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TO:
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

Dear Canadian Securities Administrators,

Re: CSA Notice and Request for Comment, Proposed National Instrument 51-107 Disclosure of Climate-related Matters

Thank you for the opportunity to comment on proposed National Instrument 51-107 Disclosure of Climate-related Matters (NI 51-107) and its companion policy. The Canada Climate Law Initiative (CCLI) strongly supports NI 51-107 and its alignment with the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD). We believe it is critically important to finalize and bring into force NI 51-107 as soon as possible, given the urgent systemic risks that climate change poses to our capital markets. The CCLI supports the Canadian Securities Administrators' (CSA's) stated goals of improving issuer access to global capital markets; assisting investors to make more informed investment and engagement decisions by enhancing climate-related disclosures; facilitating an 'equal playing field' for all issuers through comparable and consistent disclosure; and removing the costs associated with reporting to multiple disclosure frameworks.[1]

The CCLI is a collaboration of the Centre for Business Law at the University of British Columbia and Osgoode Hall Law School at York University, and is the Canadian partner of the global Commonwealth Climate and Law Initiative.[2] CCLI examines the legal basis for corporate directors, officers, pension

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[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) at 2, (hereafter CSA Consultation Document).
[2] The Commonwealth Climate and Law Initiative was founded by Oxford University Smith School of Business and Enterprise, ClientEarth, and Accounting for Sustainability.

fiduciaries, and asset managers to manage and report on climate-related financial risks and opportunities, publishing guidance on effective climate governance. We work with 67 Canadian Climate Governance Experts to enhance climate governance best practices in corporate and financial institutions.

This submission makes nine key recommendations that will enhance the achievement of the CSA's objectives and better align with developments in climate disclosure globally:

1. Mandatory TCFD-aligned disclosure is critically important, and NI 51-107 should require disclosure of transition plans setting out the issuer's actions in transition towards net-zero emissions, including measuring and reporting progress annually.

2. 'Materiality' should be the threshold for what information must be reported under strategy, targets, and metrics, rather than criteria for not having to report at all.

3. Make disclosure of Scope 1, 2, and 3 emissions mandatory for all issuers; however, if 'comply-or-explain' is retained, require independent third-party verification as to why disclosure is not possible.

4. Embed climate-related disclosure in annual financial reporting documents.

5. Align prospectus disclosure with the climate-related continuous disclosure requirements.

6. Create a safe harbour for disclosure of current metrics and methodologies for measuring emissions.

7. Scenario analysis should commence now, but disclosure should be phased in over time.

8. Include venture issuers in climate-related disclosure requirements, phasing in requirements.

9. Review climate disclosure requirements bi-annually as the CSA moves on the path towards environmental, social, and governance (ESG) disclosures.

We discuss each of these recommendations in turn.

1. Mandatory TCFD-aligned disclosure is critically important, and NI 51-107 should require disclosure of transition plans setting out the issuer's actions in transition towards net-zero emissions, including measuring and reporting progress annually.

TCFD-aligned disclosure under the four core elements of governance, strategy, risk management, and targets and metrics is critically important for issuers to be able to identify and manage climate-related risks and opportunities, and for investors and other stakeholders to have decision-useful information. To help guide developments in climate-related financial reporting, the TCFD developed a set of fundamental principles for effective disclosure; specifically, disclosures should: represent relevant information; be specific and complete; be clear, balanced, and understandable; be consistent over time; be comparable among companies within a sector, industry, or portfolio; be reliable, verifiable,

and objective; and be provided on a timely basis.[3] These principles are fundamental to effective climate-related disclosure and are key to ensuring that Canada remains a competitive market for investments.

However, notably absent from proposed NI 51-107 is TCFD's recommended 'transition plans' as an important component of an issuer's strategy to address its climate-related risks and opportunities.[4] Transition plans set out targets and specific initiatives and actions supporting the issuer's transition towards net-zero carbon emissions. Given the urgency of climate-related financial risk and the need for transition this decade, proposed NI 51-107 should require issuers to develop net-zero transition plans, including disclosure of interim and final targets towards net-zero emissions, annual progress in meeting targets, and information on how the issuer intends to deliver on its targets. Disclosure of transition plans will allow users of financial statements to evaluate the issuer's progress towards targets over time. The TCFD recommends that issuers adopt science-based transition plans, its guidance offering accessible, clear factors to consider in disclosing science-based interim targets and how progress is being measured against these goals.

The TCFD recommends that issuers in countries that have made a net-zero commitment describe their plans for transitioning in alignment with national goals.[5] It recommends that organizations should report their initial transition plans, significant updates to the plans, and progress against their transition plans annually, comparing actions year over year.[6] The United Kingdom (UK) government has announced that it will require issuers "to publish transition plans that consider the government's net zero commitment or provide an explanation if they have not done so".[7] The UK Treasury reports that transition plans should set out high-level targets the issuer is using to mitigate climate risk, including GHG reduction targets such as a net-zero commitment, interim milestones, and actionable steps the issuer plans to take to meet those targets.[8] The UK Financial Conduct Authority (FCA) has extended climate-related financial disclosure requirements to more categories of issuers, incorporating the TCFD's new guidance on transition plans.[9] It reports that more structured disclosures and greater transparency across issuers should lead to better informed business, risk, and investment decisions towards a net zero economy and development of financial products that more reliably meet consumers' climate-related preferences.[10]

The Climate-related Disclosure Prototype prepared for the new International Sustainability Standards Board (ISSB) requires disclosure of transition plans supporting the issuer's transition to a low-carbon

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[3] TCFD, *Task Force on Climate-related Financial Disclosures Guidance on Metrics, Targets, and Transition Plans* (October 2021) at 8, P141021-2.pdf (fsb.org) (hereafter TCFD Guidance).
[4] TCFD Guidance, note 3 at 39.
[5] TCFD Guidance, note 3 at 38-45.
[6] TCFD Guidance, note 3 at 41.
[7] UK Treasury, "Guidance Fact Sheet: Net Zero-aligned Financial Centre", (2 November 2021), Fact Sheet: Net Zero-aligned Financial Centre - GOV.UK (www.gov.uk) (hereafter UK Treasury).
[8] UK Treasury, note 7.
[9] FCA, "Enhancing climate-related disclosures by standard listed companies", Policy Statement PS21/23 (December 2021), PS21/23: Enhancing climate-related disclosures by standard listed companies (fca.org.uk); FCA, "FCA's new rules on climate-related disclosures to help investors, clients and consumers" (17 December 2021), FCA's new rules on climate-related disclosures to help investors, clients and consumers | FCA (hereafter FCA). The rules are effective 1 January 2022. Asset managers and asset owners will have a phased implementation, with the rules initially applying to the largest firms and coming into effect for smaller firms one year later.
[10] FCA, note 9.

economy, including disclosing the impact of significant climate-related risks and opportunities on the organization's business, strategy, and financial planning.[11]

CCLI recommends that proposed NI 51-107 require transition plans with immediate, short, medium and long term targets, proposed actions the issuer is taking, and annual reporting on progress made. With approximately 90% of the world's economy now covered by a net-zero target,[12] having transparency on issuer transition plans should be a primary purpose of NI 51-107 in order to enhance access to capital, remain competitive in global capital markets, and make meaningful progress in the transition to a net-zero economy.

