NEI INVESTMENTS

September 23, 2013

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Sent by email to: commments@osc.gov.on.ca

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

Dear Mr. Stevenson:

We are writing in response to the Ontario Securities Commission (OSC) request for comments on Staff Consultation Paper 58-401: *Disclosure Requirements Regarding Women on Boards and in Senior Management*. [1] We commend the Ontario government for exploring this issue, and the OSC for seeking feedback from market participants to inform recommendations to the Ontario Minister of Finance and Minister Responsible for Women's Issues.

With approximately C$5 billion in assets under management, NEI Investments' approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will build long-term sustainable value for all stakeholders and provide higher risk-adjusted returns to shareholders. Our ESG company evaluations, engaged proxy voting and active dialogue with companies in our funds have given us some insight into good practices and weaknesses in diversity disclosure and practice.

Our comments follow the structure of Staff Consultation Paper 58-401, referencing the OSC's specific consultation questions.

Focus of the Consultation

The correlation between gender diversity and company outperformance is compelling from an investment value perspective. If companies tend to outperform when their boards and senior management are more diverse, the implication is that companies not taking steps to increase diversity are risking underperformance – an unacceptable situation. We also believe companies have a responsibility to encourage diversity as a social imperative. Therefore, we are engaging companies in our funds on diversity issues through dialogue and proxy voting. We recently submitted comments to the International Corporate Governance Network (ICGN) on its *Position Paper on Gender Diversity*.[2]

[1] OSC Staff Consultation Paper 58-401 *Disclosure Requirements Regarding Women on Boards and in Senior Management* http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20130730_58-401_disclosure-requirements-women.htm
[2] NEI Investments (2013). *International Corporate Governance Network: Position Paper on Gender Diversity* https://www.neiinvestments.com/Documents/PublicPolicyAndStandards/2013/NEI%20response%20ICGN_BOARD%20DIVERSITY%20PAPER.pdf

We agree strongly with the statement in the OSC consultation paper that:
"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." (p3)

The OSC's statement appears to concur with our own perspective on the value of diversity, which embraces not only gender but other attributes such as ethnicity, aboriginal status and sexual orientation. We also advocate for companies to recruit directors with wider diversity of experience and expertise, including environmental, social and governance issues that are material to the business.[3] Therefore, we would encourage the OSC to expand its efforts on diversity to include other aspects of identity diversity, and diversity of experience. However, recognizing that the mandate given to the OSC by the Ontario government was limited to gender, we have largely restricted our comments to that topic.

Specific consultation questions

1. What are effective policies for increasing the number of women on boards and in senior management?

As highlighted in the consultation paper (p4-6), progress on board diversity in Canada has been painfully slow – even in the face of evidence that bringing women onto the board correlates with company outperformance. With emerging market jurisdictions such as India already taking action on gender diversity, we are concerned that Canada risks falling into a laggard position.[4]

At the public policy level, we believe the OSC's proposed approach of expanding the current corporate governance framework of guidelines[5] and disclosure requirements[6] to include gender diversity is an appropriate model. This would address the diversity issue within a context that is already familiar to boards and management of public companies. As noted in the consultation paper (p8), in 2010 the Canadian Securities Administrators (CSA) provided diversity-related guidance[7] to issuers in the context of the director selection process section of the Corporate Governance Disclosure Rule.

We are cautiously optimistic that establishing requirements for diversity disclosure, and providing guidance on recommended diversity policies and practices, will be an effective means to achieve the objective of increased diversity, as it would push more companies to put the issue on their agenda. However, if diversity statistics did not improve significantly over a reasonable period of time, it would then be appropriate to consider other options such as binding quotas. The experience in countries that have imposed quotas appears to have been that, once the effort was made to look for them, there was no real shortage of qualified women candidates.

