# Expansion of governance disclosure requirements on the horizon for public companies

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Following the lead of amendments made to the *Canada Business Corporations Act* (CBCA) in 2020, the Canadian Securities Administrators (CSA) have proposed two models for broader diversity disclosure obligations for non-venture reporting issuers.

## Takeaways

- The CSA has published proposed amendments (the Proposed Amendments) to Form 58-101F1 *Corporate Governance Disclosure* (Form 58-101F1) and National Policy 58-201 *Corporate Governance Guidelines* (NP 58-201) that would impact the annual governance disclosure required of non-venture issuers that are not investment funds.
- The Proposed Amendments include two separate approaches to governance disclosure, and in particular, diversity disclosure.
- The proposals are open for comment until July 12, 2023 and will not impact disclosure for the 2023 proxy season.

## One goal, two proposals

In the Proposed Amendments, the CSA has published two potential versions of Form 58-101F1 (the 58-101F1 Proposals) designed to increase transparency about broad diversity on boards and in executive officer positions and provide investors with information about how an issuer addresses diversity:

- **Issuer Specific Approach:** The first proposal, referred to by the CSA as “Form A”, affords issuers with the flexibility to determine which facets of diversity are relevant to the issuers’ specific industry and circumstances. Issuers would be required to describe their chosen diversity objectives and how progress is measured. Rather than prescribe specific groups about which the issuer must report, the CSA would require disclosure of different diverse groups only if the

issuer collects data with respect to any particular group it determines to be relevant to its approach to diversity and reporting would be in any format the issuer chooses. Written policies adopted by an issuer's board with respect to women and other diverse individuals would also be disclosed, and, similar to the current disclosure model under Form 58-101F1, if no such policy is adopted, an explanation of why must be provided. Disclosure of the consideration of diversity when making executive officer appointments would also be required in the same fashion as required for board diversity.

- **Standardized Approach:** The second proposal, referred to by the CSA as "Form B", is more closely aligned with the approach taken under the CBCA. Issuers would be required to report on the representation of five designated groups – women, Indigenous peoples, racialized persons, persons with disabilities, and LGBTQ2SI+ persons. Disclosure beyond the designated groups would be permitted but not required. A standardized tabular form would be used for the reporting, allowing for consistency and comparability between issuers. Issuers would also be required to describe their written strategy with respect to achieving or maintaining diversity on the board. A "comply or explain" disclosure model would be used for any written policy adopted by the issuer's board. Disclosure of the consideration of diversity when making executive officer appointments would not be required.

Both approaches (Form A and Form B) would require disclosure about targets for women and the other diverse groups subject to reporting obligations under the applicable 58-101F1 Proposal.

Accompanying the 58-101F1 Proposals, are proposed amendments to NP 58-201 which intend to provide enhanced guidelines for all issuers related to board nominations and new guidelines on board renewal and diversity.

As noted, an expanded approach to diversity disclosure is in line with current disclosure requirements applicable to CBCA-incorporated "distributing issuers" in Canada (both venture and non-venture). However, the specific facets of diversity differ slightly between those set out in the CBCA and those proposed by the CSA in the 58-101F1 Proposals. Additional diversity reporting will also align with the views of certain shareholder advocates and proxy advisors. As previously discussed, ISS has found that investors want boards to reflect issuers' customer bases and the society in which they operate. Investors also support fulsome disclosure of racial and ethnic diversity at the board level. Beginning in 2024, ISS will expect S&P/TSX Composite Index constituents to have at least one racially or ethnically diverse board member in addition to satisfying any gender diversity expectations.

In the 2022 proxy season, Globe and Mail Board Games also adjusted its methodology and allocated a significantly increased number of points to questions of diversity. Overall, diversity (gender and otherwise) was allocated 13 points in the Board Games methodology (up from 7 in 2021), with full points awarded to issuers who:

- had at least 33% of their boards comprised of women;
- disclosed a target for women on the board, if the board was less than 40% women, and a timeline for achieving the target, if the target had yet to be satisfied;

- had more than one board member who self identifies as Indigenous, a member of a visible minority, has a disability or is LGBTQ+ and specified which group the individual belongs to; and
- disclosed the details of the process used to consider board diversity.
- Given the foregoing, issuers who wish to perform well in governance rankings and receive favourable voting recommendations from proxy advisors may already be reporting broad diversity on a voluntary basis to address stakeholder concerns.

# Board nominations and renewal

In addition to enhanced diversity disclosure, the Proposed Amendments expand current disclosure obligations by requiring issuers to disclose how the board identifies and evaluates new candidates for nomination to the board along with disclosure about whether the board has a written policy respecting the nomination process, on a "comply or explain" basis. Disclosure with respect to the issuer's approach to conflicts of interest in the nomination process, board composition matrix, and considerations when considering a candidate will also be required.

While issuers already must disclose whether they have adopted term limits or other mechanisms of board renewal, the Proposed Amendments set out a new requirement to describe how the board addresses renewal and how such mechanisms contribute to effective board renewal.

# Background

Non-venture issuers will already be familiar with some level of diversity and governance disclosure obligations as the Proposed Amendments are only the most recent step towards a more fulsome disclosure regime in Canada. Since 2014, non-venture issuers have been required to report on the representation of women on boards and in executive officer positions on a "comply or explain" model. As noted above, in 2020, amendments to the CBCA were implemented that have required CBCA-incorporated distributing corporations to report statistics with respect to broader diversity – women, visible minorities, Indigenous persons and persons with disabilities – on an annual basis.

Despite this, progress towards gender equality in Canadian corporate leadership has been slow. In *CSA Multilateral Staff Notice 58-314 Review of Disclosure of Women on Boards and in Executive Officer Positions – Year 8 Report* (October 27, 2022), it was reported that in 2022 only 24% of board seats were held by women (22% in Year 7), and only 7% of issuers had a woman chairing their board. More positively, the percentage of board vacancies filled by women increased 10% to 45% (35% in Year 7), 87% of issuers had at least one woman on their board (82% in Year 7) and 30% of issuers had at least three women on their board (24% in Year 7).

Following the implementation of the CBCA diversity reporting amendments, Corporations Canada published *Diversity of Boards of Directors and Senior Management of Federal Distributing Corporations – 2020 Annual Report* finding that while 50% of all CBCA distributing corporations reported having at least 1 woman on their boards, the statistics with respect to other facets of diversity were less promising:

16% reported one visible minority, 1.7% reported one Indigenous person and 1.7% reported one person with disabilities on the board of directors.

Finally, the Ontario Capital Markets Modernization Taskforce, in its January 2021 Final Report, called on the Ontario Securities Commission to require publicly listed issuers in Canada to set board and executive management diversity targets and provide annual disclosure of data with respect to the representation of women, BIPOC, persons with disabilities or LGBTQ+ on boards and executive management. The Taskforce's recommended aggregated target was 50% for women and 30% for the other diverse groups. The Taskforce also recommended that securities law require publicly listed companies to adopt director nomination policies that address diversity and that maximum board tenure limits be set.

In light of the foregoing, the CSA undertook a consultation process related to diversity which has informed the Proposed Amendments.

# Next steps

The CSA are seeking feedback on the Proposed Amendments by July 12, 2023. Further information about the Proposed Amendments, including specific questions to which the CSA are seeking feedback, are set out in the CSA Notice and Request for Comments published on April 13, 2023.

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