadian corporate fiduciary duties. Canada's stakeholder approach to corporate fiduciary duties stands in stark contrast to a shareholder-focused, value maximizing approach.

We are among those capital market participants who believe that a diverse board makeup provides a board with exposure to additional viewpoints, and such viewpoints can be used to better understand and consider the interests of diverse stakeholders. In fact, we believe that a board lacking diverse viewpoints may be at risk of failing to adequately consider the interests of all relevant stakeholders. Shareholders and investors should be given additional disclosure and data points, including diversity disclosure, to assess a board's ability to consider stakeholder interests, in keeping with its fiduciary duties.

PART 2 – COMMENTARY ON FORM A VERSUS FORM B

Form A Versus Form B

In regards to the proposed Form A disclosure, we submit that issuers wishing to make additional disclosures on their approach to diversity are already doing so. Furthermore, the lack of a standardized table reduces the utility of the Form A disclosure. Thus, we do not believe that the adoption of Form A is a useful or efficient regulatory exercise.

In approving the Nasdaq Diversity Proposals, the SEC did not take a position as to whether increasing board diversity would itself benefit US capital markets. Instead, the SEC found the following about the proposal for increased diversity disclosure:

- the proposal would provide widely available, consistent, and comparable information that would contribute to investors' investment and voting decisions;
- the proposal would make it more efficient and less costly for investors to collect, use, and compare information on board diversity, and would thus enhance investors' investment and voting decision-making processes, and enhance investors' ability to make informed investment and voting decisions; and
- the proposal is designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

We submit that all of the above considerations would apply to the CSA adopting Form B and its tabular format, and such adoption would be consistent with the CSA members' mission to, among other things, (i) foster fair and efficient capital markets, and (ii) to reduce risks to the market's integrity and to investor confidence in the markets.

Furthermore, while the CSA may not believe that diversity at the board level is in the best interests of Canadian capital markets participants, the proposed disclosure in Form B serves these other purposes:

1. it allows shareholders and investors to determine the extent to which boards are aware of the effects of homogeneity at the board level, as well as the steps, if any, boards are taking to prevent such homogeneity;
2. it is consistent with the approaches adopted by Canada's largest and leading institutional investors; and
3. it allows shareholders and investors with additional disclosure and data points to assess a board's ability to consider the impact of its decision making on all relevant stakeholders.

PART 3 - RECOMMENDATIONS FOR ADDITIONAL DISCLOSURE

Additional Disclosure Surrounding Nomination Process

We are recommending additional disclosure that would give shareholders and investors additional information on whether there is a heightened risk that group think will develop at the board level. We also note that current securities law director independence disclosure requirements define independence as the absence of any direct or indirect material relationship with the *issuer*, but they do not reference relationships between board nominees and existing board members.

Nomination Connection Disclosure

Earlier in this letter we have referenced commentary discussing the tendency of individuals to promote and advance those who resemble themselves or who come from similar backgrounds. We believe this tendency arises in the board nomination process.

In terms of such process, we believe issuers should be required to provide the following additional disclosure in their proxy circulars when a new board nominee first stands for election to the board of directors (the Nomination Connection Disclosure):

1. whether board nominees are “close personal friends” or “close business associates” of any current board members. These terms are well understood by Canadian capital markets participants. Also, in the Companion Policy to National Instrument 45-106 – *Prospectus Exemptions*, the CSA has provided two full pages of commentary on what it believes constitutes a “close personal friend” and a “close business associate”; and
2. if a board nominee was put forward or referred to the issuer’s nomination committee by a director not on the issuer’s nomination committee, issuers should be required to disclose this fact.

We think an exemption from the Nomination Connection Disclosure should be available where the nominee in question is nominated pursuant a contractual right of nomination.

The Nomination Connection Disclosure will help shareholders and investors evaluate whether a board nominee has strong ties to existing board members, and thus determine whether there is a heightened risk for group think to develop at the board level.

Search Firm Disclosure

As part of the updated disclosure in Item 6 of Form 58-101F1 on board nominations, we believe issuers should be required to disclose whether they have used the services of an executive search firm (Search Firm Disclosure). The disclosure could be similar to, or draw upon, the compensation consultant disclosure the CSA introduced in 2011.

There is additional precedent for the Search Firm Disclosure, as Item 407(c) of SEC Regulation S-K currently requires US issuers to disclose (i) whether nominated directors

were recommended by a third-party search firm, and (ii) whether the issuer paid a fee to third parties for identifying or evaluating potential board nominees, as well as a description of the function performed by such third party.

We believe reputable executive search firms may be better positioned to identify and evaluate diverse board candidates. Recall that the Nasdaq Diversity Proposal provides issuers with access to a board recruiting service with a network of board-ready diverse candidates. Nasdaq believes that that offering a board recruiting service would assist listed companies with increasing diverse board representation, which could result in improved corporate governance, strengthening of market integrity, and improved investor confidence¹¹.

Requiring issuers to disclose the use of executive search firms will allow investors to see which issuers are using such firms, and which issuers are not. If there are conclusions to be drawn between the use of such firms and the level of board diversity, then investors will be able to draw those conclusions.

A Step in the Evolution of Corporate Governance Disclosure

The Nomination Connection Disclosure is not intended to shame directors who nominate close personal friends or business associates, or non-nomination committee directors who spearhead director nominations. Instead, as corporate governance practices and concerns evolve, such information goes into the mix of information we think investors should have at their disposal to determine whether there is a heightened risk for group think to develop at the board level.

In CSA Consultation Paper 52-404 *Approach to Director and Audit Committee Member Independence*, the CSA confirmed that the purpose of the Corporate Governance Regime was to “provide greater transparency for the marketplace regarding the nature and adequacy of issuers’ corporate governance practices.”¹² National Policy 58-201 *Corporate Governance Guidelines* itself recognize that corporate governance is evolving, and in a 2008 proposed reformulation of the Corporate Governance Disclosure Regime, the CSA stated its intention to “enhance the standard of governance and confidence in the Canadian capital markets.”

We believe the Nomination Connection Disclosure and Search Firm Disclosure would allow capital markets participants to assess the independence of board nominees from existing board members and would provide additional information called for by evolving corporate governance expectations and practices.

¹¹<https://www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf> (page 76)

¹² <https://www.osc.ca/en/securities-law/instruments-rules-policies/5/52-404/csa-consultation-paper-52-404-approach-director-and-audit-committee-member-independence>

We are available at your convenience to discuss the contents of this letter.

Yours truly,

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