



Institut sur la gouvernance  
d'organisations privées et publiques

# Submission to all of the CSA jurisdictions

Consultation on the Draft *Regulation to amend Regulation 58-101 respecting Disclosure of Corporate Governance Practices* and the Draft Amendments to *Policy Statement 58-201 to Corporate Governance Guidelines*

**July 2023**

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Pour une gouvernance créatrice de valeurs<sup>MD</sup>

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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

**TO THE ATTENTION OF:**

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Subject: Consultation on the Draft *Regulation to amend Regulation 58-101 respecting Disclosure of Corporate Governance Practices* and on the Draft Amendments to *Policy Statement 58-201 to Corporate Governance Guidelines*

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To whom it may concern,

We would like to thank you for the opportunity to submit our comments on the CSA's Notice of Consultation, published on April 13, 2023.

Created in 2005 by two academic institutions (HEC Montréal and Concordia University – John Molson School of Business) and the Stephen Jarislowsky Foundation, the Institute for Governance of Private and Public Organizations (“the Institute” or “IGOPP”) has become a centre for excellence in governance. Through its research activities, training programs, policy papers and

involvement in public debates, IGOPP has established itself as an essential reference for governance issues in both the private and public sectors.

Our institute has been concerned with issues of diversity on boards of directors for many years. Already in 2008, IGOPP set up a working group to study the question of women on boards, which culminated in a formal policy paper<sup>1</sup> published in 2009. The inclusion of disclosure requirements in the *Canada Business Corporations Act (CBCA)*, targeting four “designated” groups, with regulations coming into effect in 2020, was a turning point inviting in-depth discussion on diversity issues on boards of directors.

IGOPP then examined the issue through a compilation of factual data and an analysis that led to the publication of a first research report<sup>2</sup> in 2021. As part of this research, we compared the *CBCA* to the laws of other countries (we also compared the governance codes, principles or regulations in effect in these countries), and then collected the information disclosed in 2020 by companies subject to the law in order to compile an initial picture of the representation of designated groups on the boards and executive officers of these companies. We then compared these results with statistical data for the Canadian population, taking into account various factors such as age and level of education. This study yielded a number of findings concerning the application and interpretation of the regulations by Canadian issuers, which will be discussed in the answers to the consultation questions.

In order to measure the evolution of disclosure following the first year of adaptation to the new regulations, we published a second research report<sup>3</sup> in 2022. Once again, this study made it possible to observe the reaction of reporting issuers, and a number of those observations form the basis of the reflections submitted in response to the consultation questions.

In parallel with this latest study, IGOPP set up a working group in 2021 to address the question of broader diversity. Drawing on the literature from many disciplines and addressing many facets of diversity, the results were published in the form of a policy paper entitled “*Parity and Diversity on Boards of Directors*”<sup>4</sup> (“**IGOPP Policy Paper on Parity and Diversity**”), which included several recommendations. We invite you to take a look at this document, which is attached as Appendix 1. It forms the basis of the arguments put forward in response to the consultation questions on diversity issues.

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<sup>1</sup> Allaire, Y. *The Status of Women Corporate Directors in Canada: Pushing for Change*, Policy Paper no. 4, IGOPP, June 2009, 19p.

<sup>2</sup> Dauphin, F., Allaire, Y. and M. Sambiani. *The Quest for Diversity of Boards of Directors and in Senior Management of Public Corporations*, IGOPP, February 2021, 45p.

<sup>3</sup> Dauphin, F. *Diversité élargie à la direction et aux C.A. des sociétés ouvertes*, IGOPP, January 2022, 30p.

<sup>4</sup> Dauphin, F. *Parity and Diversity on Boards of Directors*, Policy Paper no. 12, IGOPP, July 2022, 53p.

