MANDATORY CLIMATE DISCLOSURE HAS ARRIVED IN NORTH AMERICA—A COMPARISON OF NEW U.S. AND CANADIAN STANDARDS

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March 2024 saw a flurry of significant climate-related disclosure announcements by North American securities regulators and standard setting bodies. While U.S. public companies are, understandably, primarily focused on domestic developments, U.S. companies listed on Canadian stock exchanges (in particular issuers in the mining sector, given the Toronto Stock Exchange (TSX) and TSX Venture Exchange are home to approximately 40% of the world's public mining companies) would be well served to stay abreast of the latest developments north of the border.

I. Recent Developments

On March 6, 2024, the U.S. Securities and Exchange Commission (SEC) adopted a final set of climate-related disclosure rules (SEC Rules).[1] The SEC Rules are widely considered a "scaled back" version of the rules initially proposed by the SEC in 2022. Given the number of legal challenges filed in response to the SEC Rules, on April 4, 2024, the SEC ordered a stay of the SEC Rules pending the completion of judicial review of the consolidated legal petitions by the U.S. Court of Appeals for the Eighth Circuit.[2] In issuing the stay, the SEC emphasized that it remains of the view that the SEC Rules are consistent with applicable law and within the SEC's jurisdiction. The voluntary stay is anticipated to allow the associated litigation to proceed on a more timely basis, allowing the court to focus on the merits of the legal challenges, rather than on addressing requests for the application of the SEC Rules to be suspended.

On March 13, 2024, the Canadian Sustainability Standards Board (CSSB) issued draft sustainability (CSDS 1) and climate-related (CSDS 2) disclosure standards for public consultation[3] based on corresponding standards issued in June 2023 by the International Sustainability Standards Board (ISSB).[4] The CSSB's non-binding standards are aimed at advancing the adoption in Canada of climate and sustainability disclosure standards aligned with the ISSB's inaugural standards, which the ISSB intended to serve as a new global disclosure baseline.

The same day as the CSSB release, the Canadian Securities Administrators (CSA), an umbrella organization of Canada's provincial and territorial securities regulators, issued a statement indicating that feedback received by the CSSB through its consultation process may

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[1] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024) (to be codified at 17 C.F.R. pts. 210, 229, 230, 232, 239, and 249).
[2] *See* SEC Securities Act of 1933 Release No. 11280 / Securities Exchange Act of 1934 Release No. 99908 dated April 4, 2024, File No. S7-10-22, *In re* Enhancement and Standardization of Climate-Related Disclosures for Investors, https://www.sec.gov/files/rules/other/2024/33-11280.pdf.
[3] Comments on the draft CSSB standards are due by June 10, 2024.
[4] *See* CSSB Exposure Draft – Proposed Canadian Sustainability Disclosure Standard (CSDS) 1, General Requirements for Disclosure of Sustainability-related Financial Information and CSSB Exposure Draft – Proposed Canadian Sustainability Disclosure Standard (CSDS) 2, Climate-related Disclosures, https://www.frascanada.ca/en/sustainability/documents.

help inform the CSA's efforts to finalize its proposed mandatory climate-related disclosure rule, originally published for comment in October 2021 (CSA Proposal).[5] It is important to note that the CSSB standards are not, and will not become, mandatory for Canadian issuers unless they are incorporated into a CSA rule. The CSA statement noted that it anticipates consulting on a revised proposed rule and will monitor developments.

While a comprehensive comparison of the CSA and CSSB proposals against the SEC Rules is beyond the scope of this article, there are significant differences in how these frameworks approach mandatory climate-related disclosures that may present practical challenges for companies operating in multiple jurisdictions. In particular, these frameworks take divergent approaches to disclosures related to greenhouse gas (GHG) emissions and scenario analysis.

