First Nations FINANCIAL MANAGEMENT BOARD | CONSEIL DE GESTION FINANCIÈRE des Premières Nations

DATE 2023

BY EMAIL

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
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: 514-864-6381
Email: consultation-en-cours@lautorite.qc.ca

Dear Sirs and Madams:

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

I. Introduction

We have reviewed the Canadian Securities Administrators' (the **CSA**) Request for Comments dated April 13, 2023, entitled "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" (the **Notice**), including all appendices. We have additionally reviewed the Ontario Securities Commission's (the **OSC**) "Local Matters" appendix, which is appended to the OSC's publication of the Notice at Appendix "L". Capitalized terms that are not defined in this letter are the same as those found in the Notice.

The First Nations Financial Management Board (the **FMB**) is a First Nations-led organization established under the *First Nations Fiscal Management Act*.[1]

[1] S.C. 2005, c. 9. The FMB works with its First Nations clients to develop fiscal capacity and responsible fiscal governance, and further serves First Nations by advocating for the necessary inclusion of First Nations interests in financial policy matters throughout Canada.

Today, Indigenous participation at the board and executive officer (**EO**) level is minimal.[2] This level of representation is not acceptable from either a shareholder or social perspective. The TSX shows at least 63% of non-venture issuers operating in Indigenous-intensive industries, or industries that disproportionately affect Indigenous peoples, by operating on their lands or otherwise. The presence or absence of an Indigenous person under such operational circumstances would substantially alter the total mix of information available about a company, impacting an investor or shareholder's decision.

Socially, Indigenous Peoples in Canada have long been excluded from true participation in Canada's capital markets because of unfair and discriminatory policies and legislation. In an era of reconciliation, where corporate Canada has been specifically called upon to reconcile with Indigenous peoples, the status quo cannot remain as is. Moreover, there are applicable legal obligations flowing from regulators to Indigenous peoples under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP** or the **Declaration**).

The Proposed Amendments seek to increase diversity reporting in either a more (Form B) or less (Form A) prescriptive manner. We generally support the more prescriptive Form B, although we think it could be further improved upon by requiring that issuers set targets; disclose information for each unique diverse group rather than in amalgamated form; by employing the "comply or explain" model with respect to an issuer's approach to diversity in EO positions; and by requiring disclosure across all business lines.

Investors want this information, and Form B is in line with other trends we are seeing for diversity disclosure in other sophisticated jurisdictions including the US. Since the 2014 changes to reporting on the representation of women on boards and in executive officer positions and regarding board renewal (the **2014 Requirements**), female representation, especially on boards, has increased. It is common knowledge that diversity and diverse opinions in decision making lead to better decisions.[3] This is in part because diversity limits decision-conformity in otherwise homogenous group settings[4] (i.e. groupthink).

Given the effectiveness of the 2014 Requirements, we say that Form B is the strongest alternative. It will provide investors with decision-useful information and most likely lead to greater diversity, including of Canada's constitutionally protected First People. We remind regulators that their obligations are to the public and that UNDRIP requires that they consult Indigenous peoples to obtain free, prior and informed consent (**FPIC**) before making decisions on legislative or administrative measures that may affect indigenous peoples. Diversity reporting may assist in economic reconciliation. Reconciliation is in the interests of all Canadians.

The arguments for Form A and against Form B are weak and at times specious. While problems identified, such as voluntary disclosure limiting the completeness of information, *could* happen, we think such

[2] In 2020 and 2021, for reporting CBCA companies, there were eight Indigenous directors and two Indigenous executive officers, showing a 0.00% increase from 2020 to 2021. MacDougall, A., et al, "2022 Diversity Disclosure Practices: Diversity and leadership at Canadian public companies", Osler: 2022 (**Osler Report**) at pgs. 16. Available online: https://www.osler.com/osler/media/Osler/reports/corporate-governance/Osler-Diversity-Disclosure-Practices-report-2022.pdf.

[3] See for example CFA Institute Diversity, Equity, and Inclusion Code (USA and Canada), 2022 (**CFA Code**) at pg. 2. Available online: https://www.cfainstitute.org/-/media/documents/code/dei/DEI-Code_2022.pdf.