[3] For example, in 2010 we filed a shareholder proposal with Barrick Gold, asking the company to recruit a director with expertise in corporate responsibility matters. The proposal was withdrawn when Barrick agreed to the request.
[4] *The Companies Act, 2013* s.149 includes a provision that *"such class or classes of companies as may be prescribed, shall have at least one women director."* http://egazette.nic.in/WriteReadData/2013/E_27_2013_425.pdf
[5] Canadian Securities Administrators (CSA) National Policy 58-201 *Corporate Governance Guidelines* http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20050617_58-201_corp-gov-guidelines.jsp
[6] Canadian Securities Administrators (CSA) National Instrument 58-101 *Disclosure of Corporate Governance Practices* http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20050617_58-101_disc-corp-gov-pract.jsp
[7] Canadian Securities Administrators (CSA) Staff Notice 58-306 *2010 Corporate Governance Disclosure Compliance Review* http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20101203_58-306_2010-corp-gov-disclosure.htm

We have concerns about the formulation of some quota approaches. Mandating equal numbers of women and men on the board (50/50) is inflexible from a board effectiveness perspective. It could also be potentially discriminatory for the minority of people who do not identify as either male or female, or who are transitioning. In our view, simply mandating a minimum quota of women on the board is problematic, as this implies that a 100% female board is appropriate. We believe this is equally undesirable from a diversity viewpoint – the male perspective also brings value to the boardroom. We prefer approaches that call for a minimum percentage of both women and men on the board, with the target percentage for each in the range of 30-40% to allow flexibility.

We see considerable value in voluntary initiatives such as the Catalyst Accord[8] pledge (p6). However, participation in voluntary initiatives is often restricted to leadership companies, and may not result in investors gaining access to comparable information on companies across markets.

Our perspective on effective diversity policies and practices that companies could adopt is set out in detail under question 6. In summary, we believe attention for the following areas would enhance not only diversity, but also board independence and effectiveness:

- introducing specific policies and practices relating to diversity;
- formalizing processes for director recruitment, and diversifying the candidate pool;
- making room for diversity through board renewal policies and by avoiding director interlocks and over-boarding.

2. What type of disclosure requirements regarding women on boards and in senior management would be most appropriate and useful?

To support our analysis of how companies in, or under consideration for, our funds are exposed to this emerging area of ESG risk and opportunity, in the first instance we would value basic disclosure as to whether or not diversity is on the company agenda. Where diversity is on the company agenda, we would value disclosure on strategy, policies and key initiatives, as well as on targets for diversity performance at the board, senior management and company level, and the progress against those targets. In general, we seek to understand a company's long-term strategy regarding ESG issues, as well as reviewing its current performance metrics.

In our proxy voting, it is our practice to withhold votes from sitting members of the nominating committee in cases where we see no evidence of identity diversity (including gender) in candidates put forward for board positions. So far during 2013 we have withheld votes from nominating committee members at 54 Canadian companies for this reason. Specifically at the board level, we would like companies to provide disclosure to facilitate nuanced decision-making in director elections for investors like NEI Investments that conduct proxy voting based on guidelines including diversity considerations. This disclosure should be placed prominently in the proxy circular, close to the director profiles, to ensure it is taken up in the vote decision, and should include metrics on the presence of diversity on the board, and on the efforts of the nominating committee to enhance board diversity.

In our view, it is helpful to distinguish between policies and practices for increasing the representation of women on the board, at senior management level and in the company as a whole, although there is some overlap. The current corporate governance framework focuses largely on board matters. We suggest that, in addition to incorporating diversity content to the corporate governance framework, OSC might explore the diversity issue within the context of continuous disclosure

[8] "Catalyst Accord: Women on Corporate Boards in Canada" http://www.catalyst.org/catalyst-accord-women-corporate-boards-canada

obligations under National Instrument 51-102 – alongside other potentially material social issues such as human rights and aboriginal relations, which were not addressed during the OSC's 2010 sustainability reporting initiative.[9]

We would value disclosure on identity diversity that extends beyond gender. As noted in the consultation paper (p9), the Securities and Exchange Commission (SEC) chose not to define diversity in the release 33-9089 *Proxy Disclosure Enhancements*, but later acknowledged that this had created a situation in which investors were not necessarily being provided with the types of diversity disclosure that they were seeking. We therefore suggest that, while companies should be asked specifically to disclose on gender diversity, they could also be encouraged to provide disclosure on other aspects of diversity.