II. Initial Proposals in Brief

In October 2021, the CSA was the first North American regulator to propose a mandatory climate-related disclosure rule. While the CSA Proposal was in large part aligned with the recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD), the leading voluntary climate disclosure framework, the CSA Proposal departed from the TCFD framework in two key respects:

1. The CSA Proposal included two alternatives relating to GHG emissions disclosure in respect of which the CSA was seeking feedback. The first option would require issuers to disclose Scope 1, 2, and 3 emissions,[6] or explain why no such disclosure was being made, whereas the second option would require all issuers to disclose their Scope 1 emissions, and either disclose their Scope 2 and 3 emissions, or explain why no such disclosure was being made. By way of contrast, the TCFD framework requires disclosure of Scope 1 and 2 emissions and encourages disclosure of Scope 3 emissions; and

2. The CSA Proposal would not require issuers to undertake scenario analysis, whereas disclosure relating to scenario analysis forms part of the TCFD's recommended "strategy" disclosure.

While the exact timing remains unknown, we expect the revised version of the CSA Proposal to be released for consultation in the coming months.

The SEC released its initial proposal for mandatory climate-related disclosure requirements in March 2022 (SEC Proposal), receiving over 24,000 comment letters. The SEC Proposal was more closely aligned with the TCFD framework than the CSA Proposal. For example, the SEC Proposal would have required registrants to disclose Scope 1 and 2 emissions, as well as Scope 3 emissions where material (or where the registrant had set a Scope 3 emissions

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[5] *See* CSA Notice and Request for Comment Proposed National Instrument 51-107 *Disclosure of Climate-related Matters*, https://www.osc.ca/en/securities-law/instruments-rules-policies/5/51-107/51-107-consultation-climate-related-disclosure-update-and-csa-notice-and-request-comment-proposed.

[6] Scope 1 covers an issuer's direct GHG emissions, whereas Scope 2 covers the GHG emissions arising from an issuer's purchased energy and Scope 3 covers the GHG emissions arising from an issuer's value chain.

reduction target), subject to a safe harbour rule. While scenario analysis would not be mandatory, the SEC Proposal would have mandated disclosure of any climate targets, goals, or scenario analysis, to the extent that a registrant set or completed any such targets, goals, or analysis.

Following the release of the CSA Proposal and the SEC Proposal, in June 2023 the ISSB released its own, non-binding, sustainability and climate disclosure standards, including ISSB S2 Climate-related Disclosures (ISSB S2).[7] ISSB S2 has subsumed, but also goes beyond, the TCFD by requiring more detailed disclosure under each of the four pillars of the TCFD framework: governance; strategy; risk management; and metrics and targets. Scenario analysis disclosure is mandatory under ISSB S2, and while there would be relief from Scope 3 emissions disclosure for the first year of application of ISSB S2, companies are required to begin disclosing their Scope 3 emissions in the following year. Like CSDS 2, ISSB S2 is not binding in Canada or the United States.

III. CSDS 2 vs. the SEC Rules: Key Requirements and Differences

CSDS 2 is generally aligned with the TCFD and ISSB S2, although in some respects CSDS 2 goes further than the CSA Proposal. For example, CSDS 2 would require issuers to complete climate-related scenario analysis, disclosing the implications and results thereof, and their Scope 1, 2, and 3 emissions. CSDS 2 would also require disclosure of climate-related governance and risk management processes, and climate opportunities and risks in a manner similar to the TCFD and the ISSB standards. Notably, CSDS 2 proposes no materiality threshold for GHG emissions or scenario analysis disclosure (although the CSSB has specifically requested public comment on this point). CSDS 2 would also require an issuer to disclose the amount and percentage of assets or business activities vulnerable to, or aligned with, climate-related risks and opportunities. There are a number of other detailed financial-related disclosures that would be required under CSDS 2, including in respect of capital deployment and executive compensation. Disclosures under CSDS 2 would be required to be provided in an issuer's "general-purpose financial reports," which include, without limitation, financial statements and sustainability-related financial disclosures.

Unlike the TCFD, ISSB S2, CSDS 2, and the CSA Proposal, with the exception of disclosure relating to the governance of climate-related risks and opportunities, most of the required disclosures under the SEC Rules are subject to a materiality threshold, including in respect of GHG emissions disclosure. More specifically, the SEC Rules only require disclosure of Scope 1 and 2 emissions, and only if material.[8] Registrants required to disclose their Scope 1 and 2 emissions must include an attestation report covering such disclosure in the relevant filing, although this requirement is subject to a staged phase-in period. No Scope 3 emissions disclosure is required or contemplated in the SEC Rules. Registrants who are not otherwise required to disclose GHG emissions will be required to disclose certain information, and complete third-party assurance for such disclosures, if they voluntarily disclose GHG emissions in a SEC filing.