[4] See: Gaither, Sarah E., et al, "Mere Membership in Racially Diverse Groups Reduces Conformity", Social Psychological and Personality Science, 2018, vol. 9(4), 402-410, available online: https://socialequity.duke.edu/wp-content/uploads/2019/10/Mere-Membership-in-Racially-Diverse-Groups-Reduces-Conformity.pdf.

problems are unlikely. The very people who must decide whether to disclose information are people that have a vested interest in the performance of the company.

II. The Proposed Amendments and Changes

As set out in the Notice, the Proposed Amendments may take one of two approaches to enhance diversity on boards and in EO positions, with each approach intending "to provide enhanced, decision-useful information to investors to assist with their investment and voting decisions."[5] The Proposed Amendments build upon the 2014 Requirements, which have been adopted by all province and territories except for British Columbia and Prince Edward Island.[6]

The first approach, Form A, is a less prescriptive and more flexible approach. It would require an issuer to disclose its approach to diversity, how it intends to measure progress, and any data the issuer collects in this respect. Under Form A, the issuer may choose which diversity initiatives are most beneficial to that issuer in advancing its business and strategy.[7] There is no specified format for disclosure. Issuers will still be required to collect information regarding women on the board and in executive officer positions pursuant to the 2014 Requirements.

The second approach, Form B, sets out mandatory diversity reporting regarding women, Indigenous peoples, racialized persons, persons with disabilities and LGBTQ2SI+ persons on boards and in executive officer positions. Under Form B, issuers would disclose the prescribed information in a standard format. Directors and executive officers would voluntarily report if they fall into one or more of the designated groups. Form B would also require disclosure of an issuer's written strategies, written policies, and measurable objectives relating to diversity on an issuer's board.[8] Form B currently allows for some disclosure to be amalgamated for all diverse groups other than women.[9] Form B allows for disclosure of targets but does not require targets.

III. Data and Trends Regarding Diversity Disclosure

It is worth taking a moment to consider the effectiveness of the diversity reporting we have to date. Since the 2014 Requirements came into effect, the representation of women, especially on boards, has generally increased.[10] In its 2022 report on the 2014 Requirements,[11] the CSA reported that 87% of boards have at least one woman, up from 49% in 2015.[12]

---

[5] Notice at pg. 1.
[6] Notice at pg. 1.
[7] Notice at pg. 4.
[8] Notice at pg. 4.
[9] See, e.g. number of board seats filled by "persons from designated groups, other than women" in Form B, s. 6.4(b).
[10] See also Osler Report at pg. 4: "Across all TSX-listed companies, only 11.6% of boards have no women directors, compared to 47.1% in 2015. … It has taken a keen and deliberate focus on recruiting women directors to get to this stage. This focus is reflected in high levels of adoption of board diversity policies and, in recent years, the adoption of targets for women directors. These efforts resulted in 43.6% of new board positions being filled with women candidates last year. Institutional investor pressure to increase diversity has been a key driver of change."
[11] CSA Multilateral Staff Notice 58-314 Review of Disclosure Regarding Women on Boards and in Executive Officer Positions, Year 8 Report (the **2022 Report**), October 27, 2022, available online: https://www.osc.ca/sites/default/files/2022-10/sn_20221027_58-314_women-on-boards.pdf
[12] Other notable trends include: •70% have at least one woman in an executive officer position, up from 60% in 2015;

The CSA reported a correlation between issuers adopting certain diversity measures and the proportion of board seats held by women. Issuers with targets for women on boards saw greater women representation on boards. Issuers with written policies saw a greater proportion of board seats held by women.[13] We note that with respect to women in executive officer positions, there was only a marginal increase in issuers that adopted targets, and a marginal increase in the representation of women as CEOs or CFOs.