2. 'Materiality' should be the threshold for what information must be reported under strategy, targets, and metrics, rather than criteria for not having to report at all.

For two of the four reporting categories, governance and risk management, pursuant to proposed NI 51-107 issuers will report regardless of materiality, as recommended by the TCFD. Reporting issuers will be required to describe their governance of climate-related risks and opportunities, including the board's oversight and management's role in assessing and managing climate-related risks and opportunities.[13] In terms of risk management, issuers will be required to describe the issuer's processes for identifying and assessing climate-related risks, the issuer's processes for managing climate-related risks, and how processes for identifying, assessing, and managing climate-related risks are integrated into the issuer's overall risk management.[14] CCLI strongly supports these requirements.

CCLI also recommends that strategy, targets, and metrics should be reported irrespective of materiality. Currently, proposed NI 51-107 only requires disclosure if strategy, targets, and metrics are material.[15] The criteria or 'cutoff' of issuers having to report only where material is misplaced and will tend to incentivize issuers to try to establish they fit in the category of 'not material' in order to avoid disclosure requirements. Investors want to know that issuers have conducted a materiality assessment and how they undertook this assessment, such as the parameters and references used for this process. Such disclosure gives investors a measure to rank the carbon intensity of their investment and compare investments in their portfolio of holdings. It provides investors with line of sight to an issuer's climate risk trajectory. Issuers should be reporting all four core elements of the TCFD recommendations, leaving them the flexibility to report why or why not climate is material to strategy, targets, and metrics. In turn, this disclosure will give investors greater confidence that the directors and officers are actively turning their attention to targets and metrics and to the strategies needed for the issuer to manage climate-related risks and opportunities.

[11] IFRS Foundation, Climate-related Disclosures Prototype, Developed by the Technical Readiness Working Group for the ISSB (November 2021), Technical Readiness Working Group, chaired by the IFRS Foundation, to provide recommendations to the International Sustainability Standards Board for Consideration, Climate-related Disclosures Prototype, November 3, 2021 (hereafter Climate-related Disclosures Prototype).
[12] Net Zero Climate, 'Global Net Zero Progress' (2022), Progress Tracking - Net Zero Climate.
[13] Proposed Form 51-107A Climate-related Governance Disclosure.
[14] Proposed Form 51-107B Climate-related Strategy, Risk Management and Metrics and Targets Disclosure, section 2 (hereafter Form 51-107B).
[15] Form 51-107B, instructions. Material is defined as: "Would a reasonable investor's decision whether or not to buy, sell or hold securities in the issuer likely be influenced or changed if the information in question was omitted or misstated? If so, the information is likely material."

The same criteria as proposed by the CSA would still be used: Issuers must describe the climate-related risks and opportunities the issuer has identified over the short, medium, and long term and their impact on the issuer's businesses, strategy, and financial planning;[16] and issuers are to disclose the metrics used by the issuer to assess climate-related risks and opportunities in line with its strategy and risk management process, and describe the targets used by the issuer to manage climate-related risks and opportunities and the issuer's performance against these targets.[17] However, the materiality of these factors would be included in the disclosures, including a rationale as to why an issuer has concluded that some aspect of these factors is not material to the issuer, the basis on which it has formed this conclusion, and third-party assurance that the method used to assess materiality is appropriate.

If issuers are required to disclose governance, strategy, risk management, and metrics and targets irrespective of materiality, they can still conclude, based on duly diligent and reasonable assessment that they do not need a comprehensive strategy to manage climate-related risks and opportunities and disclose to the market the basis for and the methodology used to reach that conclusion. Disclosure of climate-related metrics should be consistent with other information included in their financial filings. The Sustainability Accountability Standards Board (SASB) reports that climate change is material in nearly every industry of the 77 industries it monitors. "Because of this ubiquity, investors cannot diversify away from climate risk; instead, they must focus on managing it—and encouraging portfolio companies to manage it—in all its forms."[18] Given how ubiquitous the risks are across all sectors, only a minority of issuers would have nothing to report.

3. Make disclosure of Scope 1, 2, and 3 emissions mandatory for all issuers; however, if 'comply-or-explain' is retained, require independent third-party verification as to why disclosure is not possible.

CCLI supports the proposal to require disclosure of Scope 1, 2, and 3 emissions; however, we do not support the 'comply-or-explain' approach. Metrics on emissions are critically important to issuers meeting their responsibilities to reduce emissions in line with government policies and are key considerations for investors when they assess how the issuer is managing climate risks and opportunities and making progress in decarbonization. There is now broad scientific, financial, and regulatory consensus that emissions need to be reduced in order to prevent the devastating economic and social consequences associated with global warming.

The TCFD's October 2021 guidance recommends that all organizations should disclose absolute Scope 1 and Scope 2 GHG emissions independent of a materiality assessment and disclose Scope 3 GHG emissions subject to materiality; however, TCFD also encourages all organizations to disclose Scope 3 emissions.[19] Requiring disclosure of Scope 1, 2, and 3 emissions will assist in leveling the playing field for issuers, given the different types of emissions in different sectors. For example, 95% of retail issuers' emissions are Scope 2 and 3 emissions,[20] and not all emissions are captured in current reporting. Issuers in all sectors should be as transparent as possible in their efforts to manage climate-related financial risks and opportunities.

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[16] Form 51-107B, section 1.
[17] Form 51-107B, section 2.
[18] Value Reporting Foundation, SASB Standards, "SASB Climate Risks Technical Bulletin 2021" (April 2021) at 5, Climate-Risk-Technical-Bulletin2021-042821.pdf (sasb.org).
[19] TCFD Guidance, note 3 at 80.
[20] Janis Sarra, *Retail's Route to Net-zero Emissions, The Canadian Retail Sector and Effective Climate Governance* (CCLI, 2022), https://ccli.ubc.ca/wp-content/uploads/2022/01/Retails-Route-to-Net-zero-Emissions.pdf.

CCLI accepts that a short transition period may be necessary to allow issuers to acquire the expertise to report Scope 3 emissions across the value chain. We appreciate that Scope 3 emissions are more difficult to measure and will require issuers to seek emissions reporting from their suppliers and other companies in their value chain. However, mandating the disclosure now for all issuers will be an aid to companies identifying Scope 3 emissions because suppliers that are issuers will also be reporting their emissions and because issuers will be able to rely on the reporting mandate to embed emissions reporting in their supply and service contracts across the value chain.

Securities law developments in the UK, New Zealand, and the European Union (EU) are all including Scope 1, 2, and 3 emissions reporting, and if our capital markets are to remain competitive, regulation must not lag developments internationally. The new ISSB Climate-related Disclosures Prototype recommends disclosure of "greenhouse gas emissions—in terms of absolute gross Scope 1, Scope 2 and Scope 3, expressed as metric tonnes of CO_2 equivalent, in accordance with the Greenhouse Gas Protocol, and emissions intensity."[21] The ISSB's climate standard is expected to be finalized in 2022, and thus timing works with the proposed timing of CSA mandated disclosures. Climate change is a systemic risk to the Canadian economy and all issuers should be required to disclose Scope 1, 2, and 3 emissions annually. The safe harbour proposed in our recommendation 6 addresses any challenges for accuracy in quantification of Scope 3 emissions in the transition period, still allowing for qualitative disclosures.