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[7] *See* ISSB-2023-A – IFRS S2 Climate-related Disclosures, https://www.ifrs.org/content/dam/ifrs/publications/pdf-standards-issb/english/2023/issued/part-a/issb-2023-a-ifrs-s2-climate-related-disclosures.pdf?bypass=on.

[8] GHG emissions disclosure under the SEC Rules is further restricted to the two largest types of registrants—i.e., "large accelerated filers" and "accelerated filers."

There is no requirement in the SEC Rules to complete scenario analysis, although registrants who have undertaken scenario analysis are required to disclose certain associated information, if they determine that any climate-related risk is reasonably likely to have a material impact on the registrant's business, results of operations, or financial condition. In addition, the disclosure of Board-level climate expertise is not required under the SEC Rules, although the relevant expertise of management personnel who are responsible for assessing and managing climate-related risks must be disclosed. Disclosure of certain expenditures, losses, capitalized costs, and charges resulting from "severe weather events and other natural conditions" is also required, subject to a de minimis threshold.

Disclosure under the SEC Rules must be included in a registrant's registration statements, annual reports (Form 10-K), and, for GHG emissions, where applicable, with scope to report in the quarterly report (Form 10-Q) filed in the second quarter of the following year. Although the SEC Rules affect both domestic registrants and foreign private issuers, consistent with the SEC Proposal, the SEC Rules do not apply to Canadian registrants who rely on the Multijurisdictional Disclosure System and file their annual reports on a Form 40-F.

We also note that there are significant differences between the SEC Rules and the mandatory climate disclosure laws[9] recently passed in California, which have also been challenged in court. For example, in California, disclosure of Scope 1, 2, and 3 emissions is required, regardless of materiality, for U.S. public and private entities "doing business" in California that meet certain revenue thresholds. Given the potential breadth of reporting entities subject to this law, many U.S. issuers will need to grapple with inconsistent disclosure obligations under the California laws and the SEC Rules.

As the regulatory landscape currently stands, the Canadian proposals (i.e., the CSA Proposal and CSDS 2) contemplate more stringent disclosure requirements than the SEC Rules. We expect, however, that the CSA will receive significant pressure from Canadian issuers to align its final rule with the SEC Rules, given the significant differences between the two. It will be interesting to watch how the CSA will balance the inevitable tension between its stated focus on the CSSB proposals and the approach taken in the SEC Rules. Of particular interest will be whether the CSA follows the SEC in excluding smaller issuers from GHG emissions disclosure obligations, which is not contemplated in the CSA Proposal or CSDS 2.

IV. Expected Timing

While the official coming into force of the SEC Rules has been paused, as drafted, the SEC Rules would require climate disclosures to be made by large accelerated filers starting in 2026, with GHG emissions disclosure to follow in 2027. Disclosure in accordance with the SEC Rules for accelerated filers and smaller registrants would begin in 2026 and 2027 respectively, with the former required to begin GHG emissions disclosure by 2028.

While the timing of the CSA's final climate disclosure rule is unknown, it is unlikely that the CSA's final rule would be effective prior to 2026, given that consultation on the anticipated amendments to the CSA Proposal has not yet begun at the time of writing.

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[9] *See* California SB 253 (Climate Corporate Data Accountability Act), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB253; California SB 261 (Climate-Related Financial Risk Act), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB261.

Because the SEC Rules do not apply to any registrants before 2025, there is still time for companies to assess and refine their climate disclosures accordingly. Companies that have been proactively aligning their disclosures with leading international frameworks, like the TCFD or ISSB, are likely well positioned to integrate such disclosures into their mainstream financial reporting (to the extent not already included there). Notwithstanding a company's familiarity and adherence with these international frameworks, refining climate-related disclosures for purposes of compliance with the SEC Rules is likely to be a complex and time consuming exercise for most, which will be watched with interest by Canadian reporting issuers, not yet subject to a mandatory climate reporting regime.