

The CSA climate-related disclosure proposals

Significant implications for directors, boards and public company governance

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On October 18, 2021, the Canadian Securities Administrators (CSA) published a CSA Notice and Request for Comment (Notice) on proposed National Instrument 51-107 *Disclosure of Climate-related Matters* (NI 51-107) and its proposed Companion Policy 51-107CP (the Climate Disclosure Proposals). Comments are due by January 17, 2022, and for TSX-listed issuers with December 31 years ends would have effect in annual filings made in early 2024. A description of the Climate Disclosure Proposals can be found [here](#).

The Climate Disclosure Proposals would require disclosure based on recommendations of the Task Force on Climate Related Financial Disclosures (TCFD), which was established by the Financial Stability Board of the G20 group of countries to improve the effectiveness of climate disclosures. The Climate Disclosure Proposals would require issuers to make disclosure in the following areas:

1. **Governance** – describe the boards oversight of climate-related risks and opportunities, and management’s role in assessing and managing climate-related risks and opportunities.
2. **Strategy** – describe any climate-related risks and opportunities identified over the short, medium

and long term and describe the impact of these risks and opportunities on its business, strategy and financial planning.

3. **Risk management** – describe its processes for identifying, assessing and managing climate-related risks and how these processes are integrated into overall risk management.
4. **Metrics and targets** – describe its metrics used to assess climate-related risks and opportunities and targets used to manage these risks and opportunities.

The TCFD contemplates that issuers should disclose greenhouse gas emissions (Scope 1, 2 and 3). The Climate Disclosure Proposals would require issuers to make this disclosure or explain why they do not. The Climate Disclosure Proposals would not require issuers to disclose the resilience of their strategy with reference to various climate scenarios, a key element of the TCFD recommendations.

This insight outlines what the Climate Disclosure Proposals mean for directors, boards and public company governance, as well as steps boards of directors should consider in preparing to comply.

1. **Boards of directors should expressly establish oversight of climate-related risks and opportunities of the issuer.** This already has been established as best practice and as part of fulfilling directors' fiduciary and duty of care responsibilities. See for example the [Hansell LLP Legal Opinion: Corporate Directors are obliged to Address Climate Change Risk](#) (June 2020).

This will require reviewing, and where necessary amending, board charters and mandates and board skills and competencies matrices, and then reviewing whether any changes need to be made in board composition to ensure the board has the necessary climate competencies to effectively provide this oversight. Boards of directors should consider engaging external advisors on these issues, as well as available providing training for board members where existing corporate resources, or board expertise and knowledge may be lacking or requires additional support.

2. **Boards of directors should expressly task management with responsibility for assessing and managing climate-related risks and opportunities.** This will involve the review and revision of role descriptions and mandates. As climate-related disclosure is added to an issuer's management information circular, AIF or MD&A, the annual and interim CEO/CFO certifications (NI 52-109), will apply to that climate-related disclosure. Management will need to have designed disclosure controls and procedures to provide reasonable assurance that climate-related material information will be made known to the CEO and CFO and that required disclosure on climate-related matters is made. Boards of directors will need to be comfortable that these controls and procedures are in place and have oversight over their effectiveness.
3. **Boards of directors should consider board committee roles in the review and assessment of climate-related risks.** Boards of directors should consider the mandates of any board committees that have delegated responsibilities around risk review and assessments and consider carefully where the assessment of climate risks should fit within those board committees, if at all.

Existing committee composition may mean their involvement with all aspects of climate-related risks and opportunities is not appropriate.

This question, and in particular the role of the audit committee, requires careful thought since the assessment of climate-related risks and opportunities is likely to be done within existing enterprise risk management systems, often overseen by the audit committee. As noted below, audit committees will have some role related to climate-related review and risk/opportunity assessment given their oversight of financial reporting, but issuers may have other board committees with risk assessment responsibilities. It's important to note that the board of directors will remain responsible for the overall climate related risk/opportunity assessment though committees may assist in this assessment.

