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By email:

Alberta Securities Commission
Autorité des marchés financiers
British Columbia Securities Commission
Financial and Consumer Services Commission, New Brunswick
Financial and Consumer Affairs Authority of Saskatchewan
Manitoba Securities Commission
Nova Scotia Securities Commission
Nunavut Securities Office
Office of the Superintendent of Securities, Newfoundland and Labrador
Ontario Securities Commission
Office of the Superintendent of Securities, Northwest Territories
Office of the Yukon Superintendent of Securities
Superintendent of Securities, Department of Justice and Public Safety, Prince Edward Island

Re: Proposed National Instrument 51-107 *Disclosure of Climate-related Matters*

Dear staff:

Introduction

We are writing in response to your request for comment dated October 18, 2021 regarding the proposed introduction of National Instrument 51-107 *Disclosure of Climate-related Matters* and its companion policy (the "Proposed Instrument").

These comments are provided by the lawyers of Torys LLP who are signatories below, in their personal capacities, and not on behalf of the firm or any of its clients.

We appreciate the efforts of the Canadian Securities Administrators ("CSA") to introduce climate-related disclosure requirements that acknowledge the evolving expectations of the global investment community while being sensitive to the regulatory burden and additional cost imposed on issuers and align with many of the recommendations made in the international disclosure framework published by the Task Force on Climate-related Financial Disclosures ("TCFD").

1. Disclosure of GHG Emissions

We support the disclosure regime in the Proposed Instrument that gives issuers the option to disclose each of Scope 1, 2 and 3 greenhouse gas ("GHG") emissions or explain why they have not done so. This is consistent with the Canadian continuous disclosure regime generally and accommodates materiality judgements and the unique circumstances of individual issuers. The Canadian market consists of a diverse array of issuers that operate in varying industries and geographies and that have a wide range of market capitalizations and asset bases. As a result, the materiality of GHG emissions to an individual issuer's business, financial performance and prospects could vary widely depending on the foregoing factors, among others. As the Value Reporting Foundation (and formerly the Sustainability Accounting Standards Board) has identified in its materiality mapping, GHG emissions are likely to have a material impact on businesses in many, but not all, sectors.[1] A comply or explain regime strikes an appropriate balance between facilitating these materiality judgements and ensuring accountability to investors for any decision not to disclose by requiring an appropriate explanation. For issuers who elect not to make such disclosures, we think market forces and investor pressure will be sufficient to incentivize such disclosure where it is deemed material for a particular issuer.

It is also important to note that GHG emissions data is not always under the direct control of reporting issuers. For example, Scope 2 emissions data relating to energy use can require input from landlords and property managers. Scope 3 emissions data – whether it relates to an issuer's supply chain, business travel or investments – must be obtained from other companies. There are often valid reasons why issuers cannot obtain (or verify) some or all of this data. In such cases, a comply or explain model would allow issuers to explain why they have chosen not to provide this disclosure. Over time, as GHG emissions data collection processes become more widespread and robust and data integrity improves, we expect many issuers will elect to provide this disclosure, particularly given increasing investor pressure to do so.

If the CSA decides to require GHG emission disclosure, we recommend that issuers be given a lengthy transition period to comply. Based on Millani's 2021 Canadian TCFD Disclosure Study,[2] only 23% of the issuers listed on the S&P/TSX Composite Index as of April 20, 2021 provided a clear statement (in their annual filings or other ESG or climate change reporting) indicating that their disclosure was aligned with the TCFD recommendations and only 14% expressed a desire to align such disclosure with the TCFD recommendation in the future. That suggests that a significant proportion of Canadian issuers either do not consider such information to be material to their businesses or are not currently equipped to provide that information, due to the lack of resources, access to reliable information or other reasons. Depending on an issuer's financial resources, its GHG emissions and the materiality of those emissions, it could be challenging for it to develop a reporting system to reliably generate and verify GHG emissions data on an ongoing annual basis, especially if this work has never been done before or if the issuer does not perceive it to be material to its business. This will be especially true for Scope 3 GHG emissions disclosure, which as mentioned above will require issuers to collect and aggregate data from a number of third-parties. It will therefore be important to give issuers sufficient time to produce comprehensive, comparable and accurate data, as the alternative may result in inconsistent and unreliable reporting and create confusion for investors.

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[1] https://navigator.sasb.org/

[2] Millani's TCFD Disclosure Study: A Canadian Perspective, June 14, 2021, Millani Inc.

2. Requirement to use the GHG Protocol

In principle, we recognize and support the desire to provide a standardized GHG emissions reporting standard. However, as noted above, the Canadian market consists of a diverse array of issuers and the Greenhouse Gas Protocol published by the World Resources Institute and the World Business Council for Sustainable Development (the "GHG Protocol") may not be the most appropriate standard for every issuer. Furthermore, some issuers may already report, or be required to report, using different reporting standards that may not be completely aligned with the GHG Protocol.

