FAIR Canada Canada's Investor Rights Advocate | Promoteur des droits des investisseurs

September 29, 2023

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

Attn: The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor, Box 55
Toronto, Ontario
M5H 3S8
Fax: 416-593-2318
Email: comment@osc.gov.on.ca

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: 514-864-6381
Email: consultation-en-cours@lautorite.qc.ca

Re: CSA Notice and Request for Comment – 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*

FAIR Canada is pleased to provide comments in response to the above-referenced Consultation.

FAIR Canada is a national, independent, non-profit organization dedicated to being a catalyst for the advancement of the rights of investors and financial consumers in Canada. We advance our mission through outreach and education, public policy submissions to governments and regulators, and proactive identification of emerging issues. As part of our commitment to be a trusted, independent voice on issues that affect retail investors, we conduct research to hear directly from investors about their experiences and concerns.

FAIR Canada has a reputation for independence, thoughtful public policy commentary, and repeatedly advancing the interests of retail investors and financial consumers.[1]

A. What Works Best for Investors?

The key issue raised by the Consultation is about which of two proposed approaches (the so-called Form A and Form B approaches) to disclosing diversity on boards and in executive positions we should adopt in Canada.

Of the two proposals, we favour the Form B approach[2] as it would be better for investors. It is more consistent with a key tenet of securities law, which is to ensure shareholders and investors have the information they need to make informed investment and voting decisions. The Form B approach also has the advantage of being more consistent with the *Canada Business Corporations Act* (CBCA) and less burdensome for issuers to implement.

While we appreciate the Form A approach[3] is intended to provide issuers with greater flexibility in determining their own diversity and disclosure practices, our concern is this flexibility will come at the expense of investors, particularly retail investors.

Furthermore, the Form A approach does not create any positive obligation on issuers to consider and report on any "identified groups." Absent an obligation to do so, we are sceptical many issuers would undergo the effort to identify, define and disclose "identified groups" in their annual disclosure. In short, the Form A approach may not achieve much beyond the status quo.

1. Our Concerns with Prioritizing Flexibility for Issuers

To the extent that issuers do report on "identified groups," the Form A approach will result in disclosure that is inconsistent, difficult to compare and potentially less useful for investors. This is because issuers would not only have discretion to choose their own "identified groups," they can each choose to define them differently. This amount of discretion may result in a plethora of different practices among issuers, as well as different types of diversity reporting.

Moreover, issuers would be free to determine how to disclose the numbers and percentages of their directors and executive officers within an "identified group." For example, they could provide data on an aggregated basis or break it out separately for each "identified group." There is also no requirement to report current fiscal year-end figures in comparison to previous fiscal year-ends. Nor would issuers have to report the data in the same manner (i.e., aggregated versus broken out) year-over-year.

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[1] Visit www.faircanada.ca for more information.
[2] The Form B approach is comprised of Form B and Policy B (as such terms are defined in the Consultation).
[3] The Form A approach is comprised of Form A and Policy A (as such terms are defined in the Consultation).

Finally, the Form A approach leaves it to each issuer to choose how to present disclosure regarding:

- The issuer's targets (if any) related to women and members of "identified groups" (if any) as directors and executive officers.
- The issuer's timeframes for achieving its targets (if any).
- The annual and cumulative achievement of the issuer's targets (if any).
- The numbers and percentages of women and members of "identified groups" (if any) represented on the issuer's board and among its executive officers.

This discretion means that not all issuers will choose to provide such disclosure in an easy-to-locate-and-understand format, such as in one or more tables or graphics.

Overall, the Form A approach is more likely to lead to diversity disclosure that is itself very diverse; disclosure that is less consistent and clear, more difficult to locate and understand, and more challenging to compare. For those investors seeking this information, it could undercut their ability to make informed investment or voting decisions.

2. Retail Investor Realities

When considering between the two alternatives, it is also important to remind ourselves of their relative impact on different types of investors.

As noted, Form A will likely result in a variety of different formats, content, and levels of disclosure. It may therefore disadvantage retail investors more because, unlike institutional investors and proxy advisory firms, they do not have the resources or ability to comb through the public disclosures of different issuers. Nor do they have the same opportunity to meet with board and/or management representatives to ask questions or seek more information about an issuer's diversity.

To ensure as level a playing field as possible for all investors, regulators need to ensure diversity disclosure is as transparent and accessible as possible, both in terms of its content and presentation. We believe the Form B approach would be better in this respect.

3. A Prescriptive Approach has Several Other Advantages

In contrast to the Form A approach, the Form B approach requires mandatory reporting regarding five prescribed "designated groups," each of which groups is defined (except for women). Issuers would all report certain prescribed data with respect to the same defined groups, creating consistency and a common baseline.

In addition, the prescribed tables under the Form B approach would enable investors to find, understand, and compare the following more easily:

- Each issuer's targets (if any) regarding the number or percentages of women or members of other "designated groups" on its board or in executive officer positions.
- The timeframe set by each issuer for achieving such targets (if any).
- Each issuer's progress in achieving and maintaining its targets (if any).
- The number of each issuer's directors and executive officers who self-identify as a member of each "designated group" for the issuer's three most recent fiscal years.
- The number of each issuer's directors and executive officers who self-identify as a member of more than one "designated group" for the issuer's three most recent fiscal years.
- The total number of each issuer's directors and executive officers for the three most recent fiscal years.

