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Submission on Consultation Paper – Climate-related Disclosure Framework

- 1 This is a submission by Dentons Kensington Swan on the External Reporting Board's ('XRB') *Climate-related Disclosure Framework* Consultation Document dated July 2022 ('Consultation Paper').

About Dentons Kensington Swan

- 2 Dentons Kensington Swan is one of New Zealand's premier law firms with a legal team comprising over 100 lawyers acting on government, commercial, and financial markets projects from our offices in Wellington and Auckland. We are part of Dentons, the world's largest law firm, with more than 12,000 lawyers in over 200 locations.
- 3 We have extensive experience in financial services law issues, with a specialist financial markets team acting for established major players as well as niche providers and new entrants to the market. We assist a number of financial institutions and financial market participants with their regulatory obligations and conduct and culture initiatives, including banks and insurers and fund managers affected by the climate-related disclosure regime reforms, and a range of financial advice provider businesses involved in advising on equity securities and the distribution of products and services provided by financial institutions.

General comments

- 4 We support the XRB's proactive release of the Consultation Paper and associated exposure drafts which will assist Climate Reporting Entities ('CREs') prepare for the implementation of the upcoming Climate-Related Disclosure regime.
- 5 The XRB has done well in considering feedback from previous consultations and keeping the standards aligned with global developments.
- 6 We recommend some minor amendments to the exposure drafts so that they will better support a regime that encourages meaningful engagement by CREs. The guidance contemplated in the Consultation Paper is essential to facilitate the provision of informative disclosures to assist investor decision-making. Those recommendations are set out in our substantive submission points below.

Fernanda Lopes & Associados ► Guevara & Gutierrez ► Paz Horowitz Abogados ► Sirote ► Adepetun Caxton-Martins Agbor & Segun ► Davis Brown ► East African Law Chambers ► Eric Silwamba, Jalasi and Linyama ► Durham Jones & Pinegar ► LEAD Advogados ► Rattagan Macchiavello Arocena ► Jiménez de Aréchaga, Viana & Brause ► Lee International ► Kensington Swan ► Bingham Greenebaum ► Cohen & Grigsby ► For more information on the firms that have come together to form Dentons, go to [dentons.com/legacyfirms](https://www.dentons.com/legacyfirms)

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Submission Questions

7 Do you think draft Aotearoa New Zealand Climate Standards will meet primary user needs?

Overall, we consider that the draft Aotearoa New Zealand Climate Standards ('NZ CS') will meet primary user needs. The minor changes to the standards suggested below should assist in making the NZ CS more fit for purpose by providing additional flexibility around some of the disclosure expectations.

a Do you think that the proposed disclosure requirements will provide information that is useful to primary users for decision making? If not, please explain why not and identify any alternative proposals.

We believe that the proposed disclosure requirements will prove beneficial for primary users in their decision making as the regime develops and evolves. The disclosure requirements provide clarity and relevant information that will assist CREs to make disclosures which are fit for primary user's needs. These disclosure requirements will be especially beneficial once the regime has matured and CREs are no longer reliant on the first-time adoption provisions.

It will be difficult for CREs, and in particular managed investment scheme (MIS) managers, to obtain all relevant data from entities invested in and third party data providers, until there is a more comprehensive and consistent form of reporting globally. It would be helpful if the standards and associated guidance make greater allowance for those constraints, and include parameters to assist CREs explain the limitations on information available to primary users.

b Do you consider that draft Aotearoa New Zealand Climate Standards are clear and unambiguous in terms of the information to be disclosed? If not, how could clarity be improved?

We appreciate the difficulty in finding a balance between disclosing enough information to ensure the NZ CS are clear and unambiguous, and disclosing too much information which may render the NZ CS ineffective and unhelpful to read and follow.

It would be helpful if the requirements for applying cross-referencing for the location of disclosures in NZ CS 3 are clarified. Specifically, what the XRB considers is required in order for information to satisfy the requirement to be 'available over time' in accordance with NZ CS 3 17(b) should be specified so CREs do not need to make this information available for a longer period than is required.

