

August 5, 2013

The Secretary
Ontario Securities Commission
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Dear Secretary:

OSC Consultation Paper 58-401. Disclosure Requirements Regarding Women on Boards and in Senior Management.

I am providing comments on OSC Staff Consultation Paper 58-401: Disclosure Requirements Regarding Women on Boards and in Senior Management.

Having worked in the corporate world for some time, and seen a small number of boards in action, I believe that the un- or under-diversified board is a result not of bias *per se*, but of unconscious habits. A typical example might be when a board comprised only of men, wanting seriously to engage female directors, and having found a number of qualifying women, suddenly finds it has, unusually, an additional spot. Rather than deferring, or delegating to a nominating committee, coming to a decision, the directors agree without a second thought, when a director mentions that ‘Joe’s a good guy” and the perfect man for the job, on Joe. The issue is less gender and more ‘like prefers like’ (comfort with people with whom one has a prior connection, frequently people like oneself) and ‘let’s take the easy route’.

General Recommendations

1. I strongly believe that the most qualified person – to round out the components of a balanced board – should be identified, nominated and appointed. This may be a young white male, so I **recommend** no quotas or targets.
2. The premise of the consultation is flawed, as is evident from the requirements in other countries that focus on diversity rather than gender. While Catalyst is to be

congratulated for its efforts and research, I **recommend** that any requirement should focus on a board that reflects the general population or the client base of the entity. This would require it to include consideration of persons with disabilities, visible minorities and Aboriginal peoples.

3. Quite tenuously a securities regulatory matter, the valid issue of diversity should not fall to the OSC to address. It is a social and general competitiveness issue, and costs of the consultation should be paid for out of general tax revenues, not from fees on issuers and regulated financial firms that ultimately are paid for by people saving for retirement and other purposes. I **recommend** that the OSC track costs and expense them to the Ontario government or let them come from fines.
4. There is little new to be gained on an issue that already has been dealt with over the 20-30 years by firms subject to federal legislation: for example, transport, telecom and broadcast companies and banks. I **recommend** that boards and senior management review reports of the Canadian Human Rights Commission (CHRC) and of the entities it audits as there are extensive lessons that can be had for free from this source (see Specific Recommendation 1. below).
5. What we do not need, and what I recommend against, is a high-cost solution requiring high-paid lawyers or consultants. As an example, the reaction to the corporate and accounting scandals early in the 2000s (Enron, Tyco International, WorldCom), which led to the excessive and highly costly Sarbanes-Oxley legislation, also contributed materially to the creation of so-called director schools, to help directors better prepare for the information asymmetry between them and senior management. Starting at around \$12,000 for the complete directors' series/course, and now typically totaling \$16,000-\$20,000, this arguably has become a barrier to new independent – and qualified – directors, entrenches older “experienced” (likely less-diverse) ones, and potentially contributes to groupthink – the bane of boards. I therefore **recommend** the rule be simple and easy-to-understand (low-cost) and clear in its application (to public companies only? what about registrants and non-regulated issuers?).
6. An equally important and related issue, and as much the cause of board problems as undiversified boards, is the issue of multiple directorships held by certain directors and the inter-relationships between them (boards and directors). These have been identified as problematic by, I believe, the Canadian Coalition for Good Governance (CCGG), Canadian Securities Administrators and Council of Institutional Investors. I

recommend any rule that comes from this exercise require disclosure of all boards on which each director reported on sits.

7. As a major step forward, I **recommend** that any board member who has been on boards for 15 or more years be encouraged to step down voluntarily within the next five years. If he or she has been effective as a director, the board would be more diversified than at the start and he or she will have done their work; if the board remains undiversified, he or she will not have acted in the best interest of the company and should resign for that reason.

Specific Recommendations

1. The challenges that federally regulated industries found in making headway with respect to employment equity were several, with key ones being:
 - a. *Putting in place a process that ensures that candidates from outside the ordinary pool of hires/appointment always are considered.* First, the absence of a designated group in management or on a board does not immediately mean that there is no process or that a process is not working. However, most firms will want to establish a process changing in a consistent way how human resources and boards begin looking for candidates. The requirement to report publicly, as federally (and probably provincially) regulated companies have had to do, is a highly effective way of ensuring the policy or process is followed.
 - b. *Where to post vacancies so the right target audience is aware of them.* Just as posting in the National Post was not the best place for federally regulated companies to seek a more diverse employee base, asking existing board members for possible director nominations is not the way to achieve diversity of applicants. With today's technology, finding qualified parties is easier than ever before. A credible organization could host a database for parties interested in a more diverse board for applicants to self-identify.
 - c. Federally regulated entities were found to increase hiring of designated groups but their overall employed rates of under-represented groups did not rise as fast. Orientation is often not designed to take into account different groups, or it is not done well or at all, whether for a company or for a board of directors. Boards may

expect new members to sit and listen – serve time before participating. This is where the effective Chair should help by ensuring equal participation.

