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<b>Date</b>	October 1, 2013

The Secretary  
Ontario Securities Commission  
20 Queen Street West  
19<sup>th</sup> Floor, Box 55  
Toronto, Ontario M5H 2SB

Dear Sirs/Mesdames:

Re: Comments with respect to OSC Staff Consultation Paper 58-401 *Disclosure Requirements Regarding Women on Boards and in Senior Management*

### **Introduction**

On July 30, 2013, the Ontario Securities Commission (OSC) published OSC Staff Consultation Paper 58-401 *Disclosure Requirements Regarding Women on Boards and in Senior Management* (the Consultation Paper). In the Consultation Paper, the OSC states that it is considering amending National Instrument 58-101 *Disclosure of Corporate Governance Practices* in Ontario to require that non-venture issuers provide disclosure on an annual basis in the following four areas:

1. Policies regarding the representation of women on the issuer's board and in senior management;
2. Consideration of the representation of women in the issuer's director selection process;
3. Consideration of the representation of women in the issuer's board evaluation process; and
4. Measurement regarding the representation of women in the issuer's organization and specifically, on the board and in senior management.

We commend the OSC for its efforts in preparing the Consultation Paper and for raising awareness of the issue of the representation of women on boards and in senior management of non-venture issuers in Canada. As you know, recent studies have shown that Canada is falling behind its peers in dealing with the under-representation of women on corporate boards and any steps to ameliorate this situation would be an improvement for corporate governance in Canada. We encourage the OSC to consider the Consultation Paper and the policies it proposes as a first step to the expansion of diversity in the boardroom and we further encourage the OSC to expand the scope of this initiative to include other diverse groups and to consider expanding its scope to apply to venture issuers subject to appropriate

consideration of regulatory burden. We wholeheartedly agree with the following passage from the Consultation Paper:

Corporate decision-making benefits from a diversity of opinions and viewpoints. This diversity is enhanced when leadership roles are filled with individuals who have different professional experience, education, skill and individual qualities and attributes such as gender, age, ethnicity and cultural background.

In our view, a lack of diversity at the board and management levels results in very little divergence of opinions, and we believe such lack of diverse opinions must be considered a risk factor for the long term health of our capital markets.

We note that only the OSC has put forward the policies proposed in the Consultation Paper and that this is not a national initiative submitted by the Canadian Securities Administrators (CSA). As such, we encourage other members of the CSA to follow the lead of the OSC and to implement the recommendations proposed in the Consultation Paper on a national basis. We further encourage the CSA to support efforts to encourage increased inclusion and diversity in Canadian boardrooms and to use the proposed policies in the Consultation Paper as a first step towards a larger goal.

#### **McMillan Comments**

In connection with the Consultation Paper, the OSC has requested feedback on the proposed changes. Specifically, the OSC has requested comments on the following five points:

1. What are effective policies for increasing the number of women on boards and in senior management?
2. What type of disclosure requirements regarding women on boards and in senior management would be most appropriate and useful?
3. Are the proposed scope and content of the model disclosure requirements set out in Part 4 of the Consultation Paper appropriate or are there additional and/or different disclosure requirements that should be considered?
4. What type of statistics, data and/or accompanying qualitative information regarding the representation of women in their organization should non-venture issuers be required to disclose? Should such disclosure be reported for the non-venture issuer only or for all of its subsidiary entities also?
5. What practices should the OSC recommend for facilitating increased representation of women on boards and in senior management?

In response to the OSC's request for feedback, McMillan has prepared the following comments on the first, second, third and fifth questions above. However, notwithstanding the comments contained herein, we believe consideration should always be given in any proposal to ensuring board effectiveness rather than simply imposing standards or even guidelines.

**Part I. Comments on Questions 1 and 5 Regarding Policies and Practices**

The first and fifth questions above appear to us to be closely related. As such, we address both questions in the following discussion.