The Greenhouse Gas Protocol (GHG Protocol) has become the global reporting standard for GHG emissions calculations and should be required pursuant to NI 51-107 to create consistency of Canadian issuer reporting with global market expectations. The GHG Protocol underpins the emissions reporting in all of the widely-used global voluntary reporting standards, including SASB and TCFD, and has been integrated into the Climate-related Disclosures Prototype issued to support the work of the ISSB. We also note that the GHG Scope 3 Protocol has been in use for more than a decade, and has recently been enhanced to reflect growing expertise and accessible technologies in measuring Scope 3 emissions.[22] Use of the GHG Protocol will facilitate consistency and comparability, and will reduce costs and prevent fragmentation.

The vast majority of sectors are covered by the GHG Protocol and thus it should be the common reporting standard; CCLI does not recommend allowing issuers to report to a different standard at this time. However, we do recommend that an issuer should be able to seek permission to augment GHG Protocol disclosure for very specific measures that are material to its reporting of emissions, such as adding timberland investments in carbon accounting, where the issuer provides independent third-party assurance of accuracy and materiality. We note that the Partnership for Carbon Accounting Financials (PCAF) aligns with the GHG Protocol and offers additional tools for ease of measuring Scope 1, 2, and 3 emissions in the financial sector.[23] We also note from the Appendix to

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[21] Climate-related Disclosures Prototype, note 11.

[22] The Corporate Value Chain (Scope 3) Accounting and Reporting Standard (2011) and Corporate Value Chain (Scope 3) Accounting and Reporting Standard Supplement to the GHG Protocol Corporate Accounting and Reporting Standard (2021), Corporate Value Chain (Scope 3) Standard | Greenhouse Gas Protocol (ghgprotocol.org).

[23] Partnership for Carbon Accounting Financials (PCAF, 2020), The Global GHG Accounting and Reporting Standard for the Financial Industry (carbonaccountingfinancials.com). Also of note is that the Science Based Targets Initiative recommends that if an issuer's Scope 3 emissions are 40% or more of total Scope 1, 2, and 3 emissions, the company must set a target for emissions reductions, and all issuers are encouraged to disclose Scope 3 emissions; Science Based Targets Initiative, *SBTi Criteria and Recommendations TWG-INF-002 | Version 5.0* (October 2021), at C4, C9, C18, and 6, also recommending

this letter, which is a summary of submissions made to the United States Securities and Exchange Commission (SEC) regarding mandatory climate-related disclosure, published by the Commonwealth Climate and Law Initiative, that there is substantial investor demand for information on issuers' Scope 1 to 3 emissions.[24]

Elimination of 'or explain' in the disclosure requirements would align with New Zealand's recently enacted climate financial disclosure legislation.[25] Mandatory reporting will avoid a two-tier reporting system that undermines the goals of the proposed instrument.

If the CSA decides to maintain its 'comply-or-explain' approach, there should be safeguards added to prevent issuers from abusing this exemption. CCLI recommends that the CSA require independent third-party assurance as to why disclosure is not possible, which is a higher threshold than currently required under the proposed instrument.[26] The model for this assurance was the standard proposed in New Zealand before its Parliament dropped the 'or explain' part of its disclosure legislation. The original draft legislation proposed allowing the 'or explain' exceptions from compliance only where rigorous requirements are met: it required an entity to file a statement that it has 'reasonably determined' in accordance with applicable climate standards that the 'relevant activities are not materially affected by climate change'; required an explanation as to how the entity reached that determination; and required the entity to obtain an assurance report from a qualified climate disclosure assurance practitioner in relation to its determination that climate risk is not material.[27]

Finally, with respect to question 5 in the consultation document, a number of our Canadian Climate Governance Experts that work with issuers have advised that there is not a problem aligning the timing of reporting GHG emissions under existing federal or provincial legislation filing deadlines to the requirements in proposed NI 51-107.

4. Embed climate-related disclosure in annual financial reporting documents.

The investor community has long been concerned that separate sustainability reports are not sufficient because methodologies and reporting are inconsistent and easily changed. The CSA recognized this concern regarding lack of completeness, consistency, and comparability in its consultation document.[28] We recommend that instead of giving issuers the option of a second document, which is not required to be comparable year over year (or reconciled if not), that climate-related disclosures form part of annual financial filing statements. There should be some form of independent assurance on GHG emissions reporting to ensure accuracy, completeness, and consistency of GHG emissions data. Such assurance will enhance governance within the issuer and be critically important for investors, regulators, and other stakeholders. Locating climate disclosure in the financial statements means that they receive audit assurance.

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that all companies involved in the sale or distribution of natural gas and/or other fossil fuels should be required to set Scope 3 targets, SBTi Criteria and Recommendations TWG-INF-002, V. 5.0.

[24] The SEC rule is expected to be released in March 2022.

[25] New Zealand Parliament, *Financial Sector Climate-related Disclosures and Other Matters) Amendment Act 2021 (*2021/39), Royal Assent 27 October 2021.

[26] CSA Consultation Document, note 1 at 7, 8, 10 and Form 51-107B.

[27] For a discussion, see Janis Sarra, *On the Horizon – Briefing note on TCFD-aligned mandatory disclosure in New Zealand* (CCLI 2021), On-the-Horizon-—-Briefing-note-on-TCFD-aligned-mandatory-disclosure-in-New-Zealand.pdf (ubc.ca) and the references therein.

[28] CSA Consultation Document, note 1 at 2.

We note that the CSA published proposed amendments to NI 51-102 Continuous Disclosure Obligations (NI 51-102) in 2021 that contemplate amendments to the continuous disclosure regime to combine the financial statements, management discussion and analysis (MD&A),[29] and Annual Information Forms (AIF)[30] into one reporting document called the 'annual disclosure statement' for annual reporting purposes.[31] The proposed annual disclosure statement is the appropriate place to embed climate-related disclosures, offering issuers, investors, and other users of financial statements a streamlined and more accessible disclosure format.

In the interim, climate-related disclosure should be required to be disclosed in the financial statements, including the AIF and/or MD&A,[32] quantified where possible in the financials, with an explanation in the notes to the financial statements. In this respect, the International Financial Reporting Standards (IFRS) Foundation has offered guidance on quantifying climate-related matters in financial statements.[33] Where risks cannot be quantified, they should still be disclosed annually, including reasons why quantification is not possible. By including disclosure in the financial statements, issuers will disclose consistently on a year over year basis, there will be certifications by chief executive officers (CEO) and chief financial officers (CFO) of issuers, as required by NI 52-109,[34] and external assurance by auditors.[35] Embedding disclosure in the financial statements will measurably enhance the transparency, consistency, and comparability of disclosures.

CCLI also believes that the CSA should consider requiring issuers to disclose how oversight and management of climate-related risks and metrics have been built into executive remuneration. The TCFD guidance recommends linking a portion of executive compensation with achieving climate goals;[36] and the Climate-related Disclosures Prototype recommends disclosure of how performance metrics and oversight of targets and monitoring of progress in meeting them are incorporated into remuneration policies.[37] It is important for the CSA to align these requirements with international proposed standards.

