Board diversity: A made in Canada approach?

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Board diversity remains a key consideration in Canada despite changing views in the United States. Cross-listed issuers may want to exercise caution in their disclosure approach.

Takeaways

- Proxy advisors, institutional investors and other stakeholders in the United States (U.S.) have rescinded or changed their policies for public companies with respect to diversity on boards and among senior management.
- To date, Canadian proxy voting guidelines published by proxy advisors and institutional investors continue to consider board diversity for the 2025 proxy season.
- New diversity disclosure requirements are being proposed in Canada, including with respect to federally regulated financial institutions (FRFIs).
- Cross-listed issuers should consider their legal obligations in both Canada and the United States to best comply with disclosure requirements and meet stakeholder expectations in light of rapidly changing norms.

Views south of the 49 th parallel

President Trump has made no secret of his Administration's views with respect to diversity, equity and inclusion (DEI). Recent Presidential Executive Orders related to DEI (for example, here, here and here) have highlighted the Administration's position and reflect some of the views that investors and other stakeholders may have when it comes to corporate DEI practices. In the face of the Executive Orders and growing anti-DEI sentiments, a number of prominent proxy advisors and institutional investors have amended their voting guidelines to remove considerations of board diversity:

- **Institutional Shareholder Services (ISS)** announced on February 11, 2023 that it would "indefinitely halt consideration of certain diversity factors in making vote recommendations with respect to directors at U.S. companies…" For shareholder meetings of U.S. companies (which may include Canadian incorporated issuers who are listed in the U.S. and are considered "domestic issuers" by the SEC) gender, racial and ethnic diversity will no longer play a role in ISS' voting

recommendations. Importantly, and as further discussed below, this change only applies to ISS' U.S. voting policy.

- **Blackrock** has updated its U.S. proxy voting guidelines for 2025 to remove its specific diversity targets which were previously set at two women on a board and 30 per cent diversity for S&P 500 companies. In addition, companies are no longer expected to explain their approach to board diversity. Blackrock may still consider taking action if market norms are not followed by a S&P 500 board which means that a 30 per cent diversity target could still apply given general market practice.
- **Vanguard** has also updated its 2025 U.S. proxy voting policy to pull back its stance on board diversity. Vanguard will no longer recommend a negative vote for nominating committee chairs where insufficient action has been taken to achieve an "appropriately representative" board. Reference to diversity characteristics (gender, race and ethnicity) have also been removed while "cognitive diversity" remains in the policy. Vanguard retains the ability to recommend against nominating committee chairs if board composition and disclosure strays from market practice.

Changes in investor sentiments are not the only place where DEI has been rolled back in U.S. capital markets. In December 2024, the United States Court of Appeals for the Fifth Circuit struck down the Nasdaq Stock Market's (Nasdaq) board diversity rules on the basis that the United States Securities and Exchange Commission (SEC) had exceeded its statutory authority in approving the requirements. The rules in question had required Nasdaq-listed companies to disclose the number of board members and how they identified with respect to gender, race, ethnicity and LGBTQ+ status. Nasdaq-listed companies were also required to have at least two diverse board members or explain why they did not. While the SEC could appeal the decision, given the new Administration in the United States and a new Chair of the SEC, it is unlikely to do so.

More diversity reporting on the horizon in Canada

While it is often the case that governance trends in the United States find their way into Canada, the treatment of and expectations related to DEI may be one area where Canada takes a different approach, particularly in light of growing "made in Canada" sentiments.

Many Canadian publicly traded companies are already subject to rules and investor expectations that require issuers to disclose information about their approach to diversity:

- **Securities law** : Non-venture reporting issuers are required to disclose, on an annual basis, details of their practices with respect to women on boards and in executive officer positions in accordance with Form 58-101F1 *Corporate Governance Disclosure*. Data recently published by the Canadian Securities Administrators highlights the effect of these disclosure requirements: women represent 29 per cent of board seats at Canadian publicly traded companies (compared to 11 per cent ten years ago).
- **Corporate law** : Distributing corporations incorporated under the *Canada Business Corporations Act* (CBCA) (generally public companies) are also required to provide annual disclosure with respect to "designated groups" which

include women, Indigenous persons, persons with disabilities and members of visible minorities.

Under both securities law and the CBCA, companies are required to follow a "comply or explain" disclosure model that addresses (i) the number and percentage that diverse members represent on the board of directors and in senior management, (ii) whether the corporation has adopted a written diversity policy, (iii) whether diverse representation is considered when nominating and appointing members to the board of directors or executive team, and (iv) whether targets or other methods of refreshment have been adopted by the corporation.