## Preamble

“Any organization governed by a board of directors must strive to constitute a board that is both *legitimate and credible*.”<sup>5</sup> A board’s credibility is indispensable to its effectiveness and “[its] credibility is measured not only by its in-depth knowledge of the company’s industry and its markets, of its business model, and its value-creation drivers, but also by the integrity and the trustworthiness of its board members.”<sup>6</sup>

Board members have responsibilities and must comply with obligations that are particularly important in a highly regulated environment. The resulting disclosure of information is analyzed by numerous stakeholders with sometimes divergent objectives and interests. The issue of diversity in the composition of a board is now a major concern, a criterion which can sometimes even influence the nature of the votes cast when electing certain members.

Beyond social recognition and legitimacy, a board consisting of members with varied social and personal attributes can contribute to a greater diversity of skills and perspectives. In addition, a diverse board has many potential benefits, such as: 1) helping to bring in more diverse knowledge and points of view; 2) mitigating the risk of groupthink; 3) demonstrating and fostering a more inclusive corporate culture; 4) helping provide a broader view of risk management, and; 5) contributing to better brand and corporate reputation by aligning its stated values with its actions.

The literature also shows that recruitment and employee retention are facilitated when the forms of diversity present are representative of employees and the population of the main communities in which a company operates—at its highest echelons.

Given the importance of this issue, it is essential for boards to ensure that diversity is fully integrated and encouraged at all levels of the organization by insisting on these aspects with management, making the latter accountable for achieving levels of representativeness—established jointly with management based on the company's reality—among employees and in management positions at every level.

In our research into diversity disclosure, the main benefit that emerged was a demonstrated willingness to consider diverse candidates when selecting new members. In fact, as early as the second year of mandatory disclosure, there was a notable increase in the percentage of new members from diverse backgrounds, particularly from visible minorities, among the largest listed companies. This determination is also evident in the explanatory texts accompanying the disclosed diversity data.

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<sup>5</sup> Allaire, Y. *The Independence of Board Members: A Quest for Legitimacy*, Policy Paper no. 3, IGOPP, September 2008

<sup>6</sup> Allaire, Y. *Board Members Are Independent but Are They Legitimate and Credible?* Policy Paper no. 10, IGOPP, 2018

The importance of “broader” diversity illustrates the evolution of civil society's expectations of its major institutions. Major listed companies are now observed and scrutinized through the prism of these new expectations, where their role and responsibilities toward stakeholders and civil society in general are now perceived (rightly or wrongly, depending on the case) much more widely. Some large institutional investors are also acting as watchdogs of listed companies in this respect.

The issue of board diversity is, however, not new. Academics have been interested in the question for several decades, especially if all the research into group dynamics is included. The benefits of diversity are obvious and go far beyond the simple desire for companies to retain a form of social legitimacy by conforming to minimum expectations. However, for these benefits to be fully realized, the issue of diversity needs to be approached thoughtfully; it needs to be contextualized.

Issuers need to take a pragmatic approach to this issue, in line with their organization's current and future strategy. Diversity must be fully embraced and instilled as a belief. This is how a real climate of inclusion will be fostered at all levels of society. It is also from this perspective that we have analyzed the question and the draft amendments submitted as part of this Notice of Consultation.

## Question 1

*The Draft Amendments to the Regulation would require the disclosure of the skills, knowledge, experience, competencies and attributes of candidates that are considered and evaluated. Does this requirement raise concerns for issuers regarding disclosure of confidential or competitively sensitive information? Please explain. (Please refer to the table entitled “Board Nominations” in Annex A for a description of this draft requirement.)*

In an earlier policy paper,<sup>7</sup> IGOPP stressed that “any organization governed by a board of directors should strive to form a board that is both legitimate and credible.”

The *credibility* of a board hinges on its collective experience and expertise relevant to the specific issues and challenges of the organization. A director’s individual credibility results from his or her specific expertise and experience, grounded in independent thinking. [...] A credible director is an engaged one who is respected by other board members, who does not hesitate to raise difficult questions and to insist that key issues be addressed by the board. The credible director shares his or her experience with management, offers counsel but make sure to remain independent from management. Credibility cannot be measured.<sup>8</sup>

Although it cannot be measured, credibility remains an essential foundation for a board's effectiveness and its ability to create value for the organization. We therefore believe it is not only useful, but essential, to provide information on the characteristics that led to the selection of credible candidates.

