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Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
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Comments on CSA Proposed National Instrument 51-107 respecting Disclosure of Climate-Related Matters and its companion policy

Introduction

This letter is submitted in response to the CSA Notice of Consultation (the **Notice of Consultation**) regarding proposed National Instrument 51-107 respecting Climate-Related Matters (the **Proposed Instrument**) and its companion policy (the **Proposed Policy** and, together with the Proposed Instrument, the **Proposed Regime**) issued by the Canadian Securities Administrators (the **CSA**) on October 18, 2021. This letter reflects the views of a working group consisting of issuers having a combined market capitalization of approximately $50 billion (the **Working Group** or **we**).

Members of the Working Group welcome the CSA's involvement in suggesting standardized disclosure regarding climate-related matters for Canadian reporting issuers. However, the members generally believe that the Proposed Regime will create a significant burden for public issuers without always providing additional value to investors. As such, the Working Group would prefer to see a voluntary disclosure regime supported by CSA guidance and responsive to investor demands. In the event a mandatory disclosure regime is implemented, all

disclosure contemplated under the Proposed Regime should be subject to a materiality standard or be disclosed on a "comply-or-explain" basis. As more fully described below, members of the Working Group are particularly concerned by issues such as potential liability arising from disclosure of non-material matters in "core documents", harmonization of the Proposed Regime (and the TCFD) with other widely adopted global frameworks and standards and the increased costs involved with preparing mandatory disclosure.

We thank you for affording us an opportunity to comment on this important matter and we trust that the CSA will consider the views expressed in this letter.

General comments

In addition to our responses to the CSA's questions set out below, we would like to emphasize the following general points.

1 Voluntary disclosure is preferable

Members of the Working Group believe that guidance and recommendations from the CSA on climate-related securities disclosure, based on data from the market, are of benefit to issuers in preparing their disclosure and of benefit to investors when comparing investment options. That being said, members of the Working Group are concerned that moving to a mandatory disclosure regime and choosing TCFD as the base framework at a time when investor demands for disclosure are in flux and global standards are not in alignment is premature and may not be necessary. It is our view that a voluntary framework, allowing issuers flexibility and guided by the market and the CSA, is preferable to a mandatory regime.

2 Materiality standard or "comply or explain"

Members of the Working Group are of the view that the Proposed Regime, if enacted, should be subject to a materiality standard in line with securities laws. Under the Proposed Regime as drafted, only disclosures related to strategy, and metrics and targets, are subject to a materiality standard. Disclosures related to governance and risk management are mandatory, regardless of whether they are material to an issuer.

Subjecting the entire Proposed Regime to a materiality standard would be consistent with general disclosure requirements under securities laws. It would also constitute an appropriate balance against the potential increased liability that issuers and their directors and officers could face for misrepresentation under the secondary market liability provisions of securities legislation if they were obliged to include non-material information in their "core documents".

As an alternative, disclosure under the Proposed Regime could be on a "comply or explain" basis, as is generally the case for governance-related matters. The Proposed Regime already allows for such an option with respect to disclosure in relation to GHG emissions. The "comply or explain" approach, which could be useful to investors without imposing a heavy burden on issuers, could be extended to the entire Proposed Regime. Similar to what is allowed in other jurisdictions[1], issuers could explain why they do not report on those topics. Reasons for not reporting may include that such topics are not material for them, that their processes are under development, that no standard has been yet adopted in their industry or that costs outweigh benefits for them.

3 GHG Emissions

The CSA is consulting on requiring issuers to disclose Scope 1, Scope 2 and/or Scope 3 GHG emissions. Two regimes are contemplated: "comply or explain" or mandatory disclosure. Members of the Working Group would favor the "comply or explain" regime for a number of reasons, including the following:

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[1] See for instance p. 2 of the Step-by-Step Guide to ESG Reporting of the Hong Kong Exchange, available at: https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Environmental-Social-and-Governance/Exchanges-guidance-materials-on-ESG/step_by_step.pdf?la=en

- Data on GHG emissions may be overly burdensome or costly to obtain for many issuers, especially data on Scope 3 emissions. Any audit requirement would also involve additional costs and force issuers to prepare their disclosure on tighter timelines than may be reasonable.

- There are, as a practical matter, problems when comparing climate-related disclosure between issuers due to lack of standardized reporting. We do not believe this issue will be solved by imposing mandatory disclosure obligations. With methodologies and standards evolving and varying across various industries, issuers may continue to interpret and apply even a prescribed methodology in different ways, thereby defeating one of the main goals of mandatory disclosure. Although we acknowledge that the CSA has contemplated the use of GHG emission reporting standards other than the "GHG Protocol" we believe any required reconciliation to the GHG Protocol, where it is not being used by an issuer, has the potential to result in confusing disclosure and added issuer costs.