- **ISS**: With limited exception, for companies in the S&P/TSX Composite Index, Institutional Shareholder Services (ISS) will generally recommend that shareholders vote withhold for the Chair of the Nominating Committee (or similarly responsible committee or the Chair of the Board if no committee responsible for nominating) where women comprise less than 30 per cent of the issuers board of directors (zero women in the case of non-Composite Index issuers). Similarly, for companies in the S&P/TSX Composite Index, ISS will recommend a vote against or withhold from the Chair of the Nominating Committee (or similarly responsible committee or the Chair of the Board if no committee responsible for nominating) where the board has no apparent racially or ethnically diverse members. ISS defines "racially or ethnically diverse members" to include Aboriginal peoples and members of visible minorities.
- **Glass Lewis** : For TSX-listed issuers, Glass Lewis will generally recommend against the Chair of the Nominating Committee where the board does not have at least 30 per cent gender diversity, or the entire Nominating Committee where there are no gender diverse board members. For junior exchange-listed issuers, Glass Lewis expects at least one gender diverse board member.
- **Globe & Mail Board Games** : For 2025, a total of 13 marks (or 13 per cent) of a company's Board Games score will be allocated to diversity criteria. More specifically, full marks will be awarded where more than 33 per cent of the issuer's board are women, the company explicitly discloses that it has more than one board member from a diverse group and specifies which group such member(s) belong to, and the company discloses details of a process used to consider potential board candidates who self-identify as a member of a diverse group and includes internal targets for both the proportion of women and the proportion of members of diverse groups other than women on the board.
- **CCGG**: The Canadian Coalition for Good Governance (CCGG) has not amended its 2018 Gender Diversity Policy which continues to advocate for boards to adopt a gender diversity policy as a best practice that includes at least a 30 per cent target. In its 2025 publication, Building High Performance Boards, CCGG reiterates that it expects boards as a whole to be diverse and inclusive and supports meaningful diversity targets determined by the company. CCGG notes that "investors are increasingly skeptical of boards that justify a lack of diversity with reference to solely merit based appointment processes."

Against a backdrop of these existing disclosure requirements and expectations, a number of proposals have been made that will enhance and/or increase diversity disclosure requirements in Canada:

- ***Employment Equity Act* modernization:** the CBCA diversity disclosure requirements depend on the definition of "designated groups" found in the *Employment Equity Act* (the EEA). In 2021, the Government of Canada established the Employment Equity Act Review Task Force to undertake a comprehensive review of the EEA. Among the recommendations included in the Task Force's final report *A Transformative Framework to Achieve and Sustain Employment Equity* was a recommendation to replace the term "designated group" with "employment equity group" which would be defined more expansively that its predecessor. As a result of the recommendations, the Government of Canada launched a consultation on their initial commitments to modernize the EEA. To date, amendments to the EEA have not been implemented and corresponding amendments to the CBCA have not been proposed. However, it is likely that a change in the definitions to the EEA will necessitate corresponding revisions to the CBCA and could broaden the disclosure requirements thereunder.
- **CSA diversity disclosure proposal:** In early 2023, the Canadian Securities Regulators (CSA) published proposed amendments to Form 58-101F1 *Corporate Governance Disclosure* and National Policy 58-201 *Corporate Governance Guidelines* that would impact the annual governance disclosure required of non-venture issuers. The proposed amendments included two separate approaches to governance disclosure, and in particular, diversity disclose. Each approach would, however, require increased transparency about broad diversity on boards and in executive officer positions. Further details about the specifics of each proposal can be found in our earlier comments. The CSA has indicated that it continues to review feedback received in that consultation process and to work towards a harmonized national disclosure framework.
- **Federally regulated financial institutions:** The Canadian Department of Finance has published for consultation regulations to the *Trust and Loan Companies Act* (Canada), the *Bank Act* (Canada), and the *Insurance Companies Act* (Canada) (collectively, the Financial Institution Statutes) that, if adopted, will require certain federally regulated financial institutions – generally, banks and insurance companies - to disclose information with respect to the composition of their senior management teams to their shareholders on an annual basis. More specifically, FRFIs would have to disclose details about term limits and board renewal, written diversity policies, considerations of diversity with appointing and nominating senior management, targets for representation and the number and proportion that designated groups represent on the board of directors and in senior management positions. The proposed regulations define senior management positions to include the chair and vice-chair of the board of directors, the president, the chief executive officer (CEO), the chief financial officer (CFO), any vice-president in charge of a principal business unit, division or function and any officer who reports directly to the board of directors, the CEO or the chief operating officer (COO). Following the lead of the *Canada Business Corporations Act* (CBCA), reportable designated groups include women, Indigenous peoples (First Nations, Inuit and Métis), persons with disabilities and members of visible minorities.

Recommendations for Canadian issuers

Canadian-listed issuers should continue to consider their legal obligations with respect to diversity disclosure. Consideration should also be given to stakeholder and investor

expectations. This requires issuers to know and be actively engaged with their shareholder base. An understanding of whether significant investors follow the voting recommendations of various proxy advisors can assist with making diversity and governance related decisions.

Cross-listed issuers and issuers with significant operations in the United States may have different considerations in light of changing views. For issuers that seek to comply with ISS voting policies, those who remain "foreign private issuers" in the U.S. will generally be assessed under ISS' Canadian voting policies which continue to take into account gender and racial/ethnic diversity. Cross-listed issuers that are considered "U.S. domestic issuers" and who are subject to the same disclosure and listing standards as U.S. incorporated companies (*e.g.,* they are required to file DEF14A proxy statements) will generally be assessed under ISS' U.S. proxy voting guidelines. Given the changes to ISS' U.S. guidelines, these issuers should work to comply with both Canadian requirements and U.S. market practice.

Regardless of proxy voting guidelines, issuers should be aware of their legal obligations in each jurisdiction. While there is uncertainty in the United States with respect to DEI initiatives that can have a chilling effect on public disclosure, Canadian disclosure obligations cannot be ignored and should follow general best practices with respect to good disclosure. Statements about diversity should be substantiated and reflect the company's actual practices to avoid misrepresentations.

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