The conventional approach consists of drawing up a list of the different types of professional expertise which it is thought desirable to assemble on the board (accounting, finance, human resources, risk management, IT management, etc.). Prior experience in senior management and as a member of other boards of directors becomes a nearly universal prerequisite. IGOPP strongly suggests that, actually, the drawing up of this profile should begin by identifying industries with characteristics that closely tract those of the industry in which the target company operates: such as capital intensity, time horizon of investments, industrial vs. consumer markets, international scope of competition, key success factors, generic strategies.<sup>9</sup>

The proposed amendments would fully allow issuers to determine the approach best suited to them, including the one proposed above. The latitude granted to issuers in terms of disclosure requirements in this regard is sufficiently broad to avoid the pitfalls associated with the possible disclosure of confidential or competitively sensitive information. In fact, many issuers already provide quality information on these aspects, without any confidentiality issues or risks.

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<sup>7</sup> Allaire, Y. *The Independence of Board Members: A Quest for Legitimacy*, Policy Paper no. 3, IGOPP, September 2008

<sup>8</sup> Ibid.

<sup>9</sup> Allaire, Y. *Board Members Are Independent but Are They Legitimate and Credible?* Policy Paper no. 10, IGOPP, 2018.

## Question 2

*We are consulting on two alternatives with respect to the requirement to provide disclosure on the approach to diversity (Form A and Form B). Which approach best meets the needs of investors for making investing and voting decisions? Which Form best meets the needs of issuers in describing their approach to diversity at the board and executive officer level? Do either of the approaches raise concerns for issuers? Are there certain requirements in either form that you find preferable to the equivalent requirement in the other form? Please explain.*

A review of the literature on diversity shows that the concept is multidimensional, while “representativeness” is often mistakenly considered to be the central element of diversity. An in-depth analysis of the literature, with theoretical underpinnings in numerous disciplines such as psychology, anthropology, sociology, pedagogy and management, reveals the following three dimensions:

1. **Diversity of social and personal attributes**, including differences in race, colour, country of origin, religion, language, sexual orientation, physical abilities (disabilities), age, etc.
2. **Diversity of skills and perspectives**, which includes differences in the knowledge bases and perspectives that members bring to the group, which are likely to occur because of differences in education, experience and expertise.
3. **Diversity of values**, i.e. the extent to which members of a group differ in their instrumental values, including, for example, the way they envision and understand the organization’s role and purpose, the degree of control it exerts over its environment, its orientation vis à vis the market, customers, technology and products, its definition of success and its rules of performance, the nature and origin of its authority, its responsibility toward individuals and their duty toward the organization, the nature of interpersonal relations, etc.

The true form of diversity usually referred to in the decision-making process is diversity of “skills and perspectives.” Not only is this form of diversity desirable, but it should be the primary foundation for all director recruitment and selection planning.

At the same time, a high degree of cohesion of values and ideologies must be maintained within the board of directors and executive-level positions. Therefore, the diversity that may be established on the board must involve people with compatible values.

Regardless of the relationship between the diversity of social and personal attributes and other dimensions, it is important to underscore that this form of diversity should not be overlooked. Indeed, there are numerous benefits associated with it: for example, it helps promote employee recruitment and retention and contributes to creating a climate conducive to inclusion, in addition to conferring social legitimacy.

In IGOPP's *Policy Paper on Parity and Diversity*, we recommend that boards of directors establish the diversity profile that is relevant to their organization. This profile is not systematically a reflection of the labour force of a given country. Indeed, there must be discussion about the composition and specifics of the company's various stakeholders (e.g. customers, employees, suppliers, host communities, countries targeted for possible geographic expansion, etc.). This diversity must support the company's strategy, and be conducive to an enhanced consideration of the long-term interests of a society's stakeholders, with the aim of creating sustainable value.

