

HOT OFF THE PRESS: THE CSA ISSUES GUIDANCE ON CLIMATE CHANGE-RELATED RISKS

by Irwin Greenblatt, Eric Roblin and Jennifer Humphrey

On August 1, 2019 the Canadian Securities Administrators ("CSA") published Staff Notice 51-358 *Reporting of Climate Change-related Risks* (the "Notice") to highlight the responsibilities, risks and materiality considerations that board members and key personnel should consider in light of climate change-related issues as they relate to the issuer's Management's Discussion and Analysis ("MD&A") and Annual Information Form ("AIF"). No new legal obligations were created or modified as a result of the issuance of this Notice. Instead, its purpose was to clarify expectations and elaborate on CSA Staff Notice 51-333 — *Environmental Reporting Guidance*.

Unless otherwise stated, this article focuses only on an issuer's disclosure obligations as they relate to its MD&A and AIF. Different tests of materiality may arise depending on the particular context.

Climate change-related risks can impact the financial health of an issuer.

Climate change-related risks are becoming more of a mainstream business issue than in the past. Particularly, issuers and investors alike are recognizing that climate change-related matters can impact a company in many ways, and that such risks can provide insight into the sustainability of a business model. Notably, climate change-related matters can interrupt an issuer's operations, present unplanned costs or capital expenditures, impact the issuer's reputation, and limit its business opportunities. In turn, investors are devoting more time and attention to environmental risks and are generally seeking improved disclosure on risks, opportunities, financial impacts and governance related to climate change-related risks.

What factors should an issuer consider when determining a "material" climate-related risk?

The regulators recognize that materiality assessments in relation to climate-change related risks may be more difficult to identify than other risks. This is largely due to our evolving understanding of climate change-related risks and the duration of time for crystallization climate-related risks. Although the materiality test varies depending on specific contexts, information is generally considered "material" for purposes of a MD&A or an AIF if a reasonable investor's decision whether or not to buy, sell or hold securities in an issuer would likely be influenced or changed if the information in question was omitted



[Irwin Greenblatt](#)
Partner

t: 416.941.8816

igreenblatt@foglers.com

[Eric Roblin](#)
Partner

t: 416.941.8811

eroblin@foglers.com

[Jennifer Humphrey](#)
Associate

t: 416.365.3747

jhumphrey@foglers.com

or misstated (the "**Materiality Test**"). Management and board members (including the audit committee in some instances) have a role in strategic planning, risk oversight, as well as the review and approval of particular regulatory filings.

Omitting or misstating "material" information in an issuer's MD&A or AIF can lead to potential risks including litigation, enforcement or other regulatory action against the issuer or its personnel. An issuer's leadership should therefore consider the effects of climate change-related matters and any other "material" risks that can be posed to the issuer when preparing documents in order to meet its continuous disclosure obligations.

How can I determine if information relating to a climate-related risk is "material" (for purposes of a MD&A or an AIF)?

It is important for issuers to remember that there is no bright-line test. Instead, materiality may vary between different issuers even amongst those in the same industry, and an issuer should consider both qualitative and quantitative factors in its determination. Additionally, issuers should consider materiality in light of the context as a whole, rather than an isolated fact (although some facts can be "material" on their own). The following are a few considerations that issuers and their management should consider when determining whether or not a climate change-related matter is "material":

(i) What is the timing of the potential risk? Issuers are cautioned against limiting its materiality assessment to near-term risks, and instead should disclose risks in its MD&A and AIF even if the matter may only crystallize over the medium or long term, whether certain or not, if the Materiality Test has been met. Additionally, management is encouraged to consider the magnitude of the effect and whether the environmental risk is likely to increase over time.

(ii) What type of risk is it? Physical risks can be acute or chronic. A physical, acute risk is generally event-driven, such as by extreme weather conditions like a hurricane or flood. This may in turn pose financial implications to an issuer due to physical damage to its assets or a disruption in a supply chain or its operations. A physical, chronic risk is generally a longer-term shift in climate patterns, such as consequences arising from higher temperatures, that may cause sea levels to rise or heat waves.

Transitional risks can range from short-term to a long-term impact and are posed by risks such as those relating to an issuer's reputation, market, regulatory consequences, policy and legal or technological risks. Each risk is further described below:

- a. **reputational risk:** arises from changing perceptions related to the way that an issuer is contributing or hindering a climate-related issue, including customer preferences and stigmatization;
- b. **market risk:** arises from shifts in supply and demand and how climate change-related risks impact decision-making;

- c. **regulatory risk:** arises from the increased regulation of climate change-related matters and the potential for increased regulatory action in the event of non-compliance;
- d. **policy risks:** include actions that are taken to limit an issuer's contribution to climate-change or that seek to promote sustainable resources and more efficient practices;
- e. **legal risk:** may arise from exposure to actions related to an issuer's failure to disclose sufficient information or address risks; and
- f. **technology risk:** such as when technology replaces old systems or methodologies.

(iii) What are some additional considerations that an issuer should take into account?

- a. Can the issuer **quantify** the risk? Where practicable issuers are also encouraged to quantify and disclose the potential financial and other possible impacts of the risk.
- b. What is the **probability** that the trend, demand, commitment event or uncertainty will occur?
- c. What is the anticipated **magnitude** of the climate-change related risk?

If an issuer has disclosed climate change-related risks, can this be considered forward-looking information ("FLI")?

FLI related to climate change-related matters might include an issuer's intention to reduce its emissions or minimize its climate change footprint as it relates to its operations. Depending on the context, the issuer's projections, plans and objectives for any action or to minimize future climate change-related risks (including any consequence thereof) can be considered FLI. In turn, issuers are reminded that if they disclose FLI, the same general securities rules apply, meaning that the issuer must comply with the requirements set out in National Instrument 51-102 — *Continuous Disclosure Obligations*, including:

1. the information must be identified as FLI;
2. cautionary language related to the information must be provided;
3. "material" factors or assumptions used to develop the FLI must be provided;
4. FLI that is previously disclosed must be updated; and
5. the issuer's policy for updating the FLI must be described.

What should issuers contemplate if it discloses climate change-related risks voluntarily?

Issuers may choose to voluntarily disclose climate change-related risks or other information that may not necessarily be "material" due to the increased interest of investors. Issuers who decide to do so should remember that voluntary information must be prepared with the same rigour as regulatory

filings. Such voluntary disclosure must not contain any misrepresentations or obscure or minimize any "material" information, as in doing so may give rise to civil liability for secondary market disclosure. Additionally, "material" information required to be disclosed under securities legislation must be disclosed in all applicable regulatory filings; it is not enough to voluntarily disclose "material" information using other avenues or resources.

Where can issuers go for additional information?

For more information on how the Notice might impact your business, please contact any one of the lawyers in our securities group. The Notice can also be accessed at the following link:

https://www.osc.gov.on.ca/documents/en/SecuritiesCategory5/csa_20190801_51-358_reporting-of-climate-change-related-risks.pdf