We suggest NZ CS 1 Metrics and Targets are clarified, specifically in relation to the quantifying of physical risks in CS 1 21(d). While we support the general inclusion of required metrics to be disclosed, the lack of specificity around the metrics definitions risks those metrics no longer assisting primary users to make informed decisions when engaging in the market. Specifically, where statistical analysis is required, the lack of clear definitions over what qualifies as an acceptable metric may result in a lack of consistency between CREs. Inconsistency between CREs creates greater difficulty for primary users trying to make sense of disclosures.

c Do you consider that draft Aotearoa New Zealand Climate Standards are comprehensive enough and achieve the right balance between prescriptiveness and principles-based disclosures? If not, what should be removed or added to achieve a better balance? Please consider your answer to question 5 when responding to this question.

We consider the NZ CS is sufficiently comprehensive.

8 Do you have any views on the defined terms in draft Aotearoa New Zealand Climate Standards?

While we support the use of 'governance body' as a broad defined term (as opposed to 'board'), we believe the definition contained within the exposure drafts does not sufficiently encompass the full range of CREs. The definition of 'Governance body' in the exposure drafts refers to 'a board, investment committee or equivalent body charged with governance'. However, some CREs have large and complex corporate structures involving multiple bodies in charge of governance. For instance, if the CRE is a subsidiary of another company, both the CRE and the parent company will have their own respective boards. In this situation, it is not sufficiently clear whether the board of the parent company would also be considered a 'governance body' for the purposes of NZ CS1 and NZ CS2, as the parent company's board arguably exerts a degree of influence on the governance on the CRE. We think more clarity surrounding this definition would be beneficial. By all means stick with the term 'governance body', but include additional interpretative guidance to introduce greater flexibility for the interpretation and application of the concept.

We have concerns around the assessment that primary users are expected to be educated and experienced enough that they are considered to meet the 'reasonable persons test' for the purposes of the materiality definition in NZ CS 3. The XRB has acknowledged that there will be primary users with differing levels of sophistication, and this should be reflected within the definition of material, rather than leaving that assessment to each individual CRE. For MIS, it might be useful to adopt the definition of "material information" under the Financial Markets Conduct Act 2013 as this would provide a consistent approach to materiality for MIS managers (and their primary users).

9 Do you have any practical concerns about the feasibility of preparing the required disclosures in draft Aotearoa New Zealand Climate Standards? In responding to this question, please consider the proposed first-time adoption provisions in NZ CS 2 and your answer to question 4. Please also clearly explain what would make the specific disclosure unfeasible to disclose against either in the immediate term or the longer term.

We understand that there will be situations where CREs are relying on third parties for the information that will inform their disclosures. In situations such as where a CRE invests in funds managed by third parties it will be increasingly difficult to make the required disclosures. It would be beneficial to provide guidance to reflect what is expected of a CRE when they are intrinsically reliant on another entity for the source of their information upon which they will make their climate-related disclosures, and potentially guidance on a consistent approach to disclosing estimations or explanations for a lack of data (as previously raised at 7(a) above).

10 Do you agree with the proposed first-time adoption provisions in NZ CS 2? Why or why not?

Overall, we support the first time-adoption provisions proposed in NZ CS 2. We believe that the use of the first-time adoption provisions will give CREs a reasonable period in which to develop their disclosure processes to meet the standard expected to provide investors with meaningful information on which to base decisions.

a Are any additional first-time adoption provisions required? If so, please provide specific details regarding the adoption provision and the disclosure requirement to which it would apply, and the period of time it would apply for.

We recommend that the ambit of 'first-time adoption provision 5: Scope 3 GHG' emissions be extended to include Scope 2 GHG emissions. Scope 2 GHG emissions cover all indirect GHG emissions from the consumption of purchased electricity, heat, or steam, for CREs. The calculation of Scope 2 indirect emissions is both difficult and time consuming. We believe that requiring CREs to disclose Scope 2 GHG emissions at the inception of the regime is overly onerous. The focus should be placed on Scope 1 GHG emissions which are direct and correspondingly more readily measurable for CREs attempting to meet the disclosure standards.

We support the addition of a first-time adoption provision providing an exemption for CREs to disclose comparative information where methodologies and segmentations have changed. Where such changes have occurred, requiring outdated methodologies to be used as a means of comparison may be confusing and undermine the purpose of the regime.

11 Do you think the draft staff guidance documents will support CREs when making their disclosures and support consistent application of the disclosure requirements? Why or why not?