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[29] Form 51-102F1 Management's Discussion and Analysis.

[30] Form 51-102F2 Annual Information Form.

[31] CSA, *Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Other Amendments and Changes Relating to Annual and Interim Filings of Non-Investment Fund Reporting Issuers*, (May 2021), Proposed Amendments to National Instrument 51-102 Continuous Disclosure Obligations and Other Amendments and Changes Relating to Annual and Interim Filings of Non-Investment Fund Reporting Issuers and Seeking Feedback on a Proposed Framework | OSC. CSA, NI 51-102 Continuous Disclosure Obligations, 51-102 Continuous Disclosure Obligations | BCSC (hereafter NI 51-102).

[32] Proposed NI 51-107, Part 2, section 3.(1) If management of a reporting issuer solicits a proxy from a security holder of the issuer for the purpose of electing directors to the reporting issuer's board of directors, the issuer must include in its management information circular the disclosure referred to in Form 51-107A. (2) A reporting issuer that does not send a management information circular to its security holders must include the disclosure referred to in Form 51-107A in its AIF, or if it does not file an AIF, in its annual MD&A. Proposed NI 51-107, Part 2, section 4.(1) A reporting issuer must include the disclosure referred to in Form 51-107B in its AIF, or if it does not file an AIF, in its annual MD&A. (2) A reporting issuer that includes the disclosure of GHG emissions referred to in Form 51-107B in its AIF or annual MD&A must use a GHG emissions reporting standard to calculate and report its GHG emissions.

[33] IFRS, Effects of climate-related matters on financial statements (November 2020), https://www.ifrs.org/content/dam/ifrs/supporting-implementation/documents/effects-of-climate-related-matters-on-financial-statements.pdf.

[34] National Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings, 52-109 - Certification of Disclosure in Issuers' Annual and Interim Filings [NI] | BCSC.

[35] NI 51-102, Part 4.1(2), note 31.

[36] TCFD Guidance, note 3.

[37] Climate-related Disclosures Prototype, note 11 at proposed governance disclosure standard 4(f).

5. Align prospectus disclosure with the climate-related continuous disclosure requirements.

Climate-related disclosure should be included in Form 41-101F1 Information Required in a Prospectus. The objective of a prospectus is to provide information concerning the issuer that an investor needs in order to make an informed investment decision, based on an assessment of materiality.[38] It is another core document that protects the integrity of Canadian capital markets. Since proposed NI 51-107 requires disclosure of governance and risk management irrespective of materiality, requirements for raising capital through a prospectus need to align, as this information is essential to investment decisions made pursuant to a prospectus.

CCLI's view also is that the prospectus should disclose strategy and metrics in a form that aligns with other prospectus disclosure requirements. Form 41-101F1 sets out additional disclosure requirements for venture issuers and initial public offerings (IPO) for venture issuers without significant revenue. These provisions protect investors and need to include climate-related disclosures. Form 41-101F1 should be amended accordingly. The timing of these requirements should align with the timing of NI 51-107 disclosure so that there is a seamless integration of disclosure of climate-related matters in all aspects of the regulatory disclosure framework, avoiding confusion.

6. Create a safe harbour for disclosure of current metrics and methodologies for measuring emissions.

In order to make our recommendations 1 to 5 possible in the immediate-term, CCLI recommends a time-limited 'safe harbour' for disclosures that set out quantification of emissions and disclose the financial implications of business plans to reduce emissions and shift economic activity. Such a safe harbour would be based on the certifying officers and the issuer's board of directors being duly diligent in their efforts to disclose, including attesting that they have a reasonable basis for the methodologies used; and based on an acknowledgement that any material change in results will be reported to the market as soon as practicable or at least within 10 days of the date on which the change occurs, as required by NI 51-102.[39]

The current safe harbours in NI 51-102 Continuous Disclosure Obligations for forward-looking information (FLI) and future-oriented financial information (FOFI) are sufficient to cover FLI and FOFI in respect of forward-looking and future-oriented climate-related disclosures.[40] Part 4A of NI 51-102 requires the issuer to have a reasonable basis for the FLI; it must identify FLI as such and caution users that actual results may vary; it must identify material risk factors that could cause actual results to differ materially from the FLI; must state the material factors or assumptions used to develop the FLI;

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[38] Form 41-101F1 Information Required in a Prospectus, at 1.

[39] NI 51-102, Part 7 and Form 51-102F3 Material Change Report, note 31.

[40] NI 51-102 defines future-oriented financial information (FOFI) as "forward-looking information about prospective financial performance, financial position or cash flows, based on assumptions about future economic conditions and courses of action, and presented in the format of a historical statement of financial position, statement of comprehensive income or statement of cash flows". It defines forward-looking information as ""forward-looking information" means disclosure regarding possible events, conditions or financial performance that is based on assumptions about future economic conditions and courses of action and includes future-oriented financial information with respect to prospective financial performance, financial position or cash flows that is presented as a forecast or a projection." NI 51-102, Part 1.1, note 31.

and describe the reporting issuer's policy for updating the FLI.[41] Part 4B specifies that a reporting issuer must not disclose FOFI or a financial outlook unless the FOFI or financial outlook is based on assumptions that are reasonable in the circumstances.[42] The disclosure must be limited to a period for which the information can be reasonably estimated; use the accounting policies the reporting issuer expects to use to prepare its historical financial statements for the period covered by the FOFI; disclose as required by Part 4A; the issuer must state the date management approved the FOFI or financial outlook if the document containing the FOFI or financial outlook is undated; and must explain the purpose of the FOFI or financial outlook and caution readers that the information may not be appropriate for other purposes.[43]

These safeguards effectively cover future-oriented and forward-looking climate-related disclosure and do not need amendment. However, a safeguard for disclosing current emissions and financial information based on available technologies and methodologies that continue to improve would make sense for a temporary interim period. Such a safeguard will incentivize issuers and their officers to make best efforts to be accurate and comprehensive. The language could mirror the above provisions, particularly the cautionary language, the material risk factors, transparency in the assumptions and methodologies used to develop the disclosure, officer certification of the rigour of the disclosure given existing information and methodologies, and audit assurance of the process.

We note that the Expert Panel on Sustainable Finance recommended a safe harbour for climate-related financial disclosures made in good faith.[44] The Expert Panel noted that such a safe harbour rule would protect directors and officers from legal or regulatory liability over reported information, contingent on the proof of adequate processes and controls for reporting rigour, and would encourage increased reporting while climate information continues to develop.[45]

7. Scenario analysis should commence now, but disclosure should be phased in over time.

Proposed NI 51-107 does not require scenario analysis. The TCFD recommends disclosure that describes the resilience of an issuer's strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario.[46] Scenarios are not a prediction, but rather, are a tool that covers a range of possible future development of drivers of climate change and implications for the issuer. The TCFD recommends scenario analysis based on climate science, and as part of their disclosures, issuers should consider providing a description of how climate scenario analysis influenced the determination of targets and broader strategy and risk management goals. Such testing assists issuers in assessing the resilience of their strategies in respect of climate-related risks and opportunities, taking into consideration transition to a net-zero economy. CCLI's view is that it is difficult to see how issuers can strategically plan absent some scenario analysis.

