

REPORTING ISSUERS NEED TO BE FACTUAL AND BALANCED, STRIVING FOR ACCURATE AND COMPREHENSIVE ESG REPORTING

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McMillan is authoring a number of bulletins to assist clients in navigating the quickly developing regulatory regime surrounding ESG. The introductory bulletin for the series can be found [here](#). This bulletin seeks to deliver guidance to issuers on providing high-quality disclosure. [McMillan's Capital Markets & Securities Group](#) regularly interacts with securities regulators on these and other related issues.

The Canadian Securities Administrators (“**CSA**”) recently published its biennial report reflecting the results of the Continuous Disclosure Review Program, which assesses reporting issuers’ compliance with continuous disclosure obligations. The [CSA Staff Notice 51-364 Continuous Disclosure Review Program Activities for the fiscal years ended March 31, 2022 and March 31, 2021](#) (the “**Staff Notice**”) outlines common disclosure deficiencies in financial statements, management discussion and analysis (MD&A) and flags overly promotional disclosure in the area of ESG.

The CSA reviewed the continuous disclosure record of 1,038 issuers during fiscal years 2022 and 2021. The continuous disclosure reviews were conducted with full or issue-oriented review. Such reviews focus on the overall quality of the issuer’s disclosure, and in particular, assess whether there is sufficient information for the reader to understand the issuer’s financial performance, financial position, business risks and future prospects. In fiscal year 2022, 61% of the CSA review outcomes required issuers to:

- improve, amend or review disclosure;
- refile certain documents; or
- file unfiled documents.

In rare instances, issuers were referred to enforcement, had their securities cease-traded or placed on the default list. There were a greater number of issuers who encountered these negative outcomes compared to fiscal year 2021, with a 5% increase in the number of issuers who were referred to enforcement, cease-traded or placed on the default list; a 3% increase in the number of issuers who had to refile or file unfiled documents; and a 2% increase in the number of issuers who were required to make changes for their next filing.

Seriously “Sustainable”: Promotional versus Informational

Upon conducting its detailed review, the CSA expressed concerns with respect to disclosure being untrue and unbalanced in ways that could mislead investors. In particular, the CSA noted that there was an increase in “greenwashing”. “**Greenwashing**” occurs when a business’s disclosure, branding or marketing intentionally or inadvertently contains false or misleading environmental/sustainability information, such as claiming a product or company is “green” or “clean”, overstating environmental credentials, mischaracterizing an environmental initiative or understating emissions.

The CSA cautioned issuers to focus on informational disclosure and avoid promotional disclosure. The following guidelines are recommended by the CSA to assist issuers in improving the quality of their ESG-related disclosure:

1. **Provide consistent disclosure.** Information disclosed voluntarily (e.g. on social media platforms, marketing materials) and required disclosure documents (e.g. AIF or MD&A) should be consistent. For instance, the same event should be given the same treatment – it should not be reported favorably in voluntary disclosure and unfavorably in disclosure that is required under securities law. The CSA has also noted that including material information, such as changes in the sustainability of an issuer’s operations, in voluntary disclosures but omitting it from continuous disclosure documents such as an MD&A may result in a violation of continuous disclosure obligations.
2. **Ensure public disclosures are factual and balanced.** Disclosure, including material changes, should be announced in a factual and balanced manner. ESG claims, therefore, should be substantiated by facts and corporate operations. The CSA flagged claims such as “seriously sustainable”, “more sustainable” and “eco-friendly” as vague, potentially misleading and promotional if there is no factual basis behind the claims. Such claims must be substantiated with details with respect to the particular aspects of sustainability that are being pursued and how success will be evaluated.
3. **ESG and Forward-Looking Information (FLI).** Certain statements related to ESG may constitute FLI. For example, a statement that “the Company will reduce greenhouse gas emissions by 30% in 2023” may be considered FLI. As a reminder, FLI is expressed, among other things, as targets, goals, forecasts or projections based on assumptions about future conditions. A reporting issuer must not disclose FLI unless the issuer has a reasonable basis for the forward-looking information. In the event FLI is material, a reporting issuer must:
 - a. identify the FLI;
 - b. caution users of FLI that actual results may vary and identify material risk factors that could cause actual results to differ materially;
 - c. state material factors or assumptions used to develop FLI; and

d. describe its policy for updating FLI.