We believe several of our current proxy voting guidelines and corporate engagement priorities link indirectly to board diversity, in the sense that they encourage companies to look more widely for director candidates, beyond established networks and the current population of corporate directors.

- We have a strict guideline on board interlocks, voting against directors that sit together on more than one board.
- We vote against directors that sit on more than four boards of publicly traded companies.
- We encourage companies to recruit directors with substantial expertise in environmental and social matters relevant to the company, which may lead to companies searching outside corporate networks for candidates in academia, public service or the non-profit sector where diversity may be more advanced.

An emerging area in our proxy voting practice is the question of board entrenchment and director tenure limits. We feel that this is also relevant to achieving board diversity, for if diversity is to be achieved without expanding the size of corporate boards, over time some current board members will need to step down. To avoid creating entrenched board situations, it would be desirable if directors operated under the expectation that they will be leaving the board after a certain period, unless they are specifically asked to remain because there is no obvious candidate to fill the skills gap. We are concerned that entrenched boards not only stand in the way of enhancing diversity of identity and experience, but also undermine the principle of board independence.

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?

In general, we agree with the scope of the model disclosure requirements (p18-19), which cover specific diversity policies and performance measures, and enhancing the director selection and board evaluation process.

We would value the proposed disclosure on diversity policy, including policy content, targets, progress in implementation and performance. We suggest adding a requirement to disclose where responsibility has been assigned for the implementation of the policy or policies (noting that companies may have separate policies for diversity on the board, among senior management and in the general workforce, or these may be combined). We also strongly agree that companies with no policy should be expected to explain and discuss the risks and opportunities arising from that decision.

We believe the key to enhancing diversity lies in improving the quality of the director selection process, and expanding the pool of candidates that are considered. Therefore, we strongly agree with the proposal to add requirements to disclose on how representation of women is considered in the director selection and board assessment processes specifically. Ideally the

[9] Ontario Securities Commission (OSC) Notice 51-717 *Corporate Governance and Environmental Disclosure* http://www.osc.gov.on.ca/en/NewsEvents_nr_20091218_osc-51-717-cor-gov-env-dis.htm

disclosure requirements would cover not only gender but other aspects of identity diversity, as well as efforts to ensure that appropriate ESG expertise is represented. In this context we note that some companies are already disclosing their skills matrix in the proxy circular.

As noted earlier, board diversity cannot be enhanced unless there is room on the board for new directors. The OSC should consider enhancing requirements for disclosure on policies and practices relating to board renewal, tenure limits, the number of boards on which directors are permitted to serve, and directors serving together on different boards.

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?***

Key items of statistical information that would support our ESG investment processes include the following:

- Current proportion (in percentage terms) of gender diversity among board nominees. This information immediately influences our decision-making during proxy voting for director elections, so as noted above we recommend it should be disclosed close to the director profile section in the proxy circular.
- Current proportion (in percentage terms) of diversity among senior executives and among employees in the whole organization. From our perspective, the precise location of the disclosure of this information is less critical.
- Company targets for diversity on the board and at other levels of the organization, and progress against these targets, including trend information on whether diversity is increasing or decreasing (in percentage terms). Once again, from our perspective, the precise location of the disclosure of this information is less critical.

To the extent that the director candidates concerned are willing to identify themselves voluntarily within the board environment, and respecting their right to privacy, we would also value generalized disclosure on other aspects of identity diversity such as ethnicity, aboriginal status, or sexual orientation. We do not need to know which directors specifically are contributing to wider diversity on the board, but only the extent to which aspects of diversity are present and whether diversity is increasing or decreasing in percentage terms. In the absence of such generalized disclosure, particularly on less obvious aspects of diversity, we are sometimes reduced to guesswork based on names, biographies or profile pictures. This is not only time-consuming, but inadvertently we may be penalizing nominating committee members on boards that do in fact include broader diversity.