***OSC Recommended Approach***

We understand the OSC's proposed approach to improving gender imbalance issues is through increased disclosure. While it has been shown in international studies that there are more effective ways to actually increase the number of women on boards of directors and in senior management<sup>1</sup>, we hope that the comply or explain approach suggested by the OSC will be a preliminary step toward more comprehensive initiatives designed to ensure that leadership roles in corporate Canada are increasingly filled with individuals who have different professional experiences, education, skills, characteristics and qualities.

***International Approaches***

To better understand what policies and practices might be most suitable and effective for implementation in Canada, it is helpful to look at those measures adopted internationally. As noted in the Consultation Paper, some countries have imposed quotas to reach their desired proportion of women on the board and in senior management. For example, in 2002, Norway imposed a quota on all listed issuers that required their boards to consist of at least 40% women by 2005 (when the quota was imposed, Norwegian boards consisted of approximately 8% women). While this level was eventually achieved in 2009, there was evidence that working environments and morale may have suffered as a result.<sup>2</sup> Additionally, the quota did not succeed in improving the number of women who held the position of CEO or Chairman in Norwegian issuers, which stayed at less than 5%.<sup>3</sup> However, the overall impact of the quotas was to vastly increase the number of women on Norwegian boards.

Countries such as Finland and Sweden have not imposed quotas, but they have imposed stricter "comply or explain" policies in their corporate governance codes than that proposed by the OSC.<sup>4</sup> For example, Finland implemented a corporate governance code in 2010 which provides that both genders must be represented on corporate boards. Where issuers cannot or do not comply with the requirement, they must explain why not.<sup>5</sup> Finland has not imposed sanctions on those issuers which

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<sup>1</sup> *Women in the Boardroom: A Global Perspective*. Deloitte, November 2011.

<sup>2</sup> *Get on Board Corporate Canada: Greater Transparency Needed for Gender Diversity on Canadian Boards*. TD Economics Special Report, March 7, 2013.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> OSC Staff Consultation Paper 58-401 *Disclosure Requirements Regarding Women on Boards and in Senior Management*, published July 30, 2013.

lack representation of women on the board, but its revised corporate government code has led to Finnish corporate boards currently having between 22% and 26.4% women as opposed to only 8% in 2008.<sup>6</sup>

As discussed in the Consultation Paper, Australia has taken a similar “comply or explain” approach, except that it is imposed by the Australian Securities Exchange (the ASX). The ASX’s approach requires issuers to disclose whether and if so, how, they have implemented the ASX’s recommendations regarding the inclusion of diversity in their corporate governance policies.<sup>7</sup> While most of the diversity recommendations focus on a broader range of diverse groups than just women, ASX recommendation 3.4 provides that “companies should disclose in each annual report the proportion of women employees in the whole organization, women in senior executive positions and women on the board.”<sup>8</sup> The ASX’s revised corporate governance policies have resulted in an increase of women on applicable corporate boards from 8% in 2007 and 2008 to 13.8% in 2012.

### ***Our Suggestion***

The most effective approach to increasing the number of women on boards and in senior management appears to be the imposition of strict quotas, as has been done in Norway. However, critics remain wary of any rule that would lead to hiring and selection decisions being made on the basis of anything other than merit. This still leaves room for such “comply or explain” disclosure rules as those put forward by the OSC and also for policies that go further to encourage the inclusion of women on the board and in senior management of non-venture issuers. For example, instead of taking the Australian disclosure-only approach, we believe it would be more beneficial to implement objective standards such as those included in the Finnish approach. Thus, instead of only requiring that a diversity policy be implemented, the OSC could also set some firm guidelines on what that policy would entail. Issuers would still have the opportunity to “comply or explain”, but would also have a more objective benchmark for which to strive.

Since we realize that some may even consider this mid-way approach as too onerous for certain non-venture issuers, we suggest that an objective standard may be more effective and appealing if it does not (arguably) function somewhat like a quota. In this regard, we looked to draw an analogy from a somewhat unlikely place – professional sports.

### ***Rooney Rule***

The problems faced with respect to the lack of representation of women in the highest levels of non-venture issuers are somewhat analogous to the problems faced by the National Football League (NFL) in terms of racial diversity. In 2002, 70% of NFL players were black, while among the league’s 32 teams,

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<sup>6</sup> *Supra*, note 2.

