



September 29, 2023

VIA EMAIL

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

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Dear Sirs/Mesdames:

Re: Canadian Securities Administrators (“CSA”) Notice and Request for Comment on 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 “Proposed Amendments”)

TMX Group Limited (“**TMX**” or “**we**”) welcomes the opportunity to comment on the Proposed Amendments, published on April 13, 2023.¹ TMX owns and operates Toronto Stock Exchange (“**TSX**”) and TSX Venture Exchange (“**TSXV**”) (together, the “**Exchanges**”), among other businesses that form part of the Canadian capital markets.² The Exchanges serve a central role in the Canadian capital markets as well as a destination for international capital. TSX is a globally recognized stock exchange listing growth-oriented, strong performing companies and TSXV is Canada’s leading capital formation platform for growth-stage companies. The Exchanges are focused on facilitating the growth and efficiency of the Canadian capital markets, supporting and promoting innovation, capital formation, good governance, and advancing investor protection. Together with all of our stakeholders, we are deeply committed to making markets more inclusive and sustainable, leading on issues of importance to our clients and the broader ecosystem, and advocating for conditions that drive economic growth and competitiveness.

I. Introduction

The Proposed Amendments address an important issue relating to corporate governance – how best to ensure that investors have information relating to a company’s diversity in the composition of its board and executive officer positions, and how the company relates diversity to its strategic decisions. The Proposed Amendments propose two alternative forms of a diversity disclosure requirement. The first, Form A, is principles-based, favoring a qualitative approach to disclosure. The second, Form B, is prescriptive, favoring a quantitative approach. TMX, at this point, after weighing the costs and benefits of the two approaches and after consultation with our issuer community at large, supports Form A as the better approach to be adopted by the CSA, for the reasons discussed below.

A. TMX supports diversity

TMX believes that diversity in the composition of its board is critical for constructive discussion and effective decision-making and that diversity in board composition enhances good governance and corporate performance. TMX strives to achieve diversity and inclusion when identifying and considering qualified candidates for the board. The diversity criteria TMX considers are wide-ranging and include a mixture of key skills and experience related to our industry, and related to geographical and other considerations taking into account the regions where we operate and the communities we serve. It also considers additional criteria, such as

¹ Capitalized terms used in this letter and not specifically defined have the meaning given to them in the Proposed Amendments.

² TMX’s key subsidiaries operate cash and derivatives markets for multiple asset classes, including equities and fixed income, and provide clearing facilities, data driven solutions and other services to domestic and global financial and energy markets. TSX, TSXV, TSX Alpha Exchange, Canadian Depository for Securities, Montréal Exchange, Canadian Derivatives Clearing Corporation, TMX Datalinx, Shorcan Brokers Limited, and other companies within TMX provides listing markets, trading markets, clearing facilities, data products and other services to the global financial community and play a central role in the Canadian capital and financial markets.

gender, age, Indigenous Peoples and persons from underrepresented groups including racialized persons, people living with disabilities, and members of the 2SLGBTQ+ community.

To expand on this aspect of good governance, TMX strives to achieve diversity by recognizing that the skills and backgrounds collectively represented on the board should reflect the diverse nature of the business environment in which it operates, reinforce its commitment to fostering diversity and inclusion throughout its workforce, and include traditionally underrepresented groups among its directors.³ All of these criteria must be considered in the context of what is in the best interests of the corporation, also taking into account its public interest mandate, and are to be balanced by applicable corporate and securities law and our recognition order requirements. TMX's process attempts to follow best corporate governance practices; many of Canada's issuers engage in a similar process.

