

May 14, 2014

Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor
Ottawa, Ontario
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By email: cbca-consultations-lcsa@ic.gc.ca

Dear Director General:

We are pleased to submit our comments in response to the Discussion Paper on the *Canada Business Corporations Act* (the "Act" or "CBCA").

We congratulate Industry Canada for addressing board diversity in the Discussion Paper. While we were pleased to see the mention of the issue of board diversity in the 2012 Federal Budget and to have participated as an ex-officio member of the Advisory Council on Women on Boards beginning in 2013, we are concerned that the federal government has not yet moved forward with any legislative, regulatory or policy changes.

We believe Industry Canada has an important role to play by amending the *Act*, the most important business corporations statute in Canada, to include a provision for regulations that address board diversity since only 15.6% of Financial Post (FP) 500 seats were held by women as of May 31, 2013 according to our research. The Council has tracked the gender representation on FP500 boards sector by sector over the past 12 years. There has been a glacial improvement in women's representation across all sectors since 2001, heavily influenced by the mining, oil and gas industries. With 669 board seats in 2013, these industries have the highest number of board seats of any sector in Canada.

As the presenter of Global Board Diversity Best Practices at the meeting of the Advisory Council in June, 2013, the Council is well-versed in global trends and therefore they have informed our thinking as to how Industry Canada should proceed in respect of regulation. The trends in governance have been well noted in the July 30, 2013 Ontario Securities Commission Consultation Paper. According to GMI Ratings May 2013 Women on Boards Report, Canada's progress on gender diversity among directors is stagnant: the proportion of female directors is unchanged from the year before and up less than 1 percentage point since 2009. In fact, the percentage of companies with at least one woman on the board has fallen in Canada during this time. It is interesting to note that while our progress is stagnant, 64.8% of working-age women now have a post-secondary education, compared with 63.4 % of men according to the June 2013 release of data from Statistics Canada's National Household Survey. It is the first time females have bypassed males in overall educational attainment.

Corporate directors and the business community agree the lack of diversity on the FP500 is an economic issue that requires strong leadership and action now by governments and regulators. 62% of FP500 directors surveyed by the Council in the summer of 2013, in partnership with KPMG and the Conference Board of Canada, supported government action to set either i) a requirement to publicly describe the company's approach to, and progress toward achieving increased gender diversity (54%) or ii) quotas (8%). Only 38% supported the status quo. Last month, most of the companies and groups who sent comments about the January 2014 proposed Ontario Security Commission Proposed Amendments on gender diversity disclosure requirements supported the "comply and explain" approach taken by the securities regulator. A small minority said the OSC proposal did not go far enough, and advocated a quota system.

Addressing the gender diversity gap is necessary in ensuring the best corporate performance and good corporate governance on Canadian boards. We would like to see regulations that clearly spell out disclosure obligations. Otherwise, regulations that address diversity more generally will only maintain the status quo. We believe this will help slow the pace of Canada's decline relative to other advanced nations in respect of gender diversity at the board level. At the end of the day, new regulations will be seen to be successful by our business community and by countries around the world if the percentage of board seats held by women rises significantly *and* this change in board composition is seen by our business community as having improved corporate governance by improving board effectiveness.

Canadian Board Diversity Council

The Canadian Board Diversity Council is the leading Canadian organization advancing diversity on Canada's boards. The Council's definition of diversity in respect of boards expands the traditional definition of industry experience, management experience, education, functional area of expertise, geography and age to also include such considerations as gender, ethnicity and aboriginal status.

Our mission is to encourage companies to tap into an overlooked yet sizeable pool of talent to drive financial performance and sound governance. We achieve our mission through research, education, the identification of board-ready candidates and advocacy.

The business case is clear: companies can benefit from well-credentialed individuals who bring a wider range of skills, experiences and perspectives to corporate governance. This means better discussion, greater diligence in decision-making and ultimately, improved financial performance and shareholder value. In respect of gender diversity, our vision is to see the percentage of FP500 board seats held by women rise to 20% by 2015, and to 30% by 2018.

Feedback on Discussion Paper Section VII: Diversity of Corporate Boards and Management

Introduction

While definitions of diversity and methods of achieving this goal vary, it has been suggested by many stakeholders that a commitment to diversity, including gender diversity, could provide a corporation with access to a broader pool of knowledge and experience, varied social backgrounds and skills beyond those traditionally found in corporate boardrooms. This could result in new market opportunities, greater innovation and access to new talent pools for recruitment.