As well, with its concept of "identified group" and the flexibility afforded by the description of the "approach to achieving or maintaining diversity," **Form A best meets investors' needs for making investment and voting decisions, and is better suited for issuers to describe their approach to diversity on the board and at the executive level.** This flexibility makes it possible to extend disclosure to the level of executive officers.

Form B, which calls for the description of a written strategy and retention of the concept of "designated group" formally identifying minority groups, is more restrictive despite its "comply or explain" formula. Unlike Form A, it does not enable boards to develop a diversity strategy tailored to their organization's needs. Form B also raises a number of concerns for issuers (and board members), which will be described further in response to Question 4.

### ***Distinction between "gender diversity" and "parity"***

The high risk of confusing gender diversity with other forms of diversity calls for a more specific lexicon. When discussing gender diversity, IGOPP's *Policy Paper on Parity and Diversity* recommends referring to the **concept of parity**, which can be achieved by an acceptable range mix (pegged at between 40% and 60% in IGOPP's 2009 policy paper) that also takes into account the natural size of boards of directors (often a small odd number).

Women, who make up half of the population, are not a minority group, and their presence should therefore statistically represent half of all directors of the boards of listed companies.

The notable progress in female representation on boards, especially over the last decade, must not be held back by the pursuit of another goal for diversity, hence the importance of keeping the issue of parity a priority.

We therefore encourage you to distinguish between the concepts of "parity" and "diversity," whichever form is ultimately chosen.

On the other hand, we note with interest that women are excluded from the concept of "identified group" in Form A of the draft amendments, so that the distinction in terms of disclosure is maintained. This approach fully meets the objectives of the above discussion, but is not reflected in Form B.



### **Question 3**

*Is information on the diversity approach and objectives of issuers with respect to executive officer positions useful for investors? Does this requirement raise concerns for issuers? Please explain. (Please refer to the table entitled “Approach to Diversity – Executive Officer Positions” in Annex A for a description of this draft requirement.)*

In the course of our research, we noted certain limits to the application of the *CBCA* disclosure model with regard to the definition of “executive officers.” Reporting companies have interpreted the regulations governing the number of executive officer members to be considered for disclosure purposes very liberally. The definition in the regulations provides for a composition of between five and seven members who are executive officers. Instead, companies reported an average of more than 16 executive officers, with a median of 10 executive officer positions. This means that more than half the companies subject to the law have interpreted the regulation inaccurately (but probably in line with their own definition of executive officer positions), making data comparability much more difficult in this respect.

In light of this observation, even if this aspect is not specified in the current versions of the draft amendments, it would be preferable to let issuers determine the perimeter of the organizational structure that is considered to define the executives who make up their senior management, but to maintain this perimeter in subsequent years to allow data to be compared year over year for the same entity.

The main question remains the collection of diversity data, with all the confidentiality and bias issues that can be introduced when providing answers (addressed in greater depth in response to Question 4). In all cases, a flexible approach should be preferred to avoid any form of drift, both in information collection and in candidate selection and appointment.

### **Question 4**

*Should issuers be required to disclose data about specified designated groups, consistent with the approach in Form B? Or should issuers be required to disclose data about women only and the identified groups for which they collect data, consistent with the approach in Form A? Please explain. (Please refer to the table entitled “Concept of Diversity” in Annex A for a description of “designated groups” and “identified group.”)*

Recommendation #3 in IGOPP’s *Policy Paper on Parity and Diversity* is clear about the groups to be targeted: boards of directors should establish a diversity profile relevant to their organization. As mentioned previously in response to Question 2, this profile does not systematically reflect the working population of a given country. In fact, each issuer's senior management team needs to reflect on the composition and specific characteristics of the entity's various key stakeholders.