B. TMX encourages corporate Canada to establish diverse boards

TMX has long been involved in shaping Canadian corporate governance through the work we do with our issuers and our contribution to thought leadership in this area. These efforts include our sponsorship of the foundational study of corporate governance in Canada led by Peter Dey, resulting in the report entitled, "360° Governance: Where are the Directors in a World Crisis?"⁴ Recently, TMX co-sponsored with the Institute of Corporate Directors ("ICD") a study and report on current and future challenges facing corporate governance in Canada. This report provides guidance for strengthening corporate governance practices.⁵ In regard to diversity in governance, the TMX-ICD Report concluded in part that Canadian companies need to move faster and more decisively. This is true for all Canadian companies, not only public companies. Significantly, however, the report acknowledges that it is corporate Canada that is best placed to take a leadership role on matters of good governance. Companies are fully immersed in the day-to-day worlds of their shareholders, employees, clients, communities, and geographies in which they operate, and can move quickly, relative to governments, for example. The report also underscores the challenges of a prescriptive approach to addressing this issue and offers a principles-based blueprint to guide companies that are navigating constant change in service of their shareholders and other stakeholders.⁶

C. Growing importance of diversity-related information to shareholders and stakeholders

The benefit of diversity beyond gender in good corporate governance and management is increasingly recognized and its importance to shareholder investment and voting decisions is

³ To properly balance among these criteria, TMX uses a matrix that has identified 14 areas of expertise particularly related to TMX's business strategy and uses this matrix to identify potential gaps in board composition and the company's strategic requirements. Filling those gaps is a key consideration in the selection of new directors.

⁴ Dey, Peter and Kaplan, Sarah "360° Governance: Where are the Directors in a World in Crisis?"

⁵ "Charting the Future of Canadian Governance: A Principled Approach to Navigating Rising Expectations for Boards of Directors", a joint initiative by TMX and ICD (the "TMX - ICD Report").

⁶ Id, see page 19 for a summary of recommended principles.

growing. Board diversity and inclusion can contribute to more effective and robust decision-making processes in the context of a board fulfilling its duty to act in the best interests of the corporation, and lead to improved corporate performance. This in turn creates long-term value for shareholders, other stakeholders, and broader society. It is, therefore, no surprise that shareholders, investors, and other stakeholders are calling for increased disclosure relating to corporate board and management diversity, raising the key question of how best can robust, meaningful, and transparent diversity-related disclosure be achieved.

D. The Alternative Proposed Amendments

The CSA, noting the growing importance to investors and others of diversity-related disclosure, is seeking comment on a proposal to mandate such disclosure. Specifically, the CSA is seeking comments on two alternative proposed forms of disclosure. The first, Form A, is the more qualitative disclosure framework. The second, Form B, is more quantitative and would mandate a tabular form of disclosure of board composition based on specified categories. Both forms of disclosure are aligned in respect of requirements related to board nominations and renewal.

TMX, at this point, after weighing the costs and benefits of the two approaches and after consultation with our issuer community at large, encourages the CSA to take a principles-based approach to disclosure and require the use of Form A by applicable companies.⁷ We believe that Form A has the potential to provide shareholders with better information relating to an issuer's efforts and success in achieving diversity in its governance, be administratively more appropriate, and avoid some of the pitfalls that are inherent when a specified form or format of disclosure is prescribed. Although Form A and Form B depart in respect of the format and content of the specified diversity-related disclosure, both forms rely on a "comply or explain" disclosure model, which we favor.

II. Form A will provide investors with more useful information than Form B

A. Principles-based requirements lead to more adaptable disclosure

One size does not fit all when it comes to corporate governance. Canada's two-tiered public markets are unique with respect to the difference in the size of the issuers listed on the Exchanges for trading, the variety of economic sectors in which they operate, and the stakeholders they serve. Diversity disclosure requirements that apply to such a broad range of public companies (even if only non-venture issuers) must appropriately balance the desire for disclosure to be consistent and comparable from one company to the next, with the need for it to be adaptable to an issuer's specific circumstances. Form A disclosure, as a principles-based

⁷ Building upon its work in the TMX - ICD Report and to assist in the CSA's consideration of the Proposed Amendments, the Exchanges undertook informally to assess the views of a range of stakeholders in the Canadian capital markets.

regime, by its nature is adaptable to the very different circumstances and contexts of the various companies to which it will apply.