- There is a concern that the cost involved in producing data and disclosure on GHG emissions, particularly Scope 3 emissions, outweighs the benefit to investors of being provided with that data.

- As discussed above, the potential secondary market liability issues arising from the disclosure of such data in "core documents" is of concern.

4 Flexibility to allow harmonization with other initiatives

As noted by the CSA in the Notice of Consultation, certain groups such as the International Financial Reporting Standards Foundation (which recently formed the International Sustainability Standards Board[2] (**ISSB**)), are currently examining new sustainability standards. It is expected that such standards will be compatible with the TCFD recommendations, although this is not certain, and it would appear that the Value Reporting Foundation (formerly SASB) has expressed support for a consolidation in the standards space. We note, however, that the Global Reporting Initiative (**GRI**), whose framework is used by many issuers either alone or in conjunction with one or more other global frameworks, does not appear to be directly engaged with the ISSB.

Members of the Working Group believe that in view of the ongoing, real-time evolution and consolidation of global standards, the CSA should not be too quick to require disclosure with reference to a specific framework. We are particularly concerned that the TCFD and GRI frameworks may continue to exist as competing frameworks for climate-related disclosure and that reporting and accounting standards developed under an "ISSB/TCFD/SASB umbrella" may not be compatible with the GRI framework. This is of concern to issuers who might prefer to report on climate-related as well as broader sustainability matters, which the GRI framework is well suited to facilitate.

In addition, the Independent Review Committee on Standard Setting in Canada released its Consultation Paper on December 8, 2021 and is accepting public comment until February 28, 2022. The role of the Committee is to "conduct a review of the governance and structure for establishing Canadian accounting and assurance standards, and to identify what might be needed for the future – including sustainability standards." Although the Working Group expresses no views on the Committee or its work, we believe it highlights the need for the Proposed Regime to be flexible enough to accommodate standards which may be uniquely appropriate for Canadian issuers.

Furthermore, the requirements of the Proposed Regime ought to be harmonized with other disclosure regimes being developed in other important markets, particularly the United States, in order to avoid further confusion and the necessity for compliance with multiple disclosure regimes.

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[2] See: https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/

5 Transition Period

Assuming the Proposed Instrument came into force on December 31, 2022, the CSA intends to apply the Proposed Regime to 2023 annual filings (for non-venture issuers). Members of the Working Group believe that issuers should be given sufficient time to fully implement any new disclosure rules. Applying the Proposed Regime to 2023 annual filings may leave many issuers without enough time to successfully manage a transition. For example, issuers that have not been reporting data on GHG emissions may need a significant amount of time to develop and implement systems to gather and confirm the accuracy of such data. A transition period would also allow issuers to review new international frameworks that should be adopted in the next few years. We would thus recommend that a 3-year transition period be provided and that issuers be given until 2026 to comply with the new reporting obligations.

Responses to CSA Questions

Experience with TCFD recommendations

1. For reporting issuers that have provided climate-related disclosures voluntarily in accordance with the TCFD recommendations, what has been the experience generally in providing those disclosures?

Some members of the Working Group use the TCFD recommendations in undertaking a materiality analysis and preparing disclosure, but many of them also use (either exclusively or in conjunction with the TCFD recommendations) the GRI framework and other global standards.

Members of the Working Group that have provided climate-related disclosures voluntarily have generally had good experiences precisely because they had flexibility to perform a cost-benefit analysis and adapt disclosure to what they believed would be most useful for investors while monitoring the evolution of global initiatives.

Disclosure of GHG Emissions and Scenario Analysis

2. For reporting issuers, do you currently disclose GHG emissions on a voluntary basis? If so, are the GHG emissions calculated in accordance with the GHG Protocol?

Some, but not all members of the Working Group, currently disclose GHG emissions on a voluntary basis. Some use ISO 14064 instead of the GHG Protocol, while some use both. Members of the Working Group value such flexibility.

3. For reporting issuers, do you currently conduct climate scenario analysis (regardless of whether the analysis is disclosed)? If so, what are the benefits and challenges with preparing and/or disclosing the analysis?

Most members of the Working Group do not currently conduct climate scenario analysis. Those that do conduct climate scenario analysis do it to identify climate-related risks to their business but don't report the results of such analysis. Conducting climate scenario analysis requires significant resources and relies upon the use of assumptions and variables that are often impossible to accurately predict. Although a climate scenario analysis can be useful in terms of identifying risks and opportunities and informing long-term strategy, the results of any such analysis are generally too uncertain to be of value to an investor.

4. Under the Proposed Instrument, scenario analysis would not be required. Is this approach appropriate? Should the Proposed Instrument require this disclosure? Should issuers have the option to not provide this disclosure and explain why they have not done so?

