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Mandatory Climate-Related Disclosure: The CSA Releases Proposed National Instrument 51-107 – Open for Comment

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In the latest and most significant step to date in the push towards transparent, reliable and comparable climate-related disclosure in Canada's capital markets, the Canadian Securities Administrators ("**CSA**") published Proposed National Instrument 51-107 – *Disclosure of Climate-Related Matters* (the "**Proposed Instrument**") and its companion policy for comment on October 18, 2021.[1] The Proposed Instrument would impose mandatory climate-related disclosure on reporting issuers in Canada with limited exceptions. The Proposed Instrument is open for public consultation until January 17, 2022.

The Proposed Instrument is being released not only against the backdrop of the COP26 climate summit in Glasgow, but also in the context of the widely anticipated United States Securities and Exchange Commission rules which will require corporations to publicly disclose risks they face from climate change.[2] To set the stage, the United States Financial Stability Oversight Council recently released a report identifying climate change as a threat to financial stability, and recommending a regime of far-reaching public climate-related disclosures.[3]

To some extent, the Proposed Instrument will codify and place structure around already existing practices. CSA Staff Notice 51-358 – *Reporting of Climate Change-related Risks* provided issuers with guidance on disclosure of climate-related risks within the existing framework, without imposing new requirements.[4] A study conducted by the Chartered Professional Accountants of Canada found that the majority of companies listed on the Toronto Stock Exchange are already making climate-related disclosure, although the nature and extent of this disclosure varies.[5]

What climate-related disclosure would the Proposed Instrument require?

The Proposed Instrument would require issuers to disclose certain climate-related information, largely in compliance with the Task Force on Climate-Related Financial Disclosure ("**TCFD**") recommendations. The TCFD is an industry-led body that was established to develop recommendations for more effective disclosure of climate risks and opportunities. The TCFD recommendations, and the Proposed Instrument, break climate-related disclosure down into four core elements:

- Governance;
- Strategy;
- Risk Management; and
- Metrics and Targets.

While the specific disclosure issuers in different industries and sectors would need to make would differ, these categories would apply to all issuers subject to the Proposed Instrument.

Governance

The governance disclosure would involve describing (i) the board's oversight of climate-related risks and opportunities and (ii) management's role in assessing and managing these risks and opportunities.

Strategy

Where material such information is material, the strategy disclosure would require reporting issuers to describe (i) the climate-related risks and opportunities the issuer has identified over the short, medium, and long term and (ii) the impact of these risks and opportunities on the issuer's businesses, strategy, and financial planning.

Risk Management

The risk management disclosure would describe (i) the issuer's processes for identifying and assessing climate-related risks; (ii) the issuer's processes for managing these risks; and (iii) how these processes are integrated into issuer's overall risk management.

Metrics and Targets

Lastly, the metrics and targets disclosure would require an issuer to disclose (i) where such information is material, the metrics it uses to assess climate-related risks and opportunities in line with its strategy and risk management process; (ii) the issuer's Scope 1, Scope 2 and Scope 3 greenhouse gas emissions and the related risks or the issuer's reason for not disclosing this information; and (iii) where such information is material, the targets the issuer uses to manage climate-related risks and opportunities and its performance against these targets.

In an attempt to reduce regulatory burden, the Proposed Instrument does not include the TCFD-recommended requirement that disclosure include a "scenario analysis" which would describe the resilience of an issuer's strategy within different climate-related scenarios, including a 2°C or lower scenario. The CSA is similarly consulting on an alternative approach to greenhouse gas emission disclosure, which would only require issuers to disclose Scope 1 greenhouse gas emissions. Under this alternative, disclosure of Scope 2 and Scope 3 greenhouse gas emissions would not be mandatory but would still be subject to a comply or explain approach.[6]

Where would the prescribed disclosure be found?

The Proposed Instrument divides the prescribed disclosure into (1) climate-related governance disclosure (Form 51-107A) and (2) climate-related strategy, risk management and metrics and targets disclosure (Form 52-107A).

The required disclosure under (1) would be included in a reporting issuer's management information circular. If a corporation does not send a management information circular, it would be included in its annual information form ("**AIF**"). Lastly, if a reporting issuer does not file an AIF, it would be included in its annual management discussion and analysis ("**MD&A**"). Similarly, the required disclosure under (2) would be included in a reporting issuer's AIF, and if it does not file one, then in its annual MD&A.

Which Issuers does the Proposed Instrument apply to?

The Proposed Instrument would apply to all reporting issuers, other than investment funds, issuers of asset-backed securities, designated foreign issuers, SEC foreign issuers, certain credit support issuers and certain exchangeable security issuers.