Trying to fill positions with the sole aim of meeting arbitrary expectations set by external actors is to be avoided. The average board comprises 11 to 13 members, which makes it impossible to systematically represent all types of minorities in the workforce.

Indeed, diversity is defined according to a range of attributes and qualities, including, but not limited to, differences in race, colour, country of origin, religion, language, sexual orientation, abilities, age, socio-economic status and geographic location. No board will ever be large enough to represent all minorities.

Although mandatory disclosure as set forth in Form B requires information to be provided about a few pre-established designated groups, there are many forms of diversity, and other minority groups may correspond more closely to the company's reality. These groups must not be discriminated against, neglected or omitted.

In addition, we note that many issuers, especially in the larger market capitalizations, *already disclose diversity information* and consider much broader forms of diversity than the designated groups included in the *CBCA* or Form B of the draft amendments. It would be very unfortunate if the adoption of amendments to disclosure requirements led some issuers to reduce or modify their disclosure, to the detriment of those who use this information, who are satisfied with its current form. Many issuers are, in fact, interested in a diversity of geographic representation, language, sexual orientation or age groups, for example, in addition to the designated groups already set out in the *CBCA*. They provide statistics to this effect in their management proxy circulars.

**In our view, issuers should therefore only be required to provide information on women and identified groups for whom they collect data, in line with the approach proposed in Form A.**

As for the information to be provided, recommendation #7 of IGOPP's *Policy Paper on Parity and Diversity* specifies what we consider to be sufficient disclosure.

We believe that the board should report annually on its efforts in the area of parity and diversity. Disclosure has already demonstrated its effectiveness as an incentive to achieve parity targets and should be maintained. As discussed in our answer to Question 2, there is a high risk of confusion, and the issue of women's representation on boards should be kept separate. As such, companies should, at minimum, disclose:

- 1) the percentage of female board members;
- 2) the desire to reach (or maintain) a parity target;
- 3) if the parity target has not been reached, an explanation of how the Board intends to reach the target (what steps are planned).

In terms of the diversity of social and personal attributes, *the information provided should not be personal*. The aim of the reporting is to promote diversity and demonstrate that it is reflected in

the highest decision-making bodies of the company, not to single out individuals. If the situation requires, we recommend disclosing:

- 1) a description of relevant diversity specific to the organization;
- 2) for the board and executive officers:
  - a. types of diversity represented (as a list, for example);
  - b. the total number of board members and executive officers (separately) who represent one type of diversity or another, as well as;
  - c. the percentages that these two numbers represent of the total number of board members and executive officers.

We feel this information is sufficient and relevant to achieving the objective.

The question of targets for representing diversity within the highest decision-making bodies (board of directors and senior management) remains a delicate issue. Indeed, the relevant diversity will naturally be multidimensional, which implies choices that will be made according to available candidates, among other things. However, the setting of targets by boards is a tool that has proved its effectiveness. We therefore *encourage boards to set such targets themselves*—as a percentage of the number of members—even if they encompass several forms of social and personal attributes, in order to demonstrate a firm commitment to achieving genuine diversity. Boards should disclose this percentage and provide a brief explanation of the steps taken to achieve this target.

**Once again, Form A of the proposed amendments provides issuers with the flexibility they need to adapt to their specific circumstances, allowing them to disclose information as we recommend.**

Form B of the proposed amendments would provide a standardized tabular format for the disclosure of diversity-related information by issuing companies, targeting only the diversity of certain social and personal attributes (as defined for “designated groups”). This also raises a number of issues, particularly when it comes to classification and identification.

Belonging to one or other of the designated groups is based on self-identification. While it is difficult to impose any other method of identification, it nonetheless raises two risks: 1) the risk of non-disclosure, and 2) the risk of opportunistic disclosure. Individual defining characteristics belong to each individual. Some prefer to exclude themselves from a group to avoid being labelled, 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. Intentionally broad definitions of inclusion within certain designated groups will necessarily create ambiguities in this respect. On the other hand, some may see disclosure as a career opportunity.