The CSA concluded the 2022 Report by noting that issuers reported their diversity disclosure in different formats which caused some difficulty in locating disclosure within an information circular and in interpreting some of the disclosure. The CSA recommended that issuers consider presenting information in a uniform tabular manner, which would improve consistency and comparability, and aid investors in locating, interpreting and evaluating the information.[14]

In its 2023 Policy Guidelines for Canada, the proxy advisory Glass Lewis recommends

> *against the chair of the nominating committee of a board that is not at least 30 percent gender diverse, or the entire nominating committee of a board with no gender diverse directors, at companies on the TSX. For boards of issuers on junior exchanges, our minimum threshold remains one gender diverse director on the board.*[15]

We suggest that in future policy guidelines for Canada, Glass Lewis and other similar and well-respected proxy advisors will make similar recommendations regarding Indigenous directors on boards. Indeed, the Osler Report makes clear that diversity is the way of the future for corporate boards and executive officers:

> *Based on Canada's experience with disclosure requirements relating to the representation of women in senior leadership, achieving diversity with respect to characteristics beyond gender will take time. However, change has begun. Across all CBCA corporations, just under 10% of board positions are held by directors who are members of visible minorities, Indigenous peoples or persons with a disability.*
>
> *...*
>
> *Eight years is a long time to achieve the milestones that have been reached to date. And it will take considerable, sustained effort to achieve gender parity and representation by other diverse groups that approximates the demographics of the population in Canada. We hope that the disclosure and best practices highlighted in our report will help companies in their diversity, equity and inclusion journeys.*[16]

•45% of board vacancies were filed by women, up from 26% in 2017;
•24% of board seats were occupied by women, up from 11% in 2015;
•61% of issuers adopted a policy relating to the representation of women on their board, up from 15% in 2015;
•39% of issuers adopted targets for the representation of women on their board, up from 7% in 2015;
•5% of issuers had a female CEO, up from 4% in 2018;
•19% of issuers had a female CFO, up from 14% in 2018;
•4% of issuers adopted targets for the representation of women in executive officer positions, up from 2% in 2015. (2022 Report at pgs. 5-6)

[13] 2022 Report at pg. 9.

[14] 2022 Report at pg. 10.

[15] Glass Lewis, "2023 Policy Guidelines – Canada" (**Glass Lewis Report**), 2022, at pg. 31, available online: https://www.glasslewis.com/wp-content/uploads/2022/11/Canada-Voting-Guidelines-2023-GL.pdf?hsCtaTracking=24677147-8c3d-4a95-9803-a8e0ff79336c%7C2c13cc51-a28f-48cf-963e-37e853dd0e43.

[16] Osler Report at pg. 4.

The need for greater diversity on boards and amongst executive officers is not merely a Canadian issue. The International Sustainability Standards Board (**ISSB**) is presently consulting on its future priorities in order to issue future standards that will meet investors' needs on sustainability issues beyond climate.[17] One potential research topic is human capital. The ISSB request for information states:

> *... Human capital management includes such issues as workforce composition; workforce stability; diversity, equity and inclusion (DEI); training and development; health, safety and wellbeing; and compensation, with regard to an entity's employees and contractors.*
>
> *Various aspects of human capital management are likely to drive value in different ways. For example, academics, consulting firms and subject matter-expert organisations have found that an entity's strategy to promote DEI can affect value by enhancing the entity's ability to attract and retain talent, effectively design, market and deliver products and services, strengthen community relations, innovate, and identify risks.*[18]

In the United States, the Security Exchange Commission (**SEC**) approved diversity requirements that will come into effect in the near future. In that case, the diversity rules will require that issuers meet certain race and gender criteria. Chair of the SEC, Gary Gensler, said that "These rules will allow investors to gain a better understanding of Nasdaq-listed companies' approach to board diversity, while ensuring that those companies have the flexibility to make decisions that best serve their shareholders."[19]

We can look right here at home, as well, where Bill C-25 brought changes to the *Canada Business Corporations Act*[20] (**CBCA**) regarding diversity disclosure rules. Today, the CBCA requires disclosure regarding women, Indigenous peoples, racialized persons and persons with disabilities. It is worth bearing in mind that one of the stated goals of Bill C-25 was to bring the CBCA into line with existing securities laws.[21] Since Bill C-25 was passed in 2018 and brought into force in 2020, the CBCA diversity disclosure rules have outpaced those of securities laws.

It is clear based on the Notice that the CSA views enhanced diversity disclosure on boards and in executive officer positions as material information that investors need to make informed investment and voting decisions. We agree with this position.