<sup>7</sup> *Supra*, note 5.

<sup>8</sup> *Corporate Governance Principles and Recommendations with 2010 Amendments*. 2<sup>nd</sup> Edition, ASX Corporate Governance Council.

only three head coaches or general managers were from a visible minority. At that point, there had only been six minority head coaches in the NFL in over 80 years. In 2003, the NFL attempted to address this problem by implementing the “Rooney Rule”, named after Pittsburgh Steelers chairman Dan Rooney.

The Rooney Rule requires that at least one minority candidate be interviewed each time a coaching or general manager position becomes available.<sup>9</sup> The penalty for not doing so is the imposition of a large fine.<sup>10</sup> The Rooney Rule met with a substantial amount of success in its early years, and by 2006, 22% of coaches in the NFL were visible minorities. Recently, however, the Rooney Rule has been called into question since there were no minorities hired to fill 15 top vacancies that arose at the end of the 2012-2013 season (eight head coaching jobs and seven manager positions) even though the Rooney Rule was followed.<sup>11</sup> It has been suggested that the Rooney Rule will be revised in coming seasons in hopes of reinvigorating its effect.

We suggest that the OSC implement a rule similar to the Rooney Rule and require that for every opening on the board of directors and in senior executive positions for non-venture issuers, at least one female candidate be required to be interviewed for the position. We propose to call this rule the “Fair Representation Rule”.

While the details of the implementation of the Fair Representation Rule would be open for discussion, we propose the following as a starting point:

- For an interview to satisfy the Fair Representation Rule, it must be done in-person, and at least one interviewer must be responsible for hiring decisions (or for deciding which candidates are to move on to the next round of interviews, as applicable);
- Issuers would be required to keep records of all candidates interviewed for board and senior management positions for a fixed period of time;
- The OSC’s continuous disclosure reviews would be amended to include an issue-oriented review to determine compliance with the requirements imposed by the Fair Representation Rule during the most recent fiscal year;
- When conducting its issue-oriented continuous disclosure reviews, the OSC could request issuers to provide to the OSC, on a confidential basis, the list of candidates interviewed for any board or senior management positions filled during the last fiscal year.

Unlike the Rooney Rule, we propose that the Fair Representation Rule not be enforced through the imposition of fines. Rather, it would be a “comply or explain” rule setting an objective standard for issuers to meet. Like the Finnish law discussed under “International Approaches” above, issuers would be required to disclose whether they have complied with the Fair Representation Rule, and if they have not complied, to explain why not.

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<sup>9</sup> *Ex-Coaches: Rooney Rule is Broken*. Published Thursday, January 31, 2013 on ESPN.com.

<sup>10</sup> *Why the NFL’s Rooney Rule Matters*. Published on January 26, 2013 on Forbes.com.

<sup>11</sup> *Supra*, note 7.

Once issuers become accustomed to compliance with the Fair Representation Rule, we would suggest a gradual move toward making the Fair Representation Rule mandatory, and in such circumstances non-compliant issuers could be required to issue a stand-alone press release explaining their reasons for non-compliance. Such a press release may bring added scrutiny to issuers.

We believe there are resources available to assist issuers in implementing the Fair Representation Rule. For example, the Canadian Board Diversity Council (CBDC) has published what it refers to as Canada's first-ever database of diverse candidates for board positions in Canada's largest 500 organizations. In its April 19, 2012 press release, the CBDC stated: "The new initiative, Diversity 50, supports the Council's mandate to increase representation of candidates who reflect the diversity of the broader Canadian population."<sup>12</sup> In connection with the Diversity 50 initiative, the CBDC will identify 50 self-nominated candidates from diverse backgrounds as qualified by "criteria vetted by a group of leading Canadian CEOs."<sup>13</sup> Perhaps if the OSC joined forces with the CBDC or a similar organization, a more comprehensive database could be compiled of women candidates that could be accessed by a wider range of issuers. This database could then be expanded to include other diverse groups as more diversity initiatives arise.