As noted by the CSA, Canadian issuers who currently provide voluntary climate-related disclosures already report under a variety of frameworks, which is consistent with international data reported in the KPMG Survey of Sustainability Reporting 2020.[3] The reporting standards under these frameworks may not completely align with the GHG Protocol, meaning that issuers that currently voluntarily report GHG emissions data may need to expend significant resources either to align their disclosure with the GHG Protocol or explain how their use of a different reporting standard is comparable to the GHG Protocol.

Although we recognize that the GHG Protocol is widely used and recognized by the global investment community, issuers are best positioned to judge its relevancy and suitability for their operations. We believe that each issuer should have the flexibility to assess and select from internationally recognized GHG emissions reporting standards. While we appreciate that the CSA may want to facilitate consistency of reporting and comparability of issuers, in our experience, issuers in similar industries tend to adopt standards that are consistent with their peers, both because of competitive market forces and so that issuers themselves can objectively compare their operations to that of their competitors.

We also note that certain issuers are already subject to regulatory regimes that require them to report GHG emissions (typically, Scope 1 emissions) in accordance with specific regulatory criteria. In general, those regulatory regimes contain detailed and specific emissions reporting obligations. Issuers in many GHG emission intensive industries have already developed systems to comply with those obligations, and to generate emissions data that is already publicly available to investors. The work required to translate that Scope 1 reporting into the reporting format of the GHG Protocol will not necessarily benefit investors. Certain issuers may instead prefer to aggregate the reported emissions of facilities already subject to these regulatory requirements, with any other company-wide emissions that are not currently required to be reported.

A single universally accepted GHG emission reporting standard, including a generally accepted process for auditing or verifying reported emissions, may emerge. That standard may ultimately be a version of the GHG Protocol. However, for the time being, GHG emissions reporting is still an evolving field, especially as it relates to Scope 2 and 3 emissions. The methodologies recognized by the international investment community today may no longer be recognized in the future, and new, more appropriate methodologies may evolve. For example, the International Financial Reporting Standards Foundation (the "IFRS Foundation") has now published a Climate-related Disclosures Prototype, which introduces recommendations for a climate-related disclosures standard that would mandate the disclosure of Scope 1, Scope 2 and Scope 3 emissions.

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[3] The KPMG Survey of Sustainability Reporting 2020: The Time Has Come, December 2020, KPMG International Limited.

In light of the above, we would recommend that issuers have the option of choosing among one or more internationally recognized GHG emissions reporting standards – whether they are regulatory requirements or voluntary standards – as long as they explain why the chosen methodologies are appropriate in the circumstances. We also do not think issuers should be required to explain the differences between their chosen methodologies and the GHG Protocol as contemplated in the Proposed Instrument. Instead, issuers could be required to adopt consistent reporting methodologies from year-to-year, or explain how their methodologies have evolved and changed from the prior year, to allow reliable comparisons of data and measurement of progress over time.

The CSA should continue to monitor the progress towards the development of standardized disclosure frameworks. To the extent such requirements are adopted by the IFRS Foundation, the CSA should consider at that time whether the Proposed Instrument should be amended to align with such requirements to avoid any inconsistencies or duplication of compliance efforts by issuers.

3. Incorporation by Reference and Timing Considerations

Some issuers already disclose GHG emissions, often in the form of a standalone ESG or sustainability report or as prescribed by environmental regulators. Further, the terms of an issuer's green securities may require it to report periodically on the use of proceeds of those securities. We therefore agree with the CSA's proposal to allow information required to be disclosed under Item 4 of Form 51-107B to be incorporated by reference from another document. However, in recognition of the fact that some issuers already produce standalone TCFD-compliant reports and that other issuers may determine that a standalone report is the preferred disclosure format, we would propose that issuers be permitted to incorporate <u>all</u> information required by Forms 51-107A and 51-107B by reference from another document in addition to the information required by Item 4 of Form 51-107B. This approach would be consistent with the CSA's disclosure regime generally, which allows incorporation by reference except in very limited circumstances.

The Proposed Instrument contemplates that disclosure incorporated by reference must be filed at the same time as the AIF or MD&A, as applicable. This would have the effect of requiring non-venture issuers to disclose GHG emissions within 90 days of the issuer's financial year-end. However, this would create logistical challenges and increase compliance costs for issuers that are currently required to report on a different timeline. For example, specified industrial emitters are required to provide annual reports for covered Scope 1 GHG emissions on June 1st for the previous year's reporting period under each of the federal, Alberta, Ontario, and Québec reporting regimes. We therefore recommend that issuers be provided with the flexibility to determine when to publish the required GHG emissions disclosure, so long as such disclosure is provided at least annually and provided that the disclosure does not contain a misrepresentation as at the date of the applicable filing. This would allow issuers to continue reporting on the timeline required by any applicable legislation while ensuring that investors also have regular and recurring reporting of GHG emissions data.

We also recommend that the CSA expressly permit issuers to meet the disclosure requirements of the Proposed Instrument by publishing standalone reports so long as:

i. those reports are published on the issuer's website and filed on SEDAR (ideally, under a new filing category for ease of retrieval); and
ii. the issuer's AIF or annual MD&A:
    a. expressly incorporate the most current report by reference;
    b. similar to the short form prospectus regime, deem any report filed after the date of the AIF or annual MD&A as applicable, to be incorporated by reference; and
    c. clearly disclose how the report can be accessed.