Several jurisdictions have adopted measures to increase women's representation on boards of directors, including legislating quotas for representation, mandating diversity targets, and issuing voluntary guidelines for corporations to put in place gender diversity policies, targets and reporting.

Stakeholders and others are invited to comment as to whether new measures to promote diversity within corporate boards should be included in the CBCA and what such measures might entail.

In preparing this comment letter, we had the benefit of the views of the 54 CBDC member organizations (Appendix 1). In addition, the comment letter has been informed by the views of 182 FP500 directors who have attended 23 Board Diversity Best Practices Roundtables we have organized in Vancouver, Calgary, Toronto, and Montréal over the last three years. The Roundtables include the most recent Roundtable in Calgary on January 15, 2014 which ensures our comment letter is informed by the current views of FP500 directors on the topic of board diversity policy. These Roundtables are the only forum that currently exists in Canada to allow for meaningful discussion and an exchange of views on board diversity policy. The Roundtables have been sponsored by EY (formerly known as Ernst & Young) across Canada and in Toronto by global executive search firm Odgers Berndtson.

This comment letter compliments recommendations in two Council submissions to the Ontario Securities Commission. In our October 4, 2013 submission, we recommended more onerous disclosure requirements than envisioned in the July 30, 2013 Consultation Paper. We were pleased to see more

onerous disclosure requirements in their January 16, 2014 Proposed OSC Amendments to Form 58-101F1 *Corporate Governance Disclosure* of National Instrument 58-101 *Disclosure of Corporate Governance Practices*. In our April 14, 2014 submission, we recommended a small number of revisions to the Amendments. Overall, we believe they are reflective of thoughtful, sensible and progressive thought leadership in tackling the need to improve corporate governance in Canada.

Specific Feedback

1. Should new measures to promote diversity within corporate boards be included in the *CBCA* and what might such measures entail?

We recommend the *Act* include provision for regulations that require disclosure of board diversity measures through the introduction of a “comply or explain” approach. Our view is that new measures should be in regulation accompanying the statute, not in the statute itself. The new measures that we would like to see are in four key areas: i) disclosure of term limits, ii) disclosure of policies regarding the representation of women on the board, iii) disclosure of the consideration of the representation of women in the director identification and selection process, and iv) disclosure of the number and percentage of women on the board. We do not support quotas, nor do we support the setting of targets at this time.

Please find below our comments on each of the four key areas. We do believe it is important that *CBCA* regulations pertaining to board diversity disclosure are aligned with securities Instruments and Policy. Measures in these four key areas were addressed in four of the Proposed OSC Amendments to Form 58-101F1 *Corporate Governance Disclosure* of National Instrument 58-101 *Disclosure of Corporate Governance Practices*. We strongly support these four Proposed OSC Amendments. Our comments on each area are followed by the relevant Proposed OSC Amendment. In the case where we have recommended a revision to the Amendment, our recommended revision(s) appears and is underlined.

i) Disclosure of term limits

88.9% of Council member organizations ‘strongly support’ or ‘support’ disclosure of term limits. Furthermore, when asked if the *CBCA* should be amended to include this measure, 100% of CBDC members agreed that the *Act* should include this measure. According to the OSC January 2014 summary of feedback (to the July Consultation Paper), “many stakeholders believe that regular renewal of board membership contributes to the effectiveness of a board and that director term limits may promote an appropriate level of board renewal.”

Proposed OSC Amendment on Term Limits (Council proposed revisions are underlined) - Disclose whether or not the issuer has adopted term limits for the directors on its board. If the issuer has not adopted term limits, disclose why it has not. In addition, 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.

ii) Disclosure of policies regarding the representation of women on the board

100% of Council member organizations 'strongly support' or 'support', with 63.6% strongly supporting, the disclosure of whether a company has a policy for the representation of women on the board. Furthermore, when asked if the *CBCA* should be amended to include this measure, 67% of CBDC members agreed that the *Act* should include this measure.

Our annual research, most recently presented in our 2013 Annual Report Card, shows that 21% of FP500 boards have a written diversity policy. This underscores another disturbing finding from the same survey: 76% of board member respondents said they felt their board was diverse when asked in a separate question if they felt their board was diverse. It is interesting to note the correlation that exists between the presence of a written diversity policy and the presence of female directors: sectors in which companies are more likely to have written board diversity policies have a higher representation of women on their boards. For example, 16% of mining, oil and gas companies have a written board diversity policy; 9% of board seats are held by women. This contrasts sharply with finance and insurance companies: 33% of companies in this sector have a written board diversity policy; 23.3% of board seats are held by women.