We are comfortable that the guidance provided by the XRB in the NZ CS 1: Guidance for MIS Managers working draft ('MIS Manager Guidance') is comprehensive and will support CREs in making their disclosures. We believe that the comprehensive nature of the MIS Manager Guidance will also facilitate consistent application of those disclosure requirements. In particular, we support the use of international materials and standards (such as the Task Force on Climate-related Disclosures ('TCFD') recommendations and guidelines) as examples for how disclosures should be made by managed investment scheme ('MIS') managers under NZ CS 1.

We support the acknowledgement in the MIS Manager Guidance that the disclosure regime is in its infancy, and that both the quality of the guidance and the quality of the disclosures from CREs are expected to improve over time. It would be useful if this consideration was incorporated into specific disclosure requirements. This could look like a recommended 'gold standard' of disclosure (based on TCFD recommendations) together with an explicit acknowledgement that MIS managers will not be penalised for failing to meet that 'gold standard'.

a Do you think the guidance is under, adequately or overly specific and granular?

The MIS Manager Guidance is appropriately specific and not overly granular in most cases. However, in certain instances (disclosures 7(c) and 15(c) for example) the guidance is too

vague as to what form the XRB envisages the disclosure should take. We recommend that, for each disclosure, the XRB provides an indication of what the disclosure might look like for a typical MIS manager. It should be clear in each case that they are recommendations and examples, rather than prescriptive standards.

An area which we believe could benefit from some early guidance is the expectations for disclosure 7(b), relating to the requirement to ensure ‘appropriate skills and competencies are available to provide oversight of climate-related risks and opportunities’. Without focusing too much on the granular, we believe clarity should be given on the level of expectations expected from governance bodies. In other words, whether the governance body itself should have members who have the appropriate skills and expertise, or whether it is sufficient for the governance body to outsource this function to an external entity in order to make this determination.

We support the current inclusion of options for MIS managers to provide an explanation as to why qualitative analysis has been provided where quantitative analysis has not (disclosures 11(b), 11(c), 14(b) and 14(c)). Equally, we support the current option in the MIS Manager Guidance for MIS managers to default to high-level disclosure where granular disclosure may disclose commercially sensitive information (disclosure 10(d)). We would support extending these exemptions out to every disclosure which requires quantitative analysis and those which may involve disclosing commercially sensitive information.

We also support further guidance on disclosure 10(b) relating to the disclosure of the scenario analysis that an entity has undertaken. ‘Scenario analysis’ is described in broad terms, and the extent to which an entity has to undertake the ‘scenario analysis’, and the aspects that should be disclosed, is unclear. We support the inclusion of appropriate tables and examples for any such guidance. Without being too prescriptive, any such guidance would prove more beneficial if it were to outline the level of expectation placed on entities (i.e. for larger CREs, the extent of tables and models used in the scenario analysis will have to be more complex, while smaller companies with less complicated products should be able to rely on less extensive models and examples). We believe this risk-based approach will assist entities in ensuring that any disclosures relating to their scenario analysis are relevant and beneficial to primary users.

b Do you consider that anything in the guidance should be elevated into the standard? Should anything be demoted from the standard into guidance?

We are comfortable with the division of content between the MIS Manager Guidance and NZ CS 1. The MIS Manager Guidance is sufficiently specific without being overly granular, we believe this level of specificity would be inappropriate for inclusion in NZ CS 1. Likewise, we do not feel that anything from NZ CS 1 better belongs in the MIS Manager Guidance.

CREs may find it useful if there was a fact-sheet or quick reference guide outlining the key aspects of the MIS Guidance. This will allow CREs the ability to point to key information, and allow them to look to the guidance for more detailed information.

- 12 Paragraphs 13 to 19 of draft NZ CS 3 are the proposed location of disclosures requirements. Paragraphs BC14 to BC20 of the basis for conclusions on draft NZ CS 3 explain the XRB Board's intent regarding these proposed requirements. Do you agree with the proposed location of disclosures requirements? Why or why not?

We agree with the proposed location of the disclosure requirements as it provides flexibility for CREs to make disclosures in a way that fits their business model.

Further information

- 13 We are happy to discuss any aspect of our feedback on the Consultation Paper. Thank you for the opportunity to submit.

Yours faithfully



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