**In both cases, these disclosure risks will arise both when compiling self-identification forms and when recruiting, whereas these highly personal issues are difficult to address when approaching potential candidates** even if these will have to be implicitly considered in a desire to achieve pre-established diversity objectives (hence the importance of carefully selecting the disclosure obligations in this respect).

## **Question 5**

*Would it be beneficial to require reported data to be disclosed in a common tabular format? Does this requirement raise concerns for issuers? Please explain.*

The advantage of allowing information users to quickly measure the presence and improvement of the presence of diversity is not sufficient to counterbalance the possibility of nominative identification of directors which would introduce direct issues of confidentiality, but also data reliability issues through the disclosure bias that these confidentiality issues might entail. Even if the use of a standardized table facilitates information processing and presentation, we have strong doubts as to the added value of this information, both for the entities required to disclose it and for the users of this information, since each issuer may have a very different definition of relevant diversity.

It is clearly preferable to offer the possibility of retaining a descriptive form (as provided for in Form A), which could be desirable to ensure the confidentiality of some of the data provided according to the nature of the “identified groups,” in addition to allowing issuers to make a selection of the relevant diversity groups according to their own imperatives and particularities.

## **Question 6**

*For CBCA-incorporated issuers, are there issues or challenges in providing both CBCA disclosures and the disclosure proposed under either Form A or Form B? Please explain.*

In a report published in February 2021, IGOPP provided an initial census of the information disclosed by federally incorporated companies that were among those that make up the S&P/TSX index. This data not only established the first milestone against which any progress in diversity would be measured, but also provided an excellent opportunity to observe how these companies interpreted their new obligations, while assessing the quality of the information disclosed. In 2020, 78 companies were covered by the new disclosure obligations, and 77 in 2021 (70 of them were the same, and we have retained them in order to make a direct comparison and assessment of the actual progress on the indicators for these companies).

In light of what we have been able to observe, we do not foresee any difficulty in providing the information required by both regimes if Form A were selected. Indeed, Form A and its concept of “identified group” is inclusive of the four groups designated by the *CBCA* regulations. The “comply or explain” formula used in the federal regulations, as well as the flexibility allowed in the descriptive forms, are well aligned with the requirements of Form A, including the characteristics required at the executive officer level.

Form B, with more “designated groups” and standardized reporting requirements, would force issuers to modify their disclosure and data collection methods, creating additional costs and difficulties in complying with both regimes.

## **Question 7**

*Should we consider developing similar disclosure requirements for venture issuers in a second phase of this project? If so, should any changes be made to the proposed disclosure requirements to reflect the different stages of development and circumstances of venture issuers? Please explain*

The costs and the amount of work associated with compliance are becoming increasingly significant for issuers, especially venture issuers. There is no need to make these requirements any more onerous for smaller organizations. Many venture issuers have small boards of directors, often consisting of the founder-entrepreneur and a few members with specialized or complementary expertise and experience. With less ability to attract new members than larger companies, the challenges associated with board composition are sometimes high. At this stage of growth (and sometimes survival), it is inappropriate to add additional considerations and information requirements.

## Conclusion

As can be seen in the preceding answers to the questions, Form A of the draft amendments appears to be clearly preferable to Form B in terms of the approach to diversity disclosure. We therefore strongly recommend that Form A be selected, and that the clarifications provided in the various answers also be taken into account in drawing up the final version.

We hope the information and answers in this document will be highly useful for your future considerations.

We are available to answer any questions you might have.

Best regards,

**Institute for Governance of Private and Public Organizations (IGOPP)**

(s) François Dauphin

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By : François Dauphin, MBA, CPA  
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By : Patric Besner, lawyer  
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# **APPENDIX 1**

**(IGOPP Policy Paper on Parity and Diversity)**