Overall, the Form B approach is more likely to result in diversity disclosure that is consistent, clear, easy to find and understand, and directly comparable as between different issuers. Such disclosure is more likely to be useful to investors when they make investment and voting decisions.

B. Consistency with the CBCA

The amendments to the CBCA and its regulations in 2020 also impact securities regulation of diversity disclosure in Canada.

The Ontario Securities Commission has estimated that approximately 29% of non-venture issuers are incorporated under the CBCA.[4] Currently, these CBCA-incorporated issuers are required to disclose (on a comply-or-explain basis) the representation of members of prescribed designated groups (including women) on their boards and in senior management positions (among other requirements).

As a matter of principle, all issuers listed on the same exchange should provide the same disclosure. This principle is rooted in Canada's approach to securities regulation, where

[4] CSA Notice and Request for Comment (April 13, 2023), at 3177.

differences in public disclosure requirements generally distinguish between venture and non-venture issuers.

An additional advantage of the Form B approach is that it is more consistent with the requirements in the CBCA and its regulations (the CBCA approach) than the Form A approach. Like the CBCA approach, the Form B approach is prescriptive. The Form B approach extends mandatory diversity disclosure to the same "designated groups" regarding which the CBCA approach requires issuers to report (plus LGBTQ2SI+ persons).

By adopting the Form B approach, the CSA's members would effectively move all non-venture issuers to the same standard vis-à-vis diversity disclosure. This would promote the kind of consistent and comparable diversity disclosure that would be useful to investors.

C. The Less Burdensome Approach for Issuers

The prescriptive requirements of the Form B approach may also lead to less regulatory burden for issuers who provide diversity disclosure related to groups other than women.

Under the Form A approach, an issuer that chooses to include "identified groups" in its diversity disclosure would have to go to some effort to choose which ones and decide how to define them. This is not necessarily a straight-forward exercise. In doing so, the issuer may have to track, analyse, and attempt to reconcile the demands and preferences of various stakeholders, such as proxy advisory firms, institutional investors, and governance advocates.

Moreover, not all issuers have in-house diversity expertise. Consequently, boards and senior leaders may feel pressure to hire external consultants to assist with identifying and defining "identified groups." Whether done internally or by external consultants, the process of selecting and defining "identified groups" could be costly and time-consuming.

In contrast, by prescribing the groups that are subject to diversity reporting requirements, the Form B approach would not require issuers to spend time and resources on group selection. Issuers could also easily incorporate obtaining the required information and consents into their existing processes for collecting data from directors and executive officers for disclosure purposes each year.

D. Other Comments

1. Self-Identification

Diversity reporting under both the Form A approach and Form B approach depends upon voluntary self-identification by individual directors and executive officers.[5] This puts primary importance on the rights and choices of individual directors and executive officers and allows them to decide how they wish to present themselves publicly.

We agree with this approach. Individuals have legitimate privacy and other personal interests in choosing whether to disclose membership of an "identified group" (for the Form A approach) or "designated group" (for the Form B approach).

It is therefore possible that, in some cases, board or executive diversity for an issuer could be underreported because of voluntary self-identification. However, we are not aware of any data that substantiates that this would be true in most or even many cases.

The CSA could consider mitigating such concerns regarding self-identification as the basis for this disclosure by requiring that such disclosure include a statement that the information provided is based on those that voluntarily self-identify and may not fully reflect diversity on the issuer's board or among its executive officers.

2. Non-Venture Issuers

Smaller issuers may find increasing diversity at senior leadership levels and on their boards more challenging than larger issuers. This is particularly so where boards and executive teams are comprised of very few individuals. On the other hand, there may be venture issuers incorporated under the CBCA that already provide diversity reporting to the CBCA's prescriptive standard.

While it would be better for all venture issuers to follow a common diversity disclosure standard, we believe the approach to limit the Form A approach or Form B approach diversity disclosure requirements to non-venture issuers strikes an appropriate balance. It would also be consistent with the existing comply-or-explain disclosure framework for women to which venture issuers are not subject.

[5] In discussing how Form A differs from Form B, the Consultation notes: "It may also avoid limitations on the completeness of disclosure arising from the use of information resulting from voluntary self-identification in relation to the specified categories, although this issue may also arise from these or other categories chosen for use by issuers under Form A." We interpret this as confirming self-identification is a feature of both proposals. See CSA Notice and Request for Comment (April 13, 2023), at 3128.

To the extent the CSA does decide to mandate diversity disclosure for venture issuers, we would recommend it take an incremental approach, as it did with non-venture issuers. The CSA could consider extending the existing comply-or-explain framework for women as a first step and consider leaving further requirements to the future.

Finally, we note that issuers with operations in certain foreign countries may face unintended consequences based on their diversity disclosure. For example, some foreign countries continue to criminalize non-heterosexual relationships. To address these concerns, regulators should consider tailored exemptions for such issuers in appropriate situations.

3. Board Nominations and Board Renewal

We support the proposed requirements.

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Thank you for considering our comments on this important issue. We welcome any further opportunities to advance efforts that improve outcomes for investors. We intend to post our submission on the FAIR Canada website and have no concerns with the CSA's members publishing it on their websites. We would be pleased to discuss our submission with you. Please contact Jean-Paul Bureaud, Executive Director, at jp.bureaud@faircanada.ca or Bruce McPherson, Policy Counsel, at bruce.mcpherson@faircanada.ca.

Sincerely,

Jean-Paul Bureaud
President, CEO and Executive Director
FAIR Canada | Canadian Foundation for Advancement of Investor Rights