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[41] NI 51-102, Part 4A Forward-Looking Information, note 31.
[42] NI 51-102, Part 4B FOFI and Financial Outlooks, note 31.
[43] NI 51-102, Part 4B FOFI and Financial Outlooks, note 31.
[44] Expert Panel on Sustainable Finance, *Final Report, Mobilizing Finance for Sustainable Growth* (2019), recommendation 6.2, Final Report of the Expert Panel on Sustainable Finance: Mobilizing Finance for Sustainable Growth, Her Majesty the Queen in Right of Canada, as represented by the Minister of Environment and Climate Change, 2019 (hereafter Expert Panel).
[45] Expert Panel, note 44 at 19.
[46] TCFD Guidance, note 3 at 38-45.

A possible better route is to require scenario analysis as part of a required transition plan, but allow disclosure of results to be phased in over a specified period, commencing with disclosing that scenario analysis is being undertaken, the methodologies used, and key factors that have influenced the issuer's management of climate-related risks and opportunities.

Even that basic level of disclosure will inform investors that efforts are being made to enhance risk management and strategic planning. Once scenario tools become more standardized, the CSA can revisit the scope of disclosure, such as disclosure of outcomes of the scenarios. Important to note is that the ISSB's Climate-related Disclosures Prototype includes disclosure of scenario analysis, including how the analysis has been conducted, which scenarios were used for the assessment and the sources of the scenarios used, an explanation of why the entity believes the chosen scenarios are relevant to assessing its resilience to climate-related risks and opportunities, the time horizons over which the analysis has been conducted, the inputs into the scenario analysis, management's assumptions about the way the transition to a lower-carbon economy will affect the entity, and the results of the analysis together with an assessment demonstrating how the entity's financial position and financial performance supports the resilience of the entity's strategy and business model over the short, medium, and long term.[47] It is therefore likely that most Canadian issuers will be required to undertake disclosure on scenario analysis within two years and NI 51-107 should be aligned at the outset with these developments.

Publicly-available scenario guidance is already being developed internationally. The Intergovernmental Panel on Climate Change (IPCC) has five new illustrative scenarios, all of which indicate that temperatures are going to continue to rise for 20 years under even the lowest emissions scenarios.[48] The Bank of Canada and the Office of the Superintendent of Financial Institutions (OSFI) have released results of their pilot testing of scenario analysis with six financial institutions, recommending that scenario analysis is a useful tool for identifying potential risks in an environment of considerable uncertainty.[49] The report offers a set of global climate transition scenarios to capture a range of risk outcomes that could be stressful to the Canadian economy and the financial system. The Basel Committee on Banking Supervision has published guidance on scenario analysis and stress-testing methodologies for the financial sector.[50] The Network for the Greening of the Financial System has developed a global set of scenarios and published guidance on conducting such analysis to identify, assess, and understand climate risks.[51] The International Energy Association has issued scenarios designed to achieve specific energy outcomes.[52] The UK Climate Financial Risk Forum has issued guidance on how to use scenario analysis to assess financial impacts and inform strategy and

[47] Climate-Disclosures Prototype, note 11 at para 10.

[48] Intergovernmental Panel on Climate Change, *Climate Change 2021,The Physical Science Basis* (IPCC, 2021), IPCC_AR6_WGI_SPM_final.pdf.

[49] Bank of Canada and Office of the Superintendent of Financial Institutions, *Using Scenario Analysis to Assess Climate Transition Risk Final Report of the BoC-OSFI Climate Scenario Analysis Pilot* (January 2022), Using Scenario Analysis to Assess Climate Transition Risk (bankofcanada.ca).

[50] Basel Committee on Banking Supervision, *Climate-related financial risks – measurement methodologies* (April 2021), Climate-related financial risks - measurement methodologies (bis.org).

[51] Network for the Greening of the Financial System, *Scenarios in Action: a progress report on global supervisory and central bank climate scenario exercises* (October 2021), scenarios-in-action-a-progress-report-on-global-supervisory-and-central-bank-climate-scenario-exercises.pdf (ngfs.net).

[52] IEA, "World Energy Outlook 2021 Four Scenarios" (2021), Understanding WEO Scenarios – World Energy Model – Analysis - IEA.

business decisions.[53] The UK Department for Business, Energy, and Industrial Strategy (BEIS) has introduced new regulations requiring climate-related financial disclosures pursuant to the *Companies Act 2006*, also based on TCFD, including an expectation that companies will disclose the outcome of at least qualitative scenario analysis.[54] The breadth of guidance that is now publicly available means issuers can begin to conduct such analysis.

It is important that the CSA encourage issuers to build capacity to undertake scenario analysis from the outset. The CSA could provide a valuable service by developing some simple baseline user-friendly scenarios to assist issuers in getting started, publishing them through the forms issued to support NI 51-107. The CSA's guidance would enhance the usefulness, consistency, and comparability of scenario analysis and assist in controlling costs.

8. Include venture issuers in climate-related disclosure requirements, phasing in requirements.

It is important to include venture issuers in the new climate-related disclosure requirements of the proposed instrument. Proposed NI 51-107 contemplates a two-step implementation of disclosure requirements for issuers and venture issuers, delaying venture issuer compliance for two years after requirements for all other issuers.[55] As proposed currently, venture issuers will be required to disclose in line with all four pillars of the TCFD for the financial year ending December 31, 2025, thus, due in April 2026.[56] Our concern is that another four years is too long a period of deferral. At a time when Canada is experiencing increasing frequency of climate-related catastrophes and facing risk of an irreversible tipping point for the planet, a four-year delay is too late to meaningfully shift Canadian capital markets to respond. There has been considerable notice in Canadian capital markets for at least five years that disclosure will be required, and globally, issuers have had notice for well over a decade. Delaying all disclosure by venture issuers on the current proposed timeframe will impede their ability to raise capital, as investors will not be able to assess climate-related risks and opportunities; and it will place the financial burden of compliance on venture issuers all at once four years from now.

A better approach is to phase in requirements for venture issuers. They should be required to disclose governance and risk management one year after NI 51-107 comes into force, as is currently proposed for non-venture issuers. This disclosure would then form the foundation to venture issuers developing capacity to disclose strategy, metrics, and targets two years later. This approach phases in disclosure requirements in a way that recognizes limited resources and expertise. The CSA could issue user-friendly forms that assist venture issuers in disclosing governance and risk management, and then later develop user-friendly tools to scale up disclosure of the other two TCFD core elements.

Understanding how venture issuers are approaching their governance and risk management of climate is fundamental to transitioning Canadian capital markets and the economy more generally, allowing venture issuers to develop transition plans and the capacity in the future to also measure,

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[53] Climate Financial Risk Forum, *Climate Financial Risk Forum Guide 2021 Scenario Analysis* (October 2021), Climate Financial Risk Forum Guide 2021: Scenario Analysis (fca.org.uk) and Climate Financial Risk Forum, "Climate Financial Risk Forum, Scenario Analysis Chapter" (June 2020), Climate Financial Risk Forum Guide 2020 - Scenario Analysis chapter (fca.org.uk).