4. **Boards of directors should specifically consider the role of the audit committee in the review and assessment of climate-related risks and opportunities.** Boards of directors should ensure the resources and processes are in place for it to fulfill its role in this area. The audit committee must oversee the accounting and financial reporting processes of an issuer as well as its audit. This requires oversight of internal controls, including the processes underlying the CEO/CFO certifications which will now cover off climate-related disclosures. At a minimum, the audit committee will need to ensure that once those risks and opportunities are assessed, their implications are properly reflected in the issuer's financial reporting including in assumptions and uncertainties and estimates made in the preparation of financial statements.
5. **Boards of directors should be aware that the Climate Disclosure Proposals require climate-related disclosure to be contained in documents that by law specifically must be reviewed and approved by the board.** Climate-related disclosure is often made in stand-alone sustainability or other reports, so this will be a change for most issuers even if they are currently making TCFD-type disclosure. An issuer



will need to disclose the board's oversight of climate-related risks and opportunities in its annual management proxy circular. In addition, an issuer will need to disclose (i) climate-related risks and opportunities (short, medium and long-term) and their impact (actual and potential) on the issuer's businesses, strategy and financial planning (Strategy), (ii) the issuer's processes for identifying, assessing and managing climate-related risks (Risk Management), and (iii) metrics and targets used by an issuer to assess and manage climate-related risks and opportunities (Metrics and Targets) in its AIF (or in its annual MD&A if it is not required to prepare an AIF). Many issuers make their risk disclosure in their MD&A, and then incorporate that risk disclosure by reference in the issuer's AIF to satisfy the AIF form requirement.

The CSA has previously proposed changes to National Instrument 51-102 *Continuous Disclosure Obligations* (the Disclosure Proposals). Among other things, the Disclosure Proposals contemplate combining an issuer's financial statements, MD&A and, where applicable, AIF, into one reporting document for annual reporting purposes. It is not clear whether the Disclosure Proposals would allow issuers to continue to incorporate information from their MD&A into

their AIF, so all risk disclosure – including climate risk – may need to move to the AIF. It is important to also note that MD&A disclosure should include trends and risks that are reasonably likely to affect an issuer's financial statements in the future. Given the nature of climate-related risks and opportunities, and the need to disclose the impact of these on an issuer's business, it is likely that climate-related risks and opportunities and their impacts will need to be disclosed in an issuer's MD&A and AIF.

- 6. Boards of directors will need to assess the materiality of climate-related risks and opportunities.** The Climate Disclosure Proposals require an issuer to disclose (i) climate related risks and opportunities (short, medium and long-term) and their impact on the issuer's businesses, strategy and financial planning (Strategy), (ii) the issuer's processes for identifying, assessing and managing climate-related risks (Risk Management), and (iii) metrics and targets used by an issuer to assess and manage climate-related risks and opportunities (Metrics and Targets) *only where the information is "material"* – i.e., where a reasonable investor's decision to buy, sell or hold securities is likely to be influenced if the information is omitted or misstated. Boards of directors need to be aware that

there are widely recognized standards available, like the SASB standards of the Value Reporting Foundation, that identify a set of material sustainability topics and their related metrics for the typical company in a menu of industries. The SASB standards identify that climate change is materially impacting 72 of 77 industry subsectors. It will only be in the unusual case that “materiality” will be an acceptable basis to not include disclosure in this area, particularly because disclosure should address short, medium and longer-term risks, potential and actual impacts, and, under the TCFD recommendations both physical and transition risks. In the Climate Disclosure Proposals, the CSA notes that they view climate-related information as becoming increasingly important to investors in Canada and internationally. Many issuers are already disclosing climate-related information in investor presentations.

- 7. Boards of directors should develop a familiarity with the TCFD recommendations.** The Climate Disclosure Proposals do not specifically incorporate the TCFD recommendations. However, the disclosure under the Climate Disclosure Proposals is intended to be consistent with the TCFD recommendations on the stated areas of disclosure, and issuers are encouraged to refer to those recommendations in preparing the required disclosure under the Climate Disclosure Proposals. The TCFD and others have published guidance on implementing the TCFD recommendations. The TCFD has also prepared guidance for issuers in different industry sectors in satisfying the TCFD disclosure recommendations. Boards of directors will need to be aware that management’s assessment of climate-related risks and opportunities should include physical risks, both acute and chronic, and transition risks, like policy and legal, technology, market and reputation risks associated with the transition to a lower carbon economy.