This position also accords with the substance and recommendations found in the *360º Governance Report* (the **Dey-Kaplan Report**)[22], the proposed guidelines to modernize the Toronto Stock Exchange's 1994

---

[17] IFRS Sustainability, "Request for Information – IFRS Sustainability Disclosure Standards: Consultation on Agenda Priorities", May 2023 (**ISSB** RFI) available online: file:///C:/Users/Emily_Stockley/OneDrive%20-%20fnfmb.com/General%20-%20Strategic%20Opportunities%20Team/Comment%20Letters/ISSB%20Priorities/ISSB%20Future%20Priorities%20RFI.pdf.

[18] ISSB RFI at pg. 23.

[19] CNBC, "SEC approves Nasdaq's plan to boost diversity on corporate boards", August 6, 2021, available online: https://www.cnbc.com/2021/08/06/sec-approves-nasdaqs-plan-to-boost-diversity-on-corporate-boards.html.

[20] RSC 1985, c. C-44.

[21] Canada, House of Commons Debates, 42nd Parliament, 1st Sess, Vol. 148 (26 October 26) at 1530 and 1555 (Geoff Regan).

[22] Peter Dey and Sarah Kaplan, *360º Governance: Where are the Directors in a World in Crisis?* (**Dey-Kaplan Report**) Rotman School of Management: University of Toronto, February 2021, available online: https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report.

guidelines for board governance. The Dey-Kaplan Report recommends reporting on Indigenous Peoples and other underrepresented groups.[23]

IV. Form B is the Most Defensible and Most Effective Choice

A. General Support for Form B

Form B is consistent with other approaches to diversity both in Canada and internationally. Disclosure regarding the number of Indigenous peoples on an issuer's board or in executive offices will be material information.

Indigenous peoples will be affected by or have invaluable information for many issuers that are listed on the TSX. By our count, upwards of 63% of listed companies are in industries that are "Indigenous intensive".[24] Indigenous peoples are the people on a board or in an executive office position who will truly understand consultation, building relationships with Indigenous nations, and minimizing risk of legal challenges brought by Indigenous rightsholders. Upper management decisions and strategic decisions for such companies require subject matter experts which, in such cases, must include Indigenous peoples.

Indigenous peoples are and have been the most important stewards of our natural environment from time immemorial: "Indigenous Peoples hold unique knowledge systems and practices for the sustainable management of natural resources. Many have a special relationship with the environment, the land, and all living things."[25] All companies in Canada involve or impact biodiversity, ecosystems and/or ecosystem services (**BEES**). As the ISSB set out in its future priorities consultation, Indigenous peoples

> *play a critical role in the maintenance and stewardship of BEES because they manage or hold tenure over 25% of the world's land surface, intersecting about 40% of all terrestrial protected areas and ecologically intact landscapes and supporting about 80% of global biodiversity.*[26]

Based on the foregoing, it is plain that Indigenous peoples are integral subject matter experts for corporate boards and executive office. Thus, Indigenous representation is material to investors. Such representation will increase expertise and competence, and limit certain risks. The presence or absence of such directors or executive officers could significantly alter the 'total mix' of information available about the company, impacting their investment decision.

Like the 2014 Requirements, reporting pursuant to Form B will hopefully show a correlation between diversity reporting, establishing diversity targets and other diversity initiatives and increased representation of Indigenous peoples and of other diverse groups. As set out in the CFA Code, commitments to increasing

---

[23] Dey-Kaplan Report, Corporate Guidelines No. 18: "Boards should be designed to include the appropriate mix of backgrounds and lived experiences. The demographics of the board should represent the communities in which the corporation operates. Specifically, as suggested by regulations governing most Canadian stock exchanges, boards should announce targets for representation of women on the board and track progress towards achieving these targets. Consistent with recent federal legislation (Bill C-25), companies should also report on the representation of other underrepresented groups, at a minimum the other protected groups under the Human Rights Code: Indigenous Peoples, persons with disabilities and members of visible minorities": at pg. 16.

[24] These industries include mining, energy (including oil and gas), telecommunications, clean technology (including pipelines, and oil and gas), and financial services.