4. **Refrain from using broad or misleading promotional language.** The CSA has made a point to state that issuers should not use exaggerated reports or vague commentary in disclosure. Claims that a key partner is “high-quality” and attentive to environmental matters due to their “aggressive emissions reduction targets” must be supported by the appropriate accompanying disclosures, such as evidence of the partner’s corporate activities or sustainability metrics (e.g. metrics related to carbon emissions, energy consumption, etc.). Similarly, if an issuer is to position itself as a “global leader” in environmental solutions, its financial statements and the revenue from its operations must reflect such claims. When describing relationships with other organizations, an issuer must be specific the purposes of these organizations and provide meaningful information about them.

5. **Disclose ratings and rating criteria.** An issuer should be cognizant that if it uses or references ratings, it is important to disclose the actual rating, the specific set of criteria that the rating given was based upon and if appropriate, the third party that certified the rating. Although metrics can be useful tools, the factors that are considered and the weight ascribed in calculating a rating can vary markedly between raters and rating systems. Sufficient disclosure will ensure that a rating will be given due consideration and not mislead investors.

CSA’s Guidance on ESG-Related Investment Fund Disclosure

Earlier this year, the CSA published [Staff Notice 81-334 – ESG-Related Investment Fund Disclosure](#) (the “**Guidance**”), which provides clarity for investment funds on disclosure practices that relate to ESG. The Guidance is specifically aimed at funds whose investment objectives reference ESG factors and or who employ ESG strategies (together “**ESG-Related Funds**”). Furthermore, the Guidance provides a brief summary of key international and domestic developments, including reference to an ESG report from the International Organization of Securities Commissions, which is the international organization for securities regulators. Such organization seeks to develop and promote adherence to global securities standards, and this particular report sets out recommendations for securities regulators and policymakers to improve sustainability-related practices, policies, procedures and disclosure in the asset management industry.

To mitigate the potential issues that arise from greenwashing, the CSA also highlighted the importance of continuous disclosure for ESG-Related Funds, and encouraged such funds to disclose information that is material to their operations. For example, the CSA encouraged funds with ESG-related investment objectives to disclose the ESG-related aspects of those operations, including the fund’s progress or status on meeting its ESG-related investment objectives. For ESG-Related Funds using proxy voting as a strategy, the CSA recommended making all of the fund’s annual proxy voting records available on its website.

The CSA noted that it will continue to monitor, among others, the regulatory disclosure documents of ESG-Related Funds and consider future policy initiatives as needed. It would be reasonable to expect enhanced scrutiny of ESG-related disclosure going forward.

Climate-Related Disclosure is a Priority

In a recent [press release](#), the CSA noted that climate-related disclosure standards are “a priority”. The CSA acknowledged that the United States Securities and Exchange Commission’s (“**SEC**”) has proposed amendments to rules that would require registrants to provide certain climate-related information in their registration statement and annual reports. The International Sustainability Standards Board (“**ISSB**”) has also proposed general standard for the disclosure of sustainability-related financial information as well as a specific climate-related disclosure standard.

While the SEC’s and the ISSB’s proposed climate-related disclosure will not be binding reporting issuers in Canada unless such rules otherwise apply to Canadian reporting issuers, depending on the relevant circumstances, it is worth noting that the CSA is actively considering these international developments in informing the development of its own rules. The CSA had previously proposed a climate-related disclosure rule in October 2021 that aligns with recommendations from the Task Force on Climate-related Financial Disclosures – for more information, please see the McMillan bulletin on this topic [here](#). There is growing consensus around the importance of international consistency on climate-related disclosure standards in the global market, and therefore, we expect that Canadian securities regulators will issue their expectations in the form of disclosure requirements in due course.

To discuss the CSA’s continuous disclosure review, investment funds and/or best practices or for more information, please contact Leila Rafi, Ravipal S. Bains, Patricia Chehadé, Anju Xing or any member of our [Capital Markets & Securities](#) group.

by [Leila Rafi](#), [Ravipal S. Bains](#), [Patricia Chehadé](#) and [Anju Xing](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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