- 8. Boards of directors should consider the need for scenario analysis as contemplated within the TCFD recommendations.** Boards of directors should consider whether in order to properly identify climate-related risks and opportunities and their impact on an issuer’s business management needs to undertake some scenario analysis as contemplated within the TCFD recommendations notwithstanding that the Climate Disclosure Proposals do not require disclosure in respect of those scenarios. In turn, boards would need to review that analysis. The use of scenario analysis as a tool to assess risks and opportunities is generally understood to offer benefits in situations where the precise timing and magnitude of risks is uncertain, the analysis needs to be forward looking, and risks (and opportunities) can be high impact where historical experience is not necessarily a guide to the likelihood of their future occurrence.

- 9. Boards of directors will need to consider the annual timing of preparation of an issuer’s climate-related disclosure.** Currently, many issuers are reporting this type of information in stand-alone sustainability reports and/or other documents released throughout the year on different schedules from the typical annual disclosure cycle. Issuers may already be on GHG disclosure timelines with banks under sustainability-linked disclosure instruments and those timelines will typically be more relaxed than the Climate Disclosure Proposals will allow. Issuers will need to develop the procedures and capacity to develop and produce this disclosure in line with the usual AIF and proxy-circular disclosure requirements. In some cases, issuers are obtaining limited assurance reports from their auditors on this disclosure. The requirements for obtaining and filing consents from those auditors will need to be considered, and audit engagements will need to adjust to reflect new timing requirements and the eventual inclusion of those reports in offering documents.

10. **Boards of directors should consider any *de facto* requirement to disclose GHG emissions.** Boards of directors should consider whether there will develop (or maybe already has developed in some cases) a *de facto* requirement to disclose GHG Emissions in their disclosure documents, notwithstanding that the Climate Disclosure Proposals adopt a “comply or explain” model allowing issuers to omit that disclosure if they explain why. Access to the various sustainable finance tools or funding from some institutional investors may already require that an issuer discloses its GHG emissions. As issuers are entering into sustainability-linked financings based on GHG emissions, they will be reporting their GHG emissions to banks and bond holders. Canada’s largest banks (and other Canadian and international financial institutions) are now members of the Net-Zero Banking Alliance.

Members of the Net-Zero Banking Alliance have committed to transition the GHG emissions attributable to their lending and investment portfolios to align with pathways to net-zero by 2050, and to set interim targets for at least 2030 and every five years onwards to 2050. To satisfy these requirements, it seems likely issuers will face more general requirements to provide this GHG emissions disclosure to their banks. Many issuers are already providing GHG emissions information in investor presentations or in separate sustainability reports. Where investors and other stakeholders are asking for this data, it becomes harder to argue the information is not “material”, raising questions around selective disclosure unless it is provided in more general disclosure documents.

11. **Boards of directors should consider whether the issuer should start early in addressing the disclosure contemplated by the Climate Disclosure Proposals.** The Climate-Related Disclosure Proposals contemplate that the disclosure would be required in annual disclosures filed starting in early 2024 for TSX-listed issuers (2026 for TSXV-listed issuers with December 31 year ends). Given existing general obligations to disclose material risks and information, waiting to disclose specific climate related risks until the specific disclosure rules apply will raise the question of whether they really only became material in 2024 (or 2026), and therefore, whether an issuer’s prior disclosure was appropriate.

12. **Boards of directors need to understand the impact of the Climate Disclosure Proposals on their prospectus-related liability.** The full impact of the Climate Disclosure Proposals on the public offering process goes beyond the remit of this note, but where climate-related disclosure moves into the AIF and management proxy circular, that information will be automatically incorporated by reference in offering documents, and boards and management will take on prospectus liability for that disclosure. It is important to note that under current prospectus rules where climate-related disclosure is already material to an issuer, the failure to include that information in a prospectus document (including through incorporation by reference) will give rise to liability for misrepresentation to purchasers under the prospectus.



13. **Boards of directors will need to monitor the development of climate disclosure ratings and rankings established by third parties.**

As has occurred in respect of general governance disclosure (see for example the Canadian Coalition for Good Governance and The Globe and Mail Board Games) benchmarking of issuers climate-related disclosure has started. See for example the ClimateAction 100+ corporate benchmarking which looks at corporate disclosures around climate-related governance,

reduction of GHG emissions and public disclosure following the TCFD recommendation. These rankings (and their score cards) are likely to become a consideration in the preparation of issuers' public disclosure documents.

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