[25] International Institute for Sustainable Development, "Indigenous Peoples: Defending an Environment for All", April 22, 2022, available online: https://www.iisd.org/articles/deep-dive/indigenous-peoples-defending-environment-all.

[26] ISSB Consultation at pg. 21.

diversity will "result in better investment outcomes, help create better working environments, and generate a cycle of positive change for future generations".[27]

Indigenous peoples hold a special place in Canada as our country's constitutional First Peoples. The Truth and Reconciliation Report calls for the corporate sector to pursue economic reconciliation, [28] and the public service to become educated in the Declaration (among other things). [29] As an integral part of both the corporate and public sectors, securities regulators are impacted by each of these calls to action. Canada and B.C. have adopted UNDRIP as law, thus it is incumbent upon securities regulators to make decisions in accordance with UNDRIP. Securities regulators must consult with impacted Indigenous peoples on any Proposed Amendments, seeking free, prior, and informed consent before making final decisions.[30]

Moreover, securities regulators are required to make decisions in the public interest, to protect investors and foster fair markets that are as free of systemic risk as possible.[31] The purpose of disclosure is to enable investors to make better-informed investment decisions. At present, all federally-regulated and most provincially- and territorially-regulated issuers are required to make diversity disclosure regarding women. In our view, this is evidence from Parliament, eight provinces and three territories that gender-based diversity disclosure is in the public interest. In our view, if gender-based diversity disclosure is in the public interest, so too is other diversity disclosure, especially regarding Canada's constitutionally recognized First Peoples. In our view, this is a form of economic reconciliation. Reconciliation is plainly in the public interest.

Finally, we have considered whether the Proposed Amendments are lawful. We have considered whether Form B disclosure would impugn upon federal law-making jurisdiction. The *Constitution Act, 1867* sets out that each level of government (i.e. federal or provincial) has law-making power over classes of subjects, or "heads of power". The provincial and federal heads of power are separate and equal. The federal government has exclusive jurisdiction to make laws in relation to "Indians and Land reserved the Indians".[32]

Before a court will find that a federal or provincial law intrudes into the jurisdiction of the other, the court will first assess what the central thrust ("pith and substance") of the law is. In this case, the central thrust of Form B is disclosure of material information to investors. The central thrust is not to regulate the rights or obligations of "Indians or Lands reserved for Indians".

Form B does not offend s. 91(24)

We have further considered whether securities regulators have the jurisdiction to require such disclosure from their regulated issuers. We found no case law or interpretation of law that suggests provincial securities regulators cannot lawfully require such disclosure. Using the BC *Securities Act* as an example,

---

[27] CFA Code at pg. 2.
[28] TRC no. 92.
[29] TRC no. 57.
[30] UNDRIP at articles 18 and 19.
[31] See, e.g. BC Securities Commission: "The British Columbia Securities Commission's mission is to protect and promote the public interest by fostering a securities market that is fair and warrants public confidence, and a dynamic and competitive securities industry that provides investment opportunities and access to capital": "Mission, Values & Overall Benefits", available online: https://www.bcsc.bc.ca/about/what-we-do/mission-values-benefits; and e.g. Ontario *Securities Act*, R.S.O. 1990, c. S.5.: Section 1.1: The purposes of this Act are: (a) to provide protection to investors from unfair, improper or fraudulent practices; (b) to foster fair, efficient and competitive capital markets and confidence in capital markets; (b.1.) to foster capital formation; and (c) to contribute to the stability of the financial system and the reduction of systemic risk.
[32] *Constitution Act, 1867* at s. 91(24).

section 85(c) provides that issuers must provide disclosure as may be prescribed. Once B.C. adopts a recommendation from the CSA, the requirements become part of the regulator's regulations (i.e, are prescribed). Moreover, Form B requirements do not require that an issue constitute its board in any particular way and thus do not tread into the substance, for example, the *Business Corporations Act*. We conclude that there is no jurisdictional conflict between Form B requirements and any other provincial requirements.

B. Form B could be improved upon in four ways

While we generally support Form B, we believe it could be further improved. In our view, Form B could be strengthened by:

(1) Requiring issuers to always disclose information that is broken down by **each** diverse group (i.e. reporting specific data regarding Indigenous peoples, rather than amalgamating the disclosure for diverse groups in certain instances (e.g. targets));

(2) Including the "comply or explain" disclosure model with respect to an issuer's approach to diversity in executive officer positions;

(3) Including mandatory target-setting requirements for Indigenous directors and executive officers; and

(4) Making disclosure mandatory across all business lines.