[54] Subject to parliamentary approval, the rules will come into force for accounting periods beginning on or after 6 April 2022.

[55] CSA Consultation Document, note 1 at 9.

[56] CSA Consultation Document, note 1 at 10.

manage, and report strategy, metrics, and targets. Such an approach also aligns more closely with efforts by the Toronto Stock Exchange (TSX) and TSX Venture Exchange (TSXV) to embed disclosure requirements in such a way as to facilitate the move by venture issuers to the main board.

The European Commission is extending its sustainability disclosure requirements to small and medium enterprises, developing proportionate disclosure standards that align with their resources and allow them to develop expertise in reporting transition of their activities to a sustainable economy.[57] The Canadian Expert Panel on Sustainable Finance suggested a phasing-in of requirements for venture issuers by market cap.[58] Effective 2022, the UK government is extending TCFD-aligned climate-related disclosure to issuers on the Alternative Investment Market (AIM), its corresponding venture market, based on numbers of employees.[59] For Canadian capital markets, it makes more sense that any phasing in of reporting requirements for venture issuers be based on the nature of their activities and the material risk they face from climate change, commencing with the highest emitting sectors.

We appreciate that venture issuers will need time to achieve full capacity to disclose targets and metrics for emissions; however, by their very nature, venture issuers often have less diversified sources of capital, and less governance and risk management structures or experience. It is key that they build this capacity as soon as possible, as investors are increasingly seeking information on what the material risks are to the business.

9. Review climate disclosure requirements bi-annually as the CSA moves on the path towards environmental, social, and governance (ESG) disclosures

Canadian securities regulators need to keep pace with regulatory developments in international capital markets. It is critically important to set clear expectations regarding climate-related disclosure now, but to provide a mechanism that allows Canada to continue to align its requirements with global developments. CCLI recommends that the CSA review and update the climate-related disclosure regime bi-annually for the next decade, given the rapid pace of innovations in metrics methodologies and understanding the systemic risks associated with climate change. CCLI supports aligning CSA disclosure requirements with the ISSB climate-related accounting standards expected to be finalized this year. Regular review will also allow disclosure requirements to set standards for disclosure of scenario analysis as methodologies become standardized and comparable.

As the CSA noted in question 18 of the consultation document, the next increasingly important factor to evaluate continuous disclosure requirements are ESG risks that are material to issuers. We agree that securities regulators should be considering new disclosure requirements on a priority basis in the future, to align Canada with international developments.[60] There are a growing number of

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[57] European Commission, Corporate Sustainability Reporting Directive (2021), Corporate Sustainability Reporting Directive proposal (europa.eu).
[58] Expert Panel, note 44 at 18.
[59] UK Department for Business, Energy & Industrial Strategy (BEIS), Draft regulation on climate-related financial disclosures (5 November 2021), UK government publishes draft legislation on climate-related financial disclosures (iasplus.com). As well as large private companies and limited liability partnerships with more than 500 employees and a turnover of more than £500 million. Some commercial companies with a UK premium or standard listing will be subject to both the Listing Rule and the *Companies Act* obligations. FCA, note 9.
[60] See for example, Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA

regulatory frameworks and best practices that are available to aid the CSA in its deliberations, and we encourage the CSA to track developments with the new ISSB, which plans to issue global sustainability standards shortly after development of the climate disclosure standard.[61] The European Commission is developing the next generation of materiality considerations, moving towards the concept of 'double materiality', which adds a second dimension to materiality in having issuers disclose the social and economic impact of their activities on stakeholders.[62]

The Taskforce on Nature-Related Financial Disclosures is developing a risk management and disclosure framework for companies to report and act on nature-related risks, based on the TCFD framework.[63] It will be an important contribution to enhancing disclosure that accounts for protection of biodiversity.

As with the ISSB and IFRS Foundation's announced partnerships with the Value Reporting Foundation (SASB standards), the Climate Disclosure Standards Board, and the International Organization of Securities Commissions (IOSCO), the CSA can learn from developments in standardizing ESG disclosure as it moves to expand sustainability reporting beyond climate-related disclosures to other material systemic ESG issues. The CSA will also want to develop ESG disclosure requirements that reflect Canada's ratification of the United Nations Declaration on the Rights of Indigenous Peoples.[64] The development of new sustainability disclosure requirements should also adopt the TCFD core elements of governance, risk management, strategy, and metrics and targets. Investors need to understand how a company is identifying, measuring and managing its material ESG risks and opportunities, including, as an immediate systemic risk, climate change.

We emphasize, however, that climate change is such a pressing and systemic risk that there should be no delay in moving forward on NI 51-107.

Conclusion

CCLI applauds the CSA's proposal to align climate-related disclosure with international regulatory developments. All users of financial statements need to have reliable, relevant, clear, and comparable information on climate-related risks and opportunities. Our recommendations will further enhance the proposed framework and better align Canadian capital markets with developments internationally. Please contact us if we can be of any assistance in your efforts.

Sincerely,
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relevance) PE/20/2020/INIT. The Taxonomy Regulation First Delegated Act on sustainable activities for climate change adaptation and mitigation entered into force 1 January 2022.
[61] Climate-related Disclosures Prototype, note 11 at 9.
[62] European Commission, note 58.
[63] Taskforce on Nature-Related Financial Disclosures (2021), TNFD – Taskforce on Nature-related Financial Disclosures.
[64] *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14.

Appendix

Commonwealth Climate and Law Initiative

Review of public comments to US Securities and Exchange Commission regarding proposed climate change disclosures

Summary of review of public comments to US Securities and Exchange Commission regarding proposed climate change disclosures

1 Introduction

1.1 This document is intended to capture high-level findings of a review of the public comments submitted to the US Securities and Exchange Commission (SEC) in response to its request for comments in respect of potential climate change related disclosures.

1.2 The purpose of the review was to identify legal arguments made in the submissions in favor of and against the proposed disclosures. Each comment (published by the SEC as of 13 January 2022) has been reviewed by a team of law students and coded to identify:

A) The type of commentor;

B) Whether the commentor is 'For', 'Against' or 'Neutral' on whether the SEC mandated climate change disclosures; and

C) The type of argument used by the commentor.

1.3 The review was subject to a quality control process. However, there may be some variability in the coding of the comments.

1.4 This document represents a good-faith attempt to summarize the detailed results of our review, and is intended to capture high-level findings only. It is not intended to be a full analysis of the contents of the comments. It is not, and are not intended to be, legal advice. Nor does it contain an analysis of the merits of the legal arguments made in the submissions in favor of and against the proposed disclosures.

1.5 This document has been prepared by the Commonwealth Climate and Law Initiative (CCLI). It has been provided to interested stakeholders and may assist with their own research, analysis and policy programs. Efforts have been made to ensure this document and the results of our review are accurate and free from errors and omissions; however, this documents is not intended to be relied upon and readers are advised to conduct their own research and analysis.

1.6 In case of any questions or comments, please contact Professor Cynthia Williams at cawillia@illinois.edu or Alex Cooper at alex@commonwealthclimatelaw.org.