While the Proposed Instrument contemplates a transition phase of one year for non-venture issuers and three years for venture issuers, venture issuers are not exempt from its application. This may come as a surprise to more junior issuers that expected to be exempt from any climate-related disclosure requirements.

Climate-Related Disclosure is Here to Stay

The Proposed Instrument is the most recent, but far from the only, example of the push towards complete, reliable and comparable climate-related reporting in Canada's capital markets. The CSA has also recently shown its commitment to environmental reporting by strongly supporting the establishment of the International Sustainability Standards Board ("**ISSB**") and the Canadian offer to host the ISSB headquarters in Canada.[7] While Canada ultimately lost the bid to host the ISSB headquarters, it is set to host the organization's secondary hub.[8]

The TCFD recommendations, on which the Proposed Instrument is largely based, are taking center stage in this transition. Ontario's Capital Markets Modernization Taskforce recommended that the Ontario Securities Commission ("**OSC**") mandate climate change-related disclosure that is compliant with the TCFD recommendations for issuers through regulatory filing requirements of the OSC.[9] Similarly, the federal government has taken steps to increase the adoption of mandatory TCFD reporting throughout Canada. This includes its plans to engage with provinces and territories to make TCFD-compliant disclosure part of the regular disclosure practice for a broad spectrum of the Canadian economy and to require all Crown corporations to adopt TCFD standards as part of their corporate reporting by 2024 at the latest.[10]

As the regulatory and legislative environments in which reporting issuers operate evolve towards requiring disclosure of climate-related risks and opportunities, issuers that do not begin these practices risk being left behind.

How can we help?

Climate-related disclosure does not need to be overwhelming. We are here to help every step of the way. Currently, this may include helping your organization understand how the Proposed Instrument would affect your business or assisting you with drafting submissions to the CSA while the public consultation period for the Proposed Instrument remains open. For more information on the topic discussed in this note, or for legal advice regarding this topic or any other ESG-related matter, please contact Janet Bobechko, Susan Han, Robert Eberschlag or Conor Dooley.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice. We would like to thank articling student Emma Brown for her assistance in preparing this article.

[1] CSA, "Consultation Climate-related Disclosure Update and CSA Notice and Request for Comment Proposed National Instrument 51-107 *Disclosure of Climate-related Matters*" (18 October 2021), online: *Ontario Securities Commission* <www.osc.ca/sites/default/files/2021-10/csa_20211018_51-107_disclosure-update.pdf>.

[2] Gary Gensley, "Prepared Remarks Before the Principles for Responsible Investment 'Climate and Global Financial Markets' Webinar" (28 July 2021), online: *US SEC* <www.sec.gov/news/speech/gensler-pri-2021-07-28>.

[3] Financial Stability Oversight Council, "Report on Climate-Related Financial Risk" (2021), online: <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>.

[4] CSA Staff Notice 51-358, *Reporting of Climate Change-related Risks* (1 August 2019), online (pdf):

<www.osc.ca/sites/default/files/pdfs/irps/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf>.

[5] Charted Professional Accountants of Canada, “State of Play: Study of Climate-Related Disclosure by Canadian Public Companies” (2017), online: <www.cpacanada.ca/en/business-and-accounting-resources/financial-and-non-financial-reporting/sustainability-environmental-and-social-reporting/publications/climate-related-disclosure-study>.

[6] CSA, “Canadian securities regulators seek comment on climate-related disclosure requirements” (18 October 2021), online: *CSA* <www.securities-administrators.ca/news/canadian-securities-regulators-seek-comment-on-climate-related-disclosure-requirements/>.

[7] CSA, “Canadian securities regulators strongly support the establishment of the International Sustainability Standards Board in Canada” (7 October 2021), online: *CSA* <www.securities-administrators.ca/news/canadian-securities-regulators-strongly-support-the-establishment-of-the-international-sustainability-standards-board-in-canada/>.

[8] Jeffrey Jones and James Bradshaw, “Canada loses bid to host corporate sustainability data office to Frankfurt at COP26, but gets a secondary hub” (3 November 2021), online: *The Globe and Mail* <www.theglobeandmail.com/business/article-canada-loses-bid-to-host-corporate-sustainability-data-to-frankfurt-at/#:~:text=Watchlist-,Canada%20loses%20bid%20to%20host%20corporate%20sustainability%20data%20office%20to,but%20gets%20a%20secondary%20hub&text=Offices%20in%20London%20and%20San,important%20priority%2C%20the%20IFRS%20said.>.

[9] Capital Markets Modernization Taskforce, “Final Report” (January 2021), online: *Ontario Government* <https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf> at 69.

[10] “The Status of TCFD Reporting Requirements in Canada” (28 July 2021), online: *Manifest Climate* <manifestclimate.com/blog/tcfd-reporting-requirements-canada/>.

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