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No clear consensus on diversity disclosures

The CSA extended the comment period for competing corporate governance proposals

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James Langton

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Securities regulators may agree on the need to improve issuers' diversity disclosure, but they can't agree on how to achieve it. A public consultation on the issue so far isn't building consensus.

In April, the Canadian Securities Administrators (CSA) proposed changes to corporate governance requirements, publishing two approaches for expanding diversity disclosures beyond gender.

The Ontario Securities Commission's (OSC) approach would require issuers to report on the representation of five groups (including women) on their boards and in executive positions.

The securities regulators for Alberta, British Columbia, Saskatchewan and the Northwest Territories favoured requirements that would require companies to disclose their approach to diversity without mandating disclosure on specific groups.

The remaining eight CSA members, including Quebec's Autorité des marchés financiers, declined to pick a side.

The CSA put both options on the table in an unusual policy proposal that initially had a 90-day comment period. The CSA then extended the deadline to Sept. 29.

Comments submitted ahead of the revised deadline reveal strongly held views on both sides. In general, proponents of the OSC's approach prefer the comparability of mandated disclosure from the investor perspective, whereas advocates for the alternative generally favour the higher degree of flexibility for issuers that approach provides.

The submission from Alberta Investment Management Corp. (AIMCo) supported the OSC's proposal because it aligns with investors' needs "for clear, comprehensive, standardized and comparable information."

AIMCo criticized the CSA's other option, saying it essentially represents the status quo and wouldn't advance diversity.

Another critic of the more flexible option, the LGBTQ+ Corporate Directors Canada Association, agreed that leaving disclosure to individual issuers represents the status quo — and could enable issuers to hide active discrimination.

"Choosing [the flexible option] allows organizations to discriminate against 2SLGBTQ+ individuals by omission based solely on the argument that the designated group is not identified by the issuer as being part of its [diversity] strategy," the association's submission stated.

Moreover, leaving issuers to decide what to report could prove more burdensome than requiring specific disclosures, the Shareholder Association for Research and Education (SHARE) argued in its submission.

SHARE said that allowing companies to define which aspects of diversity to disclose creates legal risk, while the lack of consistent, transparent disclosure would create more work for investors.

"Regulators may be tempted to favour an approach that appears, on the surface, to be less onerous and to allow issuers the maximum leeway in determining what is most important to disclose," SHARE's filing stated. "While we sympathize with this concern, we believe it will ultimately leave both issuers and investors dissatisfied and, in fact, subject to even more burdensome requests for disclosures."

According to SHARE, this would probably result in a rerun of the early days of gender disclosure, when many issuers produced boilerplate reporting, leaving issuers with numerous followup requests from institutional investors looking to fulfil their own duties.

For example, some investors have begun adopting proxy-voting guidance that calls for them to vote in accordance with diversity targets for board composition. Requiring issuers to provide relevant reporting would remove some guesswork from those voting decisions.

However, even proponents of mandatory disclosure have reservations.

Vancity Investment Management Ltd., which supports the OSC's proposal, suggested there should be latitude to opt out of required disclosure if an affected individual has confidentiality concerns.

"Most boards are 10 members or fewer and therefore anonymous self-reporting can lead to an individual's status being exposed," Vancity's submission stated.

These concerns were echoed in comments that opposed the OSC's proposal.

The Canadian Investor Relations Institute (CIRI) found in a survey that many of its members are concerned about collecting information that would be required by the OSC proposal, including sexual orientation and identity, and visible-minority status.

"These concerns stem mostly from privacy but some feel there are too many categories, not the right categories and/or issues with the collection process," CIRI's submission stated.

Meanwhile, the Institute for Governance of Private and Public Organizations (IGOPP) highlighted the risks of relying on self-identification for diversity reporting.

"Some prefer to exclude themselves from a group to avoid being labeled, categorized or even simply out of embarrassment or a desire to keep these characteristics confidential. Others will want to ensure that their application is not selected to meet diversity ratios," the IGOPP said in its submission. "On the other hand, some may see [false] disclosure as a career opportunity."

These risks also were acknowledged by proponents of the OSC's approach, such as SHARE. Yet, SHARE argued that enhanced disclosure will ultimately help lower barriers.

"Increasing disclosure helps to make the presence of individuals from traditionally under-represented groups more visible at senior levels of the organization, encourages a more inclusive culture generally, and thus should improve the accuracy of disclosures over time," SHARE's submission stated. "[A]cknowledging imperfection is no reason to abdicate the responsibility to regulate clearly and fairly."

Not only does SHARE favour the OSC's approach, it favours Ontario going it alone.

"In the absence of a clear consensus, or if there is unnecessary delay in acting by the CSA as a whole, the OSC should act unilaterally," SHARE said, calling for action by the end of 2023.

"While we favour a cross-Canada regulatory approach, we believe that this issue is important enough for institutional investors and has suffered too long from uncertainty, confusion, and obfuscation. Further, it has already been subject to consultation and discussion with securities regulators for years," SHARE said.