Members of the Working Group agree that scenario analysis should not be required. Please see our response to Question 3 above for the rationale behind our determination.

Furthermore, disclosure of climate scenario analysis may lead to the inclusion of forward-looking statements in "core documents", which is an area of concern for secondary market liability purposes.

5. The TCFD recommendations contemplate disclosure of GHG emissions, where such information is material.

- *The Proposed Instrument contemplates issuers having the option to disclose GHG emissions or explain why they have not done so. Is this approach appropriate?*

  This approach is appropriate since not all issuers have similar resources and activities. Smaller issuers or issuers with activities that are not materially affected by climate may prefer to "explain".

  Furthermore, this approach is appropriate considering the proposed timeline. Some issuers may not be able to "comply" as of the anticipated coming into force of the Proposed Regime.

  Finally, as other applicable frameworks and regimes are developed (e.g. ISSB, SEC), some issuers may choose to "comply" with those other regimes for various reasons, and "explain" their choice in their disclosure.

- *For those issuers who are already required to report GHG emissions under existing federal or provincial legislation, would the requirement in the Proposed Instrument to include GHG emissions in the issuer's AIF or annual MD&A (if an issuer elects to disclose these emissions) present a timing challenge given the respective filing deadlines? If so, what is the best way to address this timing challenge?*

  Issuers should have some flexibility with respect to the location of the disclosure and the integration of documents and information by reference.

6. The Proposed Instrument contemplates that issuers that provide GHG disclosures would be required to use a GHG emissions reporting standard in measuring their GHG emissions, being the GHG Protocol or a reporting standard comparable with the GHG Protocol (as described in the Proposed Policy). Further, where an issuer uses a reporting standard that is not the GHG Protocol, it would be required to disclose how the reporting standard used is comparable with the GHG Protocol.

- *As issuers have the option of providing GHG disclosures, should a specific reporting standard, such as the GHG Protocol, be mandated when such disclosures are provided?*

  We understand that the GHG Protocol and other reporting standards, although complementary to a certain extent, may not be entirely consistent. Recommending, without imposing, a specific standard within a voluntary or "comply or explain" regime would provide issuers with the greatest flexibility to manage costs, resources and investor expectations.

- *Is the GHG Protocol appropriate for all reporting issuers? Should issuers be given the flexibility to use alternative reporting standards that are comparable with the GHG Protocol?*

  Yes, some members of the Working Group are currently using reporting standards other than the GHG Protocol as they believe they are more useful to their investors. Issuers should have the flexibility to do so.

- *Are there other reporting standards that address the disclosure needs of users or the different circumstances of issuers across multiple industries and should they be specifically identified as suitable methodologies?*

  Any standards that are developed by the ISSB or referenced by the SEC should be considered. Issuers should also have the flexibility to follow and adapt to the evolution of global standards.

7. The Proposed Instrument does not require the GHG emissions to be audited. Should there be a requirement for some form of assurance on GHG emissions reporting?

Auditing and assurances should not be a requirement in relation to the disclosure of GHG emissions data. Assurances could prove time-consuming and very costly, especially with respect to Scope 3 GHG emissions. If imposed, an audit or assurance requirement would undoubtedly lead to more issuers choosing to "explain" rather than "comply".

8. The Proposed Instrument permits an issuer to incorporate GHG disclosure by reference to another document. Is this appropriate? Should this be expanded to include other disclosure requirements of the Proposed Instrument?

Some members of the Working Group would prefer having the flexibility to insert this type of disclosure in their ESG or sustainability report rather than in their circular or AIF. Although such information may often be requested by investors, it may not meet the test of materiality for many issuers and would integrate better in those specialized reports. It would also make sense to include this type of disclosure within the same document in order to be most responsive to investor requests.

From a liability perspective, there would ideally be no obligation to include forward-looking information in a "core document". Issuers should have the option of disclosing in "non-core" documents such as an ESG or sustainability report.

Usefulness and benefits of disclosures contemplated by the Proposed Instrument

9. What climate-related information is most important for investors' investment and voting decisions? How is this information incorporated into these decisions? Is there additional information that investors require?

Many members of the Working Group have noticed that investors have consulted their ESG report and engaged with them on such disclosure. As best practice develop globally, issuers will be in a better position to assess and respond to the needs of investors.

10. What are the anticipated benefits associated with providing the disclosures contemplated by the Proposed Instrument? How would the Proposed Instrument enhance the current level of climate-related disclosures provided by reporting issuers in Canada?

Recommendations of the CSA with respect to the use of certain frameworks and the way to present information will help foster comparability among disclosure of various issuers.