C. Specific Responses to Arguments in Favour of Form A

On June 15, 2023, the Alberta Securities Commission (**ASC**) hosted an information session regarding the Proposed Amendments. At this session, participants heard that there is a consensus amongst CSA members that diversity is important and that investors want this information. Participants heard that Form A provides a qualitative approach that allows issuers to design and implement policies that make sense for their business.

In our view, Form A will maintain the status quo while placing issuers' interests before that of investors.

We think that arguments set out in the Notice for Form A and against Form B are weak and at times specious. For example, the Notice sets out that during consultations, the CSA heard that "a flexible approach would be better suited to Canada's diverse capital markets".[33] The Osler Report suggests that whatever diversity exists in the market is not making its way to boards and into executive offices. On the other hand, since the 2014 Requirements came into effect, female representation, especially on boards, has significantly increased.

Canada's constitutionally recognized First Peoples have been effectively blocked from participating in Canada's capital markets for far too long. Reconciliation, specifically economic reconciliation, demands that more be done to hasten Indigenous peoples' overdue participation. That which is measured can be managed. We anticipate that with increased disclosure, we will begin to see this long overdue participation increase, and see true change and increased diversity. This more genuinely accords with the "strong belief" that diversity is important, as was held out at the ASC's information session.

[33] Notice at pg. 3.

The Notice also sets out that that some stakeholders "expressed concern with the disclosure of personal characteristics".[34] The Notice later sets out that Form A may

> *avoid limitations on the completeness of disclosure arising from the use of information resulting from voluntary self-identification in relation to the specified categories, although this issue may also arise from these or other categories chosen for use by issuers under Form A.*[35]

We find this argument unlikely. While we respect that there may be individuals who choose not to disclose their diverse characteristics for personal reasons, we suggest this is not likely to be a trend. The disclosing individuals will be senior officials and board members of issuers. These individuals will personally have much at stake and a vested interest in the success of the issuer. Given investors' increasing interest in this disclosure, such disclosure will be well received by investors. Those directors and executive officers captured by the Form B requirements would have a personal interest in disclosing this information. We are of the view that this argument is possible but not likely. In other words, this argument is specious.

In short, selecting the less prescriptive Form A over Form B will not likely correct the purported mischief, but it will deprive investors of important and decision-useful information. It will in addition be a missed opportunity of Canada's corporate sector to increase representation of Indigenous peoples and aid in economic reconciliation. As raised above, this is required of all participants in Canada's corporate sector pursuant to Call to Action 92. In the event this issue was even slightly prevalent, we ought not to let perfect be the enemy of good.

We were surprised to read that the securities regulators in BC and the Northwest Territories (**NWT**) prefer Form A. In our view, Form B is preferable vis-à-vis Indigenous peoples and reconciliation. British Columbia is obligated to implement and the NWT has committed to implementing UNDRIP. Moreover, the British Columbia Securities Commission was specifically instructed to make reconciliation, through both the provincial UNDRIP-implementing legislation and through implementing the Calls to Action, a "foundational principle" that informs the Commission's policies and programs.[36]

The Declaration affirms the rights of Indigenous Peoples to actively participate in decision-making that will affect their rights.[37] The Declaration further affirms the duty of states to consult with Indigenous Peoples to obtain their free, prior and informed consent prior to adopting legislative or administrative measures that may affect Indigenous Peoples.[38] British Columbia has and NWT will have (if, as we posit below, it does not already have) an obligation to consult Indigenous peoples with respect to the Proposed Amendments.

[34] Notice at pg. 3.
[35] Notice at pg. 4.
[36] Mandate Letter of Selina Robinson to the BC Securities Commission. March 24, 2021, signed by the BC Securities Commission Board of Directors on April 6, 2021, available online: https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/organizational-structure/crown-corporations/mandate-letters/bc_securities_commission.pdf
[37] UNDRIP at Article 19, available online: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.
[38] UNDRIP at Article 19.