5. ***Should such disclosure be reported for the non-venture issuer only or for all of its subsidiary entities also?***

Disclosure that facilitates proxy voting for director elections is only relevant in the case of issuers. For our wider evaluation of diversity performance across the company, it is helpful to have disclosure on the issuer and its operating subsidiaries. Information on non-operating entities is not of value.

6. ***What practices should we recommend for facilitating increased representation of women on boards and in senior management?***

As noted earlier, it is helpful to distinguish practices for increasing the representation of women on boards from practices for increasing the representation of women in senior management, although there is some overlap. The OSC is ideally placed to make recommendations on investor-facing disclosure and on corporate governance principles and board responsibilities. We would question, however, if the OSC is best placed to recommend operational practices for increasing representation of women throughout the company, particularly if the vehicle for this is the corporate governance framework. At the operational level, it is more appropriate for companies to seek guidance from specialist agencies.

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?

Establish a gender diversity policy

The OSC should recommend that companies have a gender diversity policy. Leadership companies already have such policies. A recommendation from the OSC would provide a stimulus and starting point for companies that have been considering taking action on diversity, but have yet to do so. It will also help investors to rapidly identify the laggards that choose not to embrace the recommendation. Regarding whether recommended content for the policy should be set out, we do not think the OSC should be overly prescriptive in this emerging area, and once again specialist agencies may be better placed to provide detailed guidance. However, just as the Corporate Governance Policy outlines a number of issues that should be addressed under the Code of Business Conduct and Ethics, the OSC could provide high-level recommendations on content for diversity policy. In our view, policy should cover diversity at board level, senior management level and in the company as a whole, as the board has ultimate responsibility for overseeing diversity strategy across the company. Ideally it should include a commitment to disclosure, establish targets, specifically address the director recruitment process, and make clear where responsibility lies for implementing various aspects of the policy.

Assign the gender diversity mandate

It is critical that responsibility for the implementation of diversity policy should be assigned clearly at board level. Ideally the nominations committees would have the mandate to ensure the board achieves diversity. Oversight of company-wide diversity efforts might lie with the full board or the human resources committee. While a company's CEO and senior human resources executive should be responsible for implementing the corporate diversity strategy, the board should be responsible for approving the strategy and monitoring its implementation. Just as compensation committees at some companies are expanding the scope of their discussions beyond executive compensation to ensure compensation strategy is consistent throughout the organization, boards should provide oversight on diversity strategy throughout the company, ensure that the company reports on diversity at all levels, and include discussion on diversity in their meeting agendas.

Set board diversity targets and report on progress

Ideally, boards should set diversity targets leading eventually to a board comprised of a minimum of 30-40% each of both men and women. As noted earlier, this range allows flexibility for board effectiveness purposes and avoids unintended discrimination. Similar targets could be set for representation of women in senior management.

Reporting on progress should be made available to investors and other company stakeholders, as discussed under questions 3 and 4. It should extend beyond statistical reporting on the representation of women on the board, in senior management and throughout the workforce, to include issues such as retention of female employees, pay equity, and the success of diversity development programs.

Boards could consider including metrics relating to progress in implementing the company's diversity strategy in the compensation framework of the CEO and senior executives.

Formalize the director recruitment process

In our view, the key issue to address in order to increase the representation of women on boards is director recruitment. We see little evidence to suggest that retention of women is a significant issue once they have joined boards. Improving gender balance in senior management, on the other hand, requires strategies that are broader in scope.

The existing Corporate Governance Policy recommends that the nominating committee should consider the competencies and skills required on the board, and compare these against the profiles of existing directors. This process should be expanded to include considerations of identity diversity. In addition, we would argue that many boards do not have adequate expertise on sector-relevant ESG questions such as supply chain management, human rights or community relations.