Although some might argue that Form B, by using a prescriptive, quantitative format, has the potential to be more effective, it is unlikely to be appropriate for many issuers. Disclosure requirements can be a powerful tool in driving organizational change, but mandates that veer too far in the direction of being overly prescriptive can result in check-the-box disclosure that fails to capture a company's diversity goals and its experience and success in reaching those goals. Overly prescriptive mandates can instead result in disclosure that is neither transparent nor meaningful. Finally, an overly prescriptive requirement may stray into being a substantive mandate as opposed to a disclosure requirement and thereby depart from traditional forms of securities regulation.

B. Form A will likely yield deeper insights.

Form A has the potential to provide investors with significant and meaningful insight into the issuer's objectives, policies, and practices relating to diversity. It also creates an environment that requires issuers to think deeply about these issues as each develops its own diversity criteria and goals. Form A facilitates issuers in developing their diversity policies by providing guidance on what an "identified group" can include, without requiring disclosure respecting a particular group. Moreover, by requiring issuers to develop their own criteria, Form A also has the benefit of encouraging issuers to fully incorporate the goals of diversity and inclusion into the issuer's culture as opposed to viewing these goals as an intrusive regulatory requirement or mandate. The free-form, non-prescriptive approach of Form A, enables issuers to inform investors of their diversity policies, objectives, and achievements in a meaningful and thoughtful way.

By permitting each issuer to tailor its disclosure (and by extension, practice), Form A provides an issuer and its board of directors the opportunity to consider deeply and thoughtfully the relationship of its diversity criteria to meet all of the issuer's goals and address the needs of its stakeholders. A free-form narrative rather than a tabular approach enables the issuer's diversity disclosure to be used as a means of articulating, assessing, and documenting its progress in reaching its specific diversity goals. We concur with the philosophy behind Form A, that securities regulators should not prescribe categories of diversity; but instead, should defer to an issuer and its board of directors on such substantive decisions.

Despite the benefits of Form A's flexibility, some will argue that Form A will result in boilerplate disclosure. This fear ignores the very real market forces that shape issuer disclosure today, and which will tend to encourage meaningful diversity-related disclosure. Moreover, meaningful disclosure can be assured in light of the various tools available to securities regulators, including disclosure reviews performed by CSA. Meaningful disclosure is also facilitated by resources available to issuers, including those provided by TMX through its Growth Accelerator Education Program, Learning Academy, and continuous education courses offered by Canadian

universities and supported by the Exchanges. These resources facilitate issuers in considering and complying with their disclosure obligations.⁸

III. Form A is administratively superior to Form B

Many issuers list on more than one stock exchange,⁹ or may be subject to multiple reporting and disclosure mandates.¹⁰ For example, interlisted issuers would be required to comply with the disclosure requirements of more than one jurisdiction, which may include the rules of foreign trading venues. In addition, an issuer may need to comply with the specific disclosure requests of various institutional investors. The flexibility inherent in Form A assists issuers in more easily complying with these multiple forms of disclosure.

In contrast, compliance with Form B may be technically challenging to any issuer with multiple reporting and disclosure obligations. This is true whenever multiple prescriptive disclosure rules apply unless they are perfectly aligned. Despite Form B being largely aligned with the *Canada Business Corporations Act* requirements, it is unlikely to align perfectly with other disclosure requirements to which issuers may be subject, likely subjecting such issuers to the administrative burden of complying with inconsistent or possibly contradictory requirements. In this regard, nothing in Form A prevents issuers from providing disclosure in tabular form resembling Form B, if they wish. On the contrary, the instructions for Form A state that an “identified group ... can include, without limitation, Indigenous peoples, persons with disabilities, members of visible minorities, members of the LGBTQ2SI+ community and members of linguistic minorities.” This helps reconcile the two approaches in a way that accommodates the specific circumstances of a variety of issuers, which may be subject to varying disclosure requirements.