2 General findings

2.1 The majority of comments submitted are in support of the SEC's proposed rulemaking; of a total of 579 comments (as of 13 January 2022), 409 were in favor, 107 were against, and 51 were neutral. The remaining 12 comments were anomalous (duplicates, unclear or apparently erroneously submitted). It should be noted that the degree to which each commentor was in favor of further disclosure will vary; for example, some commentors are in favor only to the extent that further disclosure rules are limited to information which is deemed material, a large number request a mixture of a mandatory baseline of information (such as scope 1-3 emissions) and additional material information, and some request fully mandatory climate change disclosures (although do not always set out how they perceive these disclosures as taking effect).

2.2 The highest number of comments received were from individuals and individual investors. These were split fairly evenly between being for and against further rulemaking, and varied significantly in terms of relevance and/or the sophistication of the arguments used in support. The next highest number of comments came from NGO/Third Sector organizations (which encompasses think-tanks), the majority of which were in favor of increased disclosures, followed by Asset Managers/Investment Companies, which again were overwhelmingly in favor of increased climate change disclosures.

2.3 Whether or not a comment is in favor of the SEC's proposed rulemaking, the majority of comments submitted which commented substantively on the proposal support adapting or supporting an existing framework - mostly the TCFD frameworks, or a mix of TCFD and SASB (to judge materiality).

2.4 Generally, there appears to be a demand for mandatory disclosures of some climate change metrics, including an issuer's scope 1-3 emissions (although a number of commenters recognize the difficulties in measuring scope 3 emissions), and additional qualitative disclosures of material information. As one example (of many), see Capital Research and Management Company's comment, pp.3-4.

3 Types of commentor

3.1 This section summarizes the general arguments used by and in relation to the key groups of commentors. It does not cover each category of commentor, but focuses on those which are most relevant to the identification of legal arguments in favor of and against the proposed disclosures.

Academics

3.2 These generally deal with legal arguments regarding the SEC's authority to promulgate disclosures regarding climate change, or the need for such disclosures. Some respond directly to the SEC's request, while others are relevant papers which have been submitted. The majority of comments are in favor of increased climate change disclosures (18/26, with 4/26 against).

3.3 Arguments in favor of SEC rulemakings focus on the sufficiency of existing disclosures. For example, Kenya Rothstein argues that the SEC has authority to ratify and endorse standards used by industry professionals (as demonstrated by its adoption of FASB), and that it should therefore do so in order to fulfil investor demands for increased ESG disclosures (which, in turn, demonstrate that such information is material).

3.4 Some arguments focus on whether 'materiality' should be determined to relate only to financial information. Commentors such as Amanda Rose and Paul and Julia Mahoney argue that a 'reasonable investor' gives primacy to the financial performance of his or her investments, while the focus on ESG disclosures has arisen due to demand from institutional investors, who have wider interests.

Asset managers / Investment companies

3.5 These are overwhelmingly supportive of increased disclosures (79/82). In particular, a number of asset managers with a particular ethical focus (such as religious organizations or ESG-focused entities) are supportive.

3.6 Generally, submissions in support of increased climate change disclosures state that current disclosures are insufficient to meet their requirements as investors. A small number also state that they need increased disclosures in order to meet their fiduciary obligations.

3.7 Commonly, commentors state that they view climate change information as financially material (either explicitly stating that climate change information generally or in relation to specific sectors is material, or stating that they use it to inform their decisions). Commentors request that the SEC mandate the disclosure of a 'baseline' of quantifiable climate change information, such as scope 1, 2 and (either where appropriate or material or in any event) scope 3 emissions, as well as requiring qualitative disclosures on material issues (for example, see the comment by The Vanguard Group). Indeed, a majority (56/82) of commentors in this category explicitly requested that the SEC require issuers to disclose their scope 1, 2 and 3 emissions. Submissions commonly support leverage of existing disclosure frameworks, in particular focusing on materiality, as defined by the US Supreme Court, as a benchmark.

3.8 Commentors also request alignment with existing voluntary frameworks (mostly the TCFD recommendations) to assist with comparability. In particular, asset managers and investors which operate globally are very keen for the SEC to work towards a globally aligned framework (in most cases, in line with a TCFD-style approach, but in some cases investors request alignment with IFRS or other standards). For example, see comments from PIMCO, and Keramida, Inc.

3.9 Asset owners and investor coalitions, which are categorized separately, are generally similar in their approach to asset managers.

Companies

3.10 Operating companies generally state an opinion on a spectrum. A small minority state that the SEC should not conduct rulemaking, as the current materiality-linked and voluntary disclosures are sufficient. Corporations also warn of the increased costs incurred by new disclosures (although very few corporates raise this argument directly, some groups of corporations make this point).

3.11 However, the majority support some kind of climate change-related disclosure, to varying degrees.

3.12 Generally, corporates recommend that any SEC rulemaking:

A) Follow a principles-based approach;

B) Be rooted in materiality (many commenters note that what is material will vary from entity to entity);

C) Be phased in gradually, for example, with larger corporations required to report on them first etc.;

D) Be subject to safe harbor provisions;

E) Be furnished (as standalone disclosures, or in a separate climate change report), rather than filed as part of a Form-10K. Most corporations state that this is to reduce the risk of liability; and

F) Some corporates state that GHG emissions should be disclosed (most limit this to scopes 1 and 2; some state that scopes 1 - 3 should be disclosed).

3.13 Comments in this vein include United Airline Holdings, Inc., Oshkosk Corporation, and Cisco Systems Inc.

3.14 Corporations in the oil and gas sector tend to be more supportive of voluntary disclosure regimes being allowed to continue; or alternatively, support voluntary disclosure regimes since they have been developed through dialogue between investors and issuers (for example, see ConocoPhillips). However, this is not true of all oil and gas sector commentors – in particular, those based outside the US (and which may already be subject to climate change disclosure regimes) may be more supportive – see comments from BP, Eni SpA and TotalEnergies.

3.15 Other comments from corporates were by companies which provide data on climate change or ESG issues, and companies which operate as service providers (such as accountants and auditors). These companies are generally supportive of disclosures which are aligned with existing frameworks (for example, see comments by KPMG, Deloitte and Grant Thornton).

Lawyers/law firms

3.16 This category contains law firms and individual lawyers, as well as lawyers in official roles, such as Attorney Generals. These comments tend to be more focused on the SEC's legal authority to promulgate disclosures, and are split evenly (5 comments each way) between being for and against further disclosures.

3.17 The majority of arguments focus on the extent to which climate change disclosures are material, and therefore whether and to what extent the SEC has authority to promulgate disclosures. Those against increased disclosures argue that the SEC does not have authority to compel non-material disclosures, while those for increased disclosures often argue that climate change information is material and the SEC has authority to require disclosure as such (see Rob Bonta, California Attorney General, et al.).

3.18 There are also arguments raised regarding the application of the First Amendment; these are usually raised against increased disclosures, arguing that compelling disclosures is the same as compelling speech (see, for example Patrick Morrisey, West Virginia Attorney General and Eric S. Schmitt, Missouri Attorney General).

3.19 Some law firms recommend additional guidance on materiality in lieu of further disclosure rules (for example, Morrison & Foerster LLP).