We are further of the view that the NWT, the Yukon and Nunavut are already bound by UNDRIP as a result of the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*.[39] The territories are creatures of federal statute and are most likely bound by the UNDA.

There is no indication that any of BC, the NWT, the Yukon or Nunavut have consulted Indigenous rightsholders as is required of them. If these regulators do not consult as required, they will be in breach of their legal obligations.

CONCLUSION

There is an old adage that says "a rising tide lifts all boats". We are of the view that a policy that will provide the information investors demand while leading to greater representation of underrepresented and historically disadvantaged groups can only lead to greater prosperity for all.

We thus prefer Form B's prescriptive approach as this will provide more consistent data that will be both easier for investors to locate, and to understand and interpret. In our view, initiatives which will increase Indigenous participation in the corporate sector are essential.

Our answers to the specific questions set out in the Notice are attached at Appendix "A". We have further attached Appendix "B", which contains our suggestions for future reporting that we expect of issuers.

Finally, we encourage the CSA to visit Indigenous communities. There is no better knowledge that the CSA can obtain regarding how Indigenous peoples will be impacted by the Proposed Amendments than by consulting with Indigenous rightsholders and their representatives.

[signatures]

CC: Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
Financial and Consumer Services Commission, New Brunswick
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
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

[39] S.C. 2021, c. 14 [**UNDA**].

APPENDIX "A'

Specific Feedback on Questions Posed in Notice

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.

In our view, concerns that may exist can be mitigated through careful application of privacy laws and the use of limited redactions. The disclosure of information ought to conform to privacy laws, and where information is properly characterized as confidential, the issuer ought to disclose same to its regulator with a request for redaction. Redactions are, of course, intended to be as minimal as possible. The balance ought to be that the information provided meets the objectives of the regulator and of investors, without violating the confidential information of a candidate. In most cases, the information will not rise to this level. Competitively sensitive information ought to follow a similar process wherein the issuer requests redaction from the regulator.

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.

In our view, Form B is the preferable approach. As we canvassed in the body of this letter, investors are seeking increased diversity on boards and among executive officers. Investors will be best served where the information is readily available across a range of diversity categories, and set out in a format that is not only the same year over year but is the same from one issuer to the next. Form B will ensure more complete disclosure, and intelligibility of disclosure in a way that Form A will not.

The Notice provides that the Form A disclosure requirements would reflect an "issuer's determination as to what aspects of diversity are most beneficial to that issuer in advancing its business and strategy". Investors are increasingly aware of the benefits that diversity in the boardroom and corporate officers can bring to the overall value of a company. From this view, it is in the best interests of the company and of the company's existing shareholders for this diversity disclosure to be as complete as possible.

Securities regulators owe obligations to the public. While an issuer may prefer a less prescriptive approach for a variety of reasons, Form B allows the interests of the investing public to be better met, while also enabling issuers to continue to create and disclose written strategies, policies, and measurable objectives relating to diversity on an issuer's board and in corporate offices.

Form B should require an issuer to disclose its approach to diversity, how it intends to measure progress, and any data the issuer collects in this respect. This nuanced information will be of interest to investors. We recommend the CSA consider formats for how issues can consistently disclose this information.

The information disclosed for each member of the designated group (i.e. Indigenous Peoples, racialized persons; etc.) should be individuated. In other words, each 'class' of the designated group should be

reportedly individually, as opposed to having the data regarding the designated groups amalgamated. See, for example, current draft of sections 6.3 and 64.

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.

Diversity in executive officer positions is vital especially in smaller companies which typically require less time and action from their boards than their larger counterparts.[40] As a result, for different and diverse perspectives to be impactful in the higher-level decision making in smaller companies, diversity amongst executive officers will be important to investors. We are of the view that the prudent, well-informed investor would seek diversity information regarding a company's executive officers for the same reasons this information is relevant to a prudent, well-informed investor regarding board composition.

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.