Costs and challenges of disclosures contemplated by the Proposed Instrument

11. What are the anticipated costs and challenges associated with providing the disclosures contemplated by the Proposed Instrument?

Significant costs would have to be incurred to comply with the Proposed Regime, especially to compile data on Scope 1, 2 and/or 3 GHG emissions.

12. Do the costs and challenges vary among the four core TCFD recommendations related to governance, strategy, risk management, and metrics and targets? For example, are some of the disclosures more (or less) challenging to prepare?

Under the original TCFD recommendations, the "strategy" pillar, which contemplates a climate scenario analysis, would likely be the most costly. Under the Proposed Instrument, the main cost center is likely to be the "metrics and targets" pillar.

13. The costs of obtaining and presenting new disclosures may be proportionally greater for venture issuers that may have scarce resources. Would more accommodations for venture issuers be needed? If so, what accommodations would address these concerns while still balancing the reasonable information needs of investors? Alternatively, should venture issuers be exempted from some or all of the requirements of the Proposed Instrument?

Subjecting all disclosure under the Proposed Regime to a materiality standard or a "comply or explain approach" would be of particular benefit to venture issuers.

Guidance on disclosure requirements

14. We have provided guidance in the Proposed Policy on the disclosure required by the Proposed Instrument. Are there any other tools, guidance or data sources that would be helpful in preparing these disclosures that the Proposed Policy should refer to?

As noted by the CSA, suitable sustainability standards as developed by the ISSB could be incorporated as part of the guidance. As well, given that many issuers are subject to US securities laws, any SEC frameworks that are developed, should likely be taken into account by the CSA and integrated into guidance relating to the Proposed Regime.

15. Does the guidance set out in the Proposed Policy sufficiently explain the interaction of the risk disclosure requirement in the Proposed Instrument with the existing risk disclosure requirements in NI 51-102?

Some members of the Working Group believe that there is a risk of unbalanced disclosure as NI 51-102 is subject to a materiality threshold and the current Proposed Regime is not entirely. It may be suitable to include some more explicit guidance regarding the interaction as there is a likelihood of duplicative disclosure otherwise.

Prospectus Disclosure

16. Form 41-101F1 Information Required in a Prospectus does not contain the climate-related disclosure requirements contemplated by the Proposed Instrument. Should an issuer be required to include the disclosure required by the Proposed Instrument in a long form prospectus? If so, at what point during the phased-in implementation of the Proposed Instrument should these disclosure requirements apply in the context of a long form prospectus?

Such disclosure should only be integrated to the extent material.

Phased-in implementation

17. The Proposed Instrument contemplates a phased-in transition of the disclosure requirements, with non-venture issuers subject to a one-year transition phase and venture issuers subject to a three-year transition phase. Assuming the Proposed Instrument comes into force December 31, 2022 and the issuer has a December 31 year-end, these disclosures would be included in annual filings due in 2024 and 2026 for non-venture issuers and venture issuers, respectively.

- *Would the transition provisions in the Proposed Instrument provide reporting issuers with sufficient time to review the Proposed Instrument and prepare and file the required disclosures?*

  Please see our general comments on transition periods above.

- *Does the phased-in implementation based on non-venture or venture status address the concerns, if any, regarding the challenges and costs associated with providing the disclosures contemplated by the Proposed Instrument, particularly for venture issuers? If not, how could these concerns be addressed?*

  Please see our general comments on materiality above.

Future ESG considerations

18. In its comment letter to the IFRS Foundation's consultation paper published in September 2020, the CSA stated that developing a global set of sustainability reporting standards for climate related information is an appropriate starting point, with broader environmental factors and other sustainability topics to be considered in the future. What broader sustainability or ESG topics should be prioritized for the future?

> We don't think other sustainability topics should be made subject to disclosure at this stage. Please see the section "Harmonization with Other Initiatives" above with respect to the importance of harmonization with other disclosure regimes, including the United States.

Conclusion

In conclusion, although the Working Group is in favour of continued guidance from the CSA with respect to climate-related disclosure as market demands and standards evolve, it does not support the imposition of a mandatory disclosure regime at this time. Our primary concerns are that mandatory disclosure will be costly to implement, may increase issuer liability for secondary market disclosure and may be of limited additional value to investors. As global standards continue to evolve and develop, flexibility in terms of disclosure will allow Canadian issuers to remain globally competitive while providing investors with the most relevant information.

In the event the CSA decides to implement the Proposed Regime we would suggest that all disclosure contemplated thereunder be subject to a materiality standard or that the Proposed Regime be implemented on a "comply or explain" model to allow issuers maximum flexibility while still being responsive to investors.

We thank you for allowing us to comment on this important matter.

Yours very truly,

(signed) Norton Rose Fulbright Canada LLP