NGOs/Third Sector

3.20 This is a broad category, and encompasses a wide range and variety of responses. Some NGOs appear to have specific aims in mind, and 'piggyback' on the SEC request for comments on climate change disclosures to air views on these aims (for example, a number of comments request that the SEC require issuers to disclose whether they have received political donations).

3.21 NGOs / Third Sector Organizations which are in favor of SEC rulemaking are more common than those which are against. However, many of these state their support in general terms, rather than dealing with specific points of law or investor preference.

3.22 NGOs / Third Sector Organizations which are against SEC rulemaking generally focus their arguments on the need for disclosures and the authority of the SEC to promulgate disclosure requirements. These commonly argue that the SEC is straying into political territory, and has no mandate to operate thus. Less commonly, these NGOs argue that climate science is unfounded (either completely, or that anthropogenic climate change is unproven), or that taking action on climate change is unsupported (for instance, arguing that the benefits of fossil fuels outweigh the costs of climate change). Examples of such arguments include those by the Natural Resources Defense Council, and The Heritage Foundation.

3.23 First Amendment concerns are also raised in opposition to any proposed rulemaking, including in comments by the Competitive Enterprise Institute, and Americans for Prosperity.

Politicians

3.24 This is a small category comprising members of congress, senators and representatives. There are four commentors, three of which are in favor, and one against.

3.25 The arguments against are advanced by various members of congress (French Hill, Member of Congress, et al.). They argue that the SEC has not followed the process required by the Administrative Procedures Act (see also comments from American Fuel Petrochemical Manufacturers, and Americans for Prosperity).

3.26 Arguments in favor are focused on the adequacy of the current disclosure regime to provide adequate information for investors (see Elizabeth Warren, United States Senator and Sean Casten, United States Representative and Brian Schatz, U.S. Senator and Sheldon Whitehouse, U.S. Senator).

Professional organizations

3.27 This category comprises organizations which act as professional membership bodies or other organizations of individual workers. It contains groups such as the American Retirement Association (membership of which contains actuaries and pensions advisers) and the Society of Corporate Governance (membership of which contains general counsel and in-house attorneys). 18/24 are in favor of increased disclosures, and 6/24 are against.

3.28 A majority of comments in this category are focused on the materiality standard, and request that the SEC retain this standard. This is the case regardless of whether the commentor is in favor or against new disclosure rules – in the former case see comments by Business Roundtable and Financial Executives International; in the latter, see comments by Society for Corporate Governance and Committee on Securities Law of the Business Law Section of the Maryland State Bar Association.

Standards bodies

3.29 These commentors are generally standard setters of voluntary climate disclosure frameworks. These comments either take the form of providing information to the SEC to assist them in their own rulemaking, or recommend that their standards are incorporated into any eventual rulemaking. For example, SASB proposes that its standards are adapted by the SEC, and that it would be a good choice for a third-party standard setter.

3.30 This category also contains a comment by the American Petroleum Institute, which argues that the fact that many organizations in the petroleum sector use voluntary standards indicates that there is no need for mandatory disclosures.

Trade associations

3.31 This is a broad term, designed to capture groups of corporates. The degree of organization and the size of the association may vary significantly.

3.32 The views expressed by trade associations vary depending on the entities which comprise their membership. Generally, these views are more reticent to support new disclosure rules than those expressed by individual corporates. Perhaps reflecting this, a greater number of commentors in this category expressed neutral views (25/50 in favor, 10/50 against, and 15/50 expressing a neutral view).

3.33 For example, the American Gas Association, which is against new disclosures, argues that these are not required as compliance with voluntary standards has led to sufficient material information being disclosed to the market. However, the National Association of Manufacturers, which states that it supports a principles-based disclosure regime, is keen to emphasize its view that any new disclosure regime should be limited to material information, should be flexible and should not stray into policy areas.

4 Canadian entities

4.1 Canadian entities have submitted or signed on to six comments. The Canadian entities which have submitted their own comments are:

A) The Canadian Coalition for Good Governance. The CCGG notes recent developments concerning the Canadian disclosure regime, and states its support for TCFD-aligned disclosures, as well as its *prima facie* support for ISSB standards. The CCGG recommends using SASB's standards as a method of identifying material information.

B) The Canadian Bankers Association. The CBA requests that dual-listed issuers be permitted to disclose in accordance with the laws of their jurisdictions of incorporation. The CBA supports climate change disclosures, but states that they should be limited to material information, and subject to safe harbor provisions.

C) The Canada Pension Plan Investment Board. The CPP Investment Board states that it requires consistent, comparable and accurate information on climate change-related risks. It also states that scope 1 and scope 2 emissions should be disclosed.

D) The Pension Investment Association of Canada. The PIAC states that it is within the scope of the fiduciary duties of its members to consider climate change risk. The PIAC states that "*Specifically, investors need information that allows them to understand the financial implications of climate change on a company's business model, how management and the board is overseeing this risk, and allows them to assess how companies are measuring and monitoring their Scope 1, 2 and 3 emissions.*"

4.2 Canada's ten largest pension plan investment managers (Alberta Investment Management Corp.; BCI; CDPQ; Canada Pension Plan Investment Board; Healthcare of Ontario Pension Plan; Investment Management Corporation of Ontario; OMERS; OPTrust; Ontario Teachers' Pension Plan; and Public Sector Pension Investment Board) have submitted a comment. This comment supports the SEC's proposed rulemaking, and recommends moving beyond a principles-based approach and leveraging the recommendations of the TCFD. The pension plan investment managers also state that their ability to fulfil their mandates requires increased transparency on climate change risks.

4.3 Finally, the Canada Post Corporation Pension Plan is a signatory to the UN Principles for Responsible Investment comment, which supports standardized, mandatory disclosure of ESG data.

About the Commonwealth Climate and Law Initiative (CCLI)

The CCLI is a legal research and stakeholder engagement initiative founded by Oxford University Smith School of Enterprise and the Environment, ClientEarth and Accounting for Sustainability (A4S). We are a UK non-profit organization funded by environmental philanthropy and research grants.

We apply existing company law to climate risk in order to drive a rapid and orderly transition towards a net zero carbon economy. We examine the legal basis for directors and trustees to manage and report on climate change-related risk and climate mitigation. Our legal research is at the forefront of the intersection of climate and biodiversity risks under existing companies and securities laws. We commission legal opinions from independent experts within a jurisdiction to build the authoritative evidence base on which to shift mainstream understanding of the requirements of corporate and securities laws to nature crises. We convene conferences, host webinars and stakeholder events to disseminate our findings and build capacity across the corporate, regulator and civil society ecosystem. Our approach is outcome-focused and evidence-led. We have partnered with world-leading behavioral science consultancy Influence at Work to undertake research on the role that psychology plays in understanding how boards engage with the subject of climate change in the boardroom.

We collaborate with leading organizations, such as the World Economic Forum, the Law Society of Singapore, and CD Howe.

Our Canadian partner, the Canada Climate Law Initiative, convenes more than 60 experts to educate Canadian boards on climate change under the Canadian Climate Governance Experts project. They also provide an online knowledge hub for climate risk and sustainable finance resources.

More information here.