Boards that recruit candidates informally - relying primarily on "who they know" - inevitably risk narrowing the candidate pool. In addition, such an approach may bias selection to candidates whose profile is similar to incumbent directors. Both factors can lead to the perpetuation of boards with unintended gender imbalances. A formalized recruitment process would include developing a matrix of skills, expertise and other attributes that should be represented on the board as a whole, gap analysis of sitting board members against this matrix, agreed mechanisms to solicit director candidates, and the evaluation of prospective directors against the matrix and gap analysis. Boards should also consider obtaining independent professional assistance for director searches, if necessary.

Increasing director candidate pool diversity

Obviously, board diversity cannot increase unless the shortlist of candidates for director vacancies includes individuals that would bring diversity. Nominating committees (or the recruitment professionals advising them) could be asked to develop gender-balanced director candidate short lists. As a minimum, boards could routinely consider at least one candidate who would enhance diversity when building the candidate list for each upcoming vacancy on the board.

Boards could maintain lists of qualified director candidates, including candidates that would enhance diversity. They could also consider advertising for prospective candidates through initiatives such as the Canadian Board Diversity Council, Women on Board, or the Institute of Corporate Directors' Directors Register, or consult the list of board-ready diversity candidates prepared by the Canadian Board Diversity Council.

Boards could broaden their perspective on what constitutes suitable experience for a director. While we are not aware of evidence that company outperformance correlates to recruitment of directors who are sitting or former CEOs, have previous public company board experience, or have C-suite experience, director candidates are often chosen from these categories. As women are under-represented in these categories at present, relying on them for director recruitment may tend to skew the process towards male candidates. Including senior-level experience in academia, public service and the non-profit sector may enhance diversity as well as bringing valuable new expertise to the board.

Make room for diversity through other corporate governance good practices

As suggested earlier, boards should complement specific action on diversity with corporate governance good practices that could help to expand the size of Canada's overall director candidate pool, and could create space for diversity without expanding the size of individual company boards. This would include policies to avoid over-boarding (where directors serve on an excessively large number of boards) and interlocks (where directors serve together on more than one board), and to place limits on director tenure and encourage renewal of the board.

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)?

At this stage, we see a "comply or explain" model of disclosure as a practical step forward that could win significant stakeholder support. Alternatives to "comply or explain" are not laid out in the consultation paper, but could include a principles-based approach, or a straightforward "comply" approach. We see value in setting out the principles behind the compliance requirements (the objectives that compliance is intended to achieve), but would be concerned that a fully principles-based approach might not encourage better practice and disclosure among those companies that most need to improve. These issuers are most likely to respond adequately in a system that obliges them to report against clearly-defined guidelines on good practices and minimum standards. Smaller issuers are also likely to find this approach less challenging, because it provides clarity. At the other end of the spectrum, a "comply or explain" approach allows diversity leaders to apply new and innovative approaches to this emerging aspect of governance that are beyond compliance, and then describe and explain them in reporting.

Conclusion

In conclusion, once again we would like to commend OSC for seeking comments on the consultation paper, and we reiterate the following points:

- In general we support the OSC's proposals on gender diversity, and believe they represent a good starting point for addressing the board diversity gap in Canada. The proposed disclosures would provide us with information that would support our ESG processes.
- We believe that achieving board diversity requires diversity-specific initiatives, but also effort to enhance director recruitment processes, expand the overall director candidate pool, and make space on boards for diversity.
- As well as gender, we encourage OSC to consider other aspects of identity diversity, and diversity of expertise.

If you have any questions regarding this letter, please do not hesitate to contact **Michelle de Cordova, Director, Corporate Engagement & Public Policy (**mdecordova@neiinvestments.com **604-742-8319).**

Sincerely,

NEI Investments

Robert Walker
Vice President, ESG Services & Ethical Funds

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