- d. Backlash.* It is important to keep an eye not just on the numbers and rush to diversity: this can lead to the choice of individuals not ready for roles and/or to considerable, if unspoken, negativity from the remaining undiversified population, let's call them young white males. For the long run benefit of all employees and the company on whose board directors sit, too much, too quickly can lead to the loss of good employees. The balance is difficult to achieve – something that is neither too fast, nor too slow, but just right. It can be helpful to engage those who are not part of one of the designated groups in devising a solution.

I **recommend** that entities responding to this consultation engage with those federally (and likely also provincially) that have been through the CHRC or equivalent audit process to describe what steps did and did not work in moving towards greater diversity.

2. Federally and provincially regulated companies subject to employment equity legislation should be exempt from reporting that is the equivalent of what they are already doing. To eliminate additional work, I **recommend** any reporting should be through a simple online database allowing easy data analysis. While the System for Electronic Data on Insiders (SEDI) would be ideal, the cost and slowness of change of that portal argues against it (refer SEDI User Opinion Survey, Highlights, June 2006). The Canadian Coalition for Good Governance might have been one entity that could have overseen development of a simple database and hosted it, however, as 11 out of its 12 directors currently appear to be whitish men (although diversified geographically), perhaps that is not the ideal place.

To the extent changes to or new requirements are being developed for boards and senior management, they must emphasize ethics. The requirement to behave ethically must not just be a check on some list, but a discussion topic on each Board agenda and discussed within the company, with a duty to report unethical behaviour.

Responses to Specific Consultation Questions

1. *What are effective policies for increasing the number of women on boards and in senior management?* Disclosure. As noted above, this should extend beyond women to

other under-represented-on-the-basis-of-population groups, which should be those against which federally regulated companies measure themselves and report. While understanding non-application of the proposed rules to venture issuers, such issuers could be encouraged to also adopt and apply the guidance if possible.

- 2. *What type of disclosure requirements regarding women on boards and in senior management would be most appropriate and useful?*** The requirements should refer to all under-represented groups and include only the number of employees and the number of the designated groups in the company in mid- and senior executive positions, as well as the number of board members with the number of people from designated groups on the board. In the case of boards, there should be disclosure of what other boards any director sits on and for how many years he or she has been on that board. Federally and provincially regulated entities should be exempt to the extent they already report publicly on diversity.
- 3. *Are the proposed scope and content of the model disclosure requirements described in Part 4 of this consultation paper appropriate? Are there additional or different disclosure requirements that should be considered? Please explain.*** Excessive: see 2. above. The requirements should refer to all under-represented groups.
- 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?*** The requirements should refer to all under-represented groups. Quantitative data captured should be brief (see 2. above), field-based to be easily searchable, and allow extraction and trend analysis. As well, it should provide for a 100-word description/explanation/link to its own website should a firm wish. Excessive disclosure, as evidenced in the case of long-form and simplified prospectuses, means it will not be read.
- 5. *Should such disclosure be reported for the non-venture issuer only or for all of its subsidiary entities also? Parent issuer only until the company is above a certain size (\$500 million in assets?). What practices should we recommend for facilitating increased representation of women on boards and in senior management?*** There should be no recommended practices needed; recommending practices will lead to a cookie-cutter approach that may be less appropriate to different companies and sectors, and limit learning by board and management. Ideally, there should NOT be paid consultants involved (unless I can be one of them) as the consultants, in my

experience, are often as un-differentiated as the boards they are advising. Rather, boards should be encouraged to develop their own approach, for example, there could be a mid-management team of non-diverse staff who, in return for developing a diversity-promotion model that will arguably impede their own promotions, gives them the offsetting privilege of working with a board subcommittee. Or, as has proven recently to be beneficial on a social matter, ask public high-school students for views, combining their civics course with involvement with a real business – they will be the workforce of the future.

- *For example, should we recommend that non-venture issuers have a gender diversity policy? If so, should we set out recommended content for the policy?* No and no. The rule should be outcomes-based, and media will ensure that companies are judged if disclosed results do not show a trend to greater balance over time. A survey of boards could be undertaken in four years (say two board terms) after implementation of any rule. The requirements should refer to all under-represented groups
- *Should non-venture issuers be required to comply with the recommended practices or explain why they have not complied (i.e., a “comply or explain” model of disclosure)?* No. Media will provide appropriate coverage and the company’s financial results will be proof enough, if one subscribes – as I do – to the theory that diversified boards on average will be more effective in the long run. Too much regulation will tend to lead to entities getting to a threshold and seeing no need to go beyond. Disclosure is the optimal (effective and low-cost) solution.

Final Comments

I look forward to the outcome of this exercise and should any board be looking for a qualified female director, I am available for the going rate.

Yours truly,

B. White
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