Proposed OSC Amendment on Policies regarding the representation of women on the board (Council proposed revisions are underlined) -

(a) "Disclose whether the issuer has adopted a written policy for the identification and nomination of women directors. If the issuer has not adopted such a policy, disclose why it has not and explain any risks or opportunity costs with the decision not to have such a policy"

(b) If an issuer has adopted a written policy referred to in (a), disclose the following in respect of the policy:

(i) a short summary of its measurable objectives including numerical targets (actual and percentage based on board size over the last five years) and key provisions;

(ii) the measures taken to ensure that the policy has been implemented effectively;

(iii) annual and cumulative progress by the issuer on achieving the objectives of the policy; and,

(iv) whether and, if so how, the board or its nominating committee measures the effectiveness of the policy.

iii) Disclosure of the consideration of the representation of women in the director identification and selection process

91% of Council member organizations ‘strongly support’ or ‘support’, with 54.6% of respondents strongly supporting the disclosure of how a company considers the representation of women in the director identification and selection process.

This is the key issue in our view which the Proposed Amendments must address, as our research shows in each of the last four years that only 1 in 5 directors are identified through a rigorous process which goes beyond the individual directors’ own networks. To put it bluntly, as women have typically not been in those networks in meaningful numbers, women have not been considered. We believe companies should be required to explicitly indicate whether, and if so how, the board or its nomination committee considers the level of representation of women on the board in identifying and nominating candidates for election or re-election to the board. This requirement would mean that if the company does not take the representation of women into account in its process, it should explain why not and identify any risks or opportunity costs associated with the decision not to do so.

Proposed OSC Amendment on Consideration of the representation of women in the director identification and selection process - Disclose whether, and if so how, the board or nominating committee considers the level of representation of women on the board in identifying and nominating candidates for election or re-election to the board. If the issuer does not consider the level of representation of women on the board in identifying and nominating candidates for election or re-election to the board, disclose the issuer’s reasons for not doing so.

iv) Disclosure of the number and percentage of women on the board

90.9% of Council member organizations ‘strongly support’ or ‘support’ a company being required to disclose the proportion (in percentage terms) of women on the board. In November, 2013, the OSC issued a survey to approximately 1,000 TSX-listed issuers regarding gender diversity. It is interesting to note that the survey results showed the level of transparency regarding the representation of women by the respondents was low, with 61% of respondents not publicly disclosing the proportion of women on the board.

According to the OSC January 2014 summary of feedback (to the July Consultation Paper), “many stakeholders believe that measurement is a critical component of [a] proposed disclosure model ...this type of reporting also provides greater transparency to investors and other stakeholders and enables them to make comparisons...”

Proposed OSC Amendment on Number of women on the board and in executive officer positions -

(a) Disclose the number and proportion (in percentage terms) of directors on the issuer’s board who are women.

(b) Disclose the number and proportion (in percentage terms) of executive officers of the issuer, including all subsidiary entities of the issuer, who are women.

In Closing

Thank you for the opportunity to share our comments with you on behalf of our member organizations. Please see the list of our member organizations in Appendix 1 on the following page. We would value the opportunity to contribute to further discussion on amendment(s) and/or regulations.

With warm regards,



Pamela Jeffery

Founder

Appendix 1: Founding and Corporate Members

Accenture	KPMG
Agrium	Laurentian Bank of Canada
BC Hydro	Maytree Foundation
BCE	McCarthy Tétrault LLP
BMO Financial Group	Miller Thomson LLP
Beedie School of Business	National Bank of Canada
CIBC	Norton Rose Fulbright LLP
Canada Mortgage and Housing Corporation	Odgers Berndtson
Canadian Institute of Diversity & Inclusion	Pacific Rubiales Energy
Canadian Oil Sands	Postmedia Network
Canadian Pacific	PotashCorp
Canadian Society of Corporate Secretaries	PwC
Canadian Women in Communications	RBC
Cisco Canada	Scotiabank
Coast Capital Savings Credit Union	Shoppers Drug Mart
Crowe Soberman LLP	Sionna Investment Managers
Deloitte	Suncor Energy
Desjardins	Sun Life Financial of Canada
The Directors College	TD Bank Group
EY	Talisman Energy
HSBC Bank Canada	TELUS
Husky Energy	Torys LLP
Hydro-Québec	Toronto Hydro-Electric Systems
IAMGOLD	Vancouver Airport Authority
Iron Ore Company of Canada	Via Rail Canada
Institute of Corporate Directors	Women in Capital Markets
Jeffery Group	Women's Executive Network