We recognize that the Fair Representation Rule may need to be flexible when applied to issuers conducting an initial public offering and where control of the issuer's board of directors becomes the subject of a proxy contest.

#### *Lead Director*

In order to successfully implement the OSC's proposed recommendations as well as any additional policies or proposals that the OSC enacts (such as the Fair Representation Rule), it would be useful for each non-venture issuer to have a dedicated board member in charge of gender diversity initiatives, even if only at the board level. Part 3 of National Policy 58-201 *Corporate Governance Guidelines* provides that if the chair of a board is not an independent director, an independent "lead director" should be appointed. The lead director (or independent chair of the board, as the case may be) should "act as the effective leader of the board and ensure that the board's agenda will enable it to successfully carry out its duties".<sup>14</sup>

Similarly, we propose that the OSC consider requiring non-venture issuers to have a "lead diversity director" to spearhead the issuer's diversity efforts, particularly at the board level. In many cases, this role could be performed by the chair or other members of the issuer's nomination committee. The role of the lead diversity director would be to ensure that the issuer's diversity policy gets carried out effectively (particularly at the board level) and that it is complied with on a practical level. The lead

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<sup>12</sup> *CBDA Launches Canada-First Diversity 50 Database of Board Candidates*. Canadian Board Diversity Council press release dated April 19, 2012.

<sup>13</sup> *Ibid.*

<sup>14</sup> National Policy 58-201 *Corporate Governance Guidelines*, at subsection 3.2.

diversity director would need to have specific duties, which could be set out by the OSC. These duties could include, for example:

- ensuring that the board reviews the diversity policy annually and considers what, if any, changes are necessary, for example, to adapt to the issuer as it grows;
- reviewing the issuer's approaches to hiring new senior executive officers and filling positions on the board of directors to ensure compliance with the diversity policy;
- reviewing the issuer's disclosure to ensure that it meets the requirements set out by the OSC; and
- providing an annual report to the board of directors on the issuer's progress in terms of certain stated diversity goals that could be set out in the diversity policy.

The intended effect of establishing a requirement for a lead diversity director would be to increase accountability for improving diversity on boards and in senior management of issuers in Canada. The lead diversity director would be responsible for making recommendations to the board for the issuer's approach to inclusion and diversity issues. However, such a requirement would not apply if it would create a redundancy within the issuer's organization. For example, if an issuer already has a chief diversity officer, it would not also be required to appoint a lead diversity director.

## **Part II: Comments on Questions 2 and 3 Regarding Potential Additional Disclosure Requirements**

In light of the discussion in Part I above, we believe that there are several additional elements that could be added to the disclosure requirements noted by the OSC that would encourage better practices by issuers with respect to the representation of women on their boards and in senior management positions. Specifically, non-venture issuers should also be required to disclose:

- whether the issuer has reviewed all internal policies to determine whether they inadvertently exclude/marginalize women;
- whether the issuer has hired an outside consultant to advise on policies and procedures from a gender diversity perspective;
- whether employees (including those currently in senior executive positions) have received training on issues related to gender diversity;
- whether the issuer filled any board or senior management positions during the last fiscal year; and
- if a rule such as the Fair Representation Rule is adopted, whether the issuer complied with such rule and if not, provide an explanation of why not.

**Conclusion**

In publishing the Consultation Paper and recommending changes to applicable disclosure laws, the OSC has taken an important first step in addressing the issue of gender imbalance in top levels of senior Canadian issuers, and we commend the OSC for its initiative. One hopes that the OSC's efforts will pave the way towards increasing the representation of other diverse groups in Canadian boardrooms and senior management. We encourage other members of the CSA to follow suit, and hope that broader changes are made to address diversity issues in all Canadian jurisdictions.

If you wish to discuss any aspect of this letter, we encourage you to contact any one of the following lawyers who would be pleased to speak to you at your convenience:

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Yours truly,

*"Amandeep Sandhu"*

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