In our view, the disclosure requirements in Form B are preferable to those in Form A. Form A would allow issuers to choose whether an "identified group" is part of the issuer's strategy regarding diversity. This enables issuers to take a view of the composition of their board or executive officers to determine the easiest route to exemplifying diversity. As set out above, the diversity disclosure requirements regarding women have led to an increase in women participation, especially on issuer's boards. In our view, this is the type of policy that is needed for Canada's Indigenous peoples, who have long been excluded from meaningfully participating in corporate Canada. Without these requirements, the status quo regarding Indigenous participation on boards and in executive officer positions will likely continue. Increased diversity reporting will allow the reporting to be transformative, not performative.

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.

As set out in the body to our letter, we are of the view that a common tabular format is integral to the success of diversity disclosure.

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 only additional data that would be disclosed under Form B would be with respect to LGBTQ2SI+ persons. In our view, any administrative burden posed between the two forms of disclosure should be minimal for a well-organized, responsive issuer.

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 are of the view that diversity disclosure will better serve investors in all issuers, regardless of size or whether they are listed on a major exchange. With particular respect to Indigenous participation on venture issuers, we note that over 80% of TSXV issuers are engaged in "Indigenous intensive" businesses. As set out

[40] Glass Lewis at pg. 28.

in the body of this letter, in order for these companies to assure investors that they have competent and qualified decision makers in upper management, Indigenous participation is required.

We understand that there may be practical issues that venture issuers may face in seeking to have greater diversity on its boards and among its executive officers. For example, given the greater risks for investing in the venture market, underrepresented segments may prefer to be on boards or act in executive officer positions of the more stable non-venture issuers. As noted in the body of this letter, Glass Lewis has different gender diversity recommendations for non-venture and venture issuers.[41] We support the development of increased disclosure requirements for venture issuers, and recommend that further literature review and consultations be undertaken in determining what is suitable for such issuers while improving diversity amongst these issuers.

[41] For non-venture boards, they recommend 30% gender diversity on boards. For venture issuers, they recommend one gender diverse director on the board. See Glass Lewis Report at pg. 31.

Appendix "B"

FMB Suggestions for Future Reporting

We encourage the CSA and all securities regulators to consider the following areas for future reporting regarding Indigenous peoples:

Reconciliation

- Has the issuer developed and published a Reconciliation Action Plan?
- How are issuers complying with Truth and Reconciliation Report Call to Action number 92?
- How are issuers complying with UNDRIP?

Diversity policies:

- Does the issuer voluntarily undertake internal disclosure reporting?
- Does the issuer have an Indigenous advisory board?
- Is the issuer disclosing their board and staff Indigenous representation?
- Does the issuer have Indigenous people on its board and among its Senior Executive?
- Do financiers or insurers have a policy recording reconciliation that may restrict the issuer?

Financing:

- Does the issuer's bank or insurance company put limitations on what the issuer can do?

Track record:

- Does the issuer have a history of leadership in reconciliation?
- Does the issuer have a record of prior litigation and/or poor relationships with Indigenous communities?
- Is the issuer currently looking to expand a previously approved project without free, prior, and informed consent (FPIC)?
- Are there First Nations and/or Indigenous groups that the corporation has not engaged?

Economic growth:

- Does the issuer have Indigenous ownership in whole or in part?
- Is the issuer ensuring Indigenous communities have opportunities for equity participation in projects on their traditional territories?
- Is the issuer developing projects in partnership with affected communities – not bringing completed proposals for approval, but rather building collaborative relationships at the beginning of the process?
- Is the issuer providing complete details to impacts First Nations on the options for the project?

- What options is the issuer creating for Indigenous employment?

Community impact:

- How are impacted communities impacted by the corporation's work? Are the results mutually beneficial, and not just related to financial benefits?
- Does the issuer consider double materiality, impact on people, society, and the environment?

Contracting and procurement:

- Is the issuer extending procurement opportunities to Indigenous-owned businesses? (Call to Action 92 from the Truth & Reconciliation Commission)

Education:

- Have staff and management received training on the "history of Indigenous peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Indigenous rights, Indigenous law, and Indigenous-Crown relations"? (Call to Action 92 from the Truth & Reconciliation Commission)
- Have staff and management received training in cultural competency, conflict resolution, human rights, and anti-racism? (Call to Action 92 from the Truth & Reconciliation Commission)

We additionally recommend that similar disclosure requirements be considered and eventually put in place for registrants.