Finally, the reporting requirements in Form B rely on voluntary self-disclosure by directors and executive officers of an issuer regarding how any such individuals may identify under the named diversity categories, disclosed on an aggregated basis. The complexities and legal challenges regarding the collection of this information have been publicized and are ongoing. A reluctance by any director to self-report introduces some significant limitations in terms of the accuracy of

⁸ TMX’s Growth Accelerator Education Program is a complementary one-on-one education and mentorship program to support company growth and successes. Additionally, TMX offers its Learning Academy and ESG 101 platforms that provide issuer-relevant resources, events and insights. Finally, the Exchanges, along with the British Columbia Securities Commission, lead a course at Simon Fraser University to provide issuers with the information required to comply with Canada’s complex system of securities regulation.

⁹ As of August 31, 2023, TSX had 220 issuers listed on more than one exchange, where TSXV had 70 issuers in the same position.

¹⁰ Through our consultations, we heard that issuers are balancing many rules and regulations with regard to disclosure, whether that is Canadian stock exchange rules or the rules of foreign exchanges, financial reporting standards, in addition to provincial, federal or foreign legislation. We understand issuers must ensure disclosure meets all applicable requirements and as such, the more flexible approach of Form A would not add another level of regulatory burden, yet it would provide investors with decision-useful information.

the mandated disclosure. Form A, which enables an issuer to disclose using a free-form narrative, avoids these limitations.

IV. Venture issuers

The Proposed Amendments should not apply to venture issuers. We understand from our consultation with various TSXV stakeholders¹¹ that TSXV issuers appreciate the importance and significance of the Proposed Amendments and the role diversity disclosure plays in the evolution of good governance in the Canadian capital markets. However, both forms in the Proposed Amendments (Form A or Form B) would add a regulatory burden that would be proportionally greater for venture issuers, many of which do not have the available capacity or resources to undertake these new governance obligations and the corresponding disclosures.

V. Conclusions

A. Diversity disclosure requirements must be harmonized across CSA jurisdictions

We recognize that although participating CSA jurisdictions are consulting on both Form A and Form B, some jurisdictions have indicated a preference for one proposal over the other. Despite the differences in the opinions expressed in the consultation, it is imperative that the CSA adopt a single and uniform proposal for the Canadian capital markets. Not doing so would result in inconsistent requirements being imposed on issuers. Furthermore, such a result would undermine a key aim of the CSA – developing a national system of harmonized securities regulation, policy, and practice.

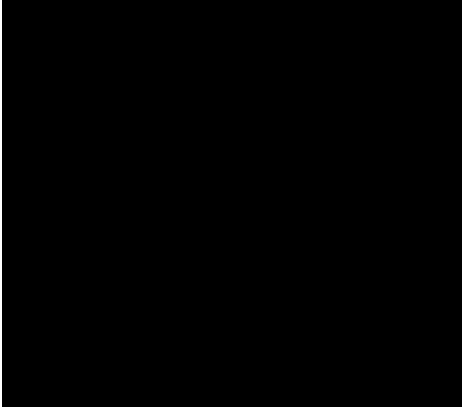
B. Form A is the preferred approach

For the reasons discussed above, TMX prefers Form A. Principles-based disclosure requirements will be relevant and applicable for companies of different types, and sizes, in different sectors, and serving different stakeholders. Formulaic approaches, like Form B, will be too restrictive.

¹¹ Our consultation with TSXV stakeholders included the advisory committees of the TSXV (the four Local Advisory Committees and the National Advisory Committee), in addition to legal counsel that represent some of these issuers.

We appreciate your consideration of our comments and we would be happy to discuss these at greater length with the appropriate representatives. Please do not hesitate to contact us if you have any questions regarding our comments.

Yours very truly,



John McKenzie
Chief Executive Officer, TMX Group