Giving issuers the ability to have the most current report deemed to be incorporated by reference in their AIF or annual MD&A will address any inconsistencies in the timing of reporting while ensuring that investors have ready access to the most current information available. This would be consistent with the proposed amendments to National Instrument 51-102 *Continuous Disclosure Obligations* ("NI 51-102") to streamline reporting requirements and the general efforts by the CSA to modernize the disclosure regime.

4. Assurance Requirement

Over time, we believe some form of assurance on GHG emissions reporting would be valuable to investors who have limited independent ability to verify such disclosures. Moreover, some issuers that are required to or voluntarily report GHG emissions already seek external assurance from an independent third-party accredited verification body. However, at this stage, we believe it is premature for the CSA to mandate any assurance requirement. Although there are well-recognized emissions verification standards used in the market, including for regulatory compliance, further consideration should be given to how a third-party verification regime should be implemented for the purposes of securities filings. It will be important to first consult on issues such as which verification bodies can be used to provide assurance, how those bodies will be accredited and the level of assurance that they will need to provide.

5. Scenario Analysis

While we understand that scenario analysis – if done consistently by each issuer – may be helpful information for investors, the Canadian market has not yet developed in a manner that would support a requirement for this disclosure. As indicated by the CSA, the market has not yet matured to a stage where standardized assumptions and methodology are understood both among investors and issuers such that climate change scenario analysis disclosure would be consistent and comparable across issuers and industries. The market may develop in a manner that is supportive of this type of disclosure in the future, in which case a disclosure requirement related to scenario analysis should be re-considered, provided it is specific enough such that meaningful comparative disclosure can be provided amongst issuers. If and when that becomes the case, we would recommend a comply or explain regime for reasons similar to those related to GHG emissions disclosure described above.

6. Issuer Liability

The proposed climate change disclosure regime raises several issuer liability matters. Much of the information that issuers will need to consider disclosing in response to the proposed rules will be forward-looking in nature, in particular disclosure in respect of climate-related risks, opportunities and targets. Sections 132.1(1) and 138.4(9) of the *Securities Act* (Ontario) (the "Act") and similar acts in other provinces and territories provide an exception to issuer liability for a misrepresentation contained in forward-looking information if the issuer includes (i) a reasonable cautionary statement identifying the forward-looking information as such and material factors that may cause actual results to vary and (ii) a statement of the material facts or assumptions applied in making the statement, and the issuer had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information. However, section 4B.2(2)(a) of NI 51-102 also requires that future-oriented financial information or financial outlook be limited to a period for which the information can be reasonably estimated and the CSA has provided guidance in section 4A.8 of Companion Policy 51-102CP that in many cases the appropriate period will not go beyond the end of the issuer's next fiscal year. Given the long-term nature of climate change and its potential impacts, issuers will likely need to consider potential impacts and targets that go well beyond the end of the next fiscal year, which raises the question of whether the CSA's guidance is appropriate for this type of disclosure. The CSA may therefore wish to consider modifying that guidance to address the disclosure that may be required by the Proposed Instrument in particular. This has the potential of becoming a more significant issue if scenario analysis disclosure is mandated.

In its request for comments on the proposed climate change disclosure rules, the CSA asked whether similar disclosure should be required to be included in a long form prospectus. While we agree with the principle of aligning the climate change disclosure requirements in a long form prospectus with ongoing continuous disclosure and short form prospectus requirements (since we anticipate, for example, that investors in an initial public offering ("IPO") will be equally interested in this disclosure and that the market may start to expect this disclosure in an IPO prospectus), we believe doing so will require an expansion of the current safe harbour for liability for forward-looking disclosure. While section 132.1(1) of the Act, and similar acts in other provinces and territories provide an exception to issuer liability for a misrepresentation contained in forward-looking information in a prospectus, section 132.1(2) specifically excludes forward-looking information included in a document released in connection with an IPO. If the proposed climate change disclosure rules are extended to long form prospectuses without being modified, IPO issuers would be required to make forward-looking statements for which they would not receive the safe-harbour benefit of section 132.1(1).

The U.S. disclosure regime similarly does not provide a safe harbour for forward-looking information included in an IPO prospectus. For issuers conducting their IPO in Canada and the U.S. concurrently (including in reliance on the Multijurisdictional Disclosure System), this means that if the proposed rules apply to long-form prospectuses, they could potentially be exposed to U.S. litigation for disclosure that the Canadian rules require. If it becomes desirable for the CSA to include similar climate change disclosure rules in Form 41-101F1 *Information Required in a Prospectus*, we would therefore recommend that the CSA eliminate any real or perceived requirement to include forward-looking information from those rules unless the safe harbour for forward-looking information is extended to IPO prospectuses both in Canada and the U.S.

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Once again, we appreciate the opportunity to comment on the Proposed Instrument and would be happy to discuss any of our comments set out above with you by phone or by email.

Yours truly,

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