Via E-Mail

September 5, 2024

Deceptive Marketing Practices Directorate
Competition Bureau
Place du Portage I
50 Victoria Street, Room C-114
Gatineau, Quebec K1A 0C9

Attention: **Mr. Matthew Boswell**
Commissioner of Competition

Mr. Stéphane Lamoureux
Senior Deputy Commissioner

Dear Commissioner Boswell and Senior Deputy Commissioner Lamoureux:

Re: Comments regarding Guidance on June 2024 Changes to the *Competition Act* (Canada) – Section 74.01(1)(b.2)

We are writing in response to the public consultation on the guidance that the Competition Bureau (**Bureau**) is developing with respect to the application of the new provisions in the *Competition Act* (Canada) (**CA**) aimed at greenwashing.

Thank you for the opportunity to provide you with our comments. We very much appreciate the Bureau's commitment to principled, transparent, and evidence-based enforcement of the CA. We also wish to acknowledge the fact that the language of new Section 74.01(1)(b.2) was not language that was proposed by the Commissioner, nor is it language that we have seen used in other jurisdictions around the world. The Commissioner's guidance on the scope and meaning of Section 74.01(1)(b.2), therefore, is of critical importance to Canadian businesses, particularly those involved in the oil and gas, agricultural and other hard-to-abate industries in Canada.

Basis for BD&P Comments

Burnet, Duckworth and Palmer LLP is a Calgary-based law firm that advises clients across a variety of industries and sectors, with many being heavily involved in the energy industry. We work with and advise clients ranging from small private companies to large public companies and those in between. We currently represent over 50 public companies listed on the Toronto Stock Exchange and the TSX Venture Exchange, with many of our clients also listed on U.S. stock exchanges and other international stock exchanges. In addition to our other areas of practice, we have significant expertise in both private and public company mergers and acquisitions, corporate finance, corporate governance, continuous disclosure, corporate and securities litigation, general securities law, commercial law, energy law and competition law.

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Scope of our Comments

Our comments relate specifically to Section 74.01(1)(b.2) of the CA:

> *74.01(1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,*
>
> *(b.2) makes a representation to the public with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is not based on adequate and proper substantiation in accordance with internationally recognized methodology, the proof of which lies on the person making the representation;*

We strongly encourage the Bureau to take a balanced approach to interpretating the new provisions – one that allows Canadian businesses to meet the demands of their investors and stakeholders for more disclosure and greater transparency in their environmental sustainability initiatives and climate-related risks, opportunities, management and mitigation, while ensuring disclosures are not misleading.

This balanced approach is consistent with the observations made in the 17th Report of the Standing Senate Committee on National Finance:

> *The Committee notes that a meaningful proportion of industry players active in Canada have made real efforts to support the move to a net-zero economy and to differentiate their products and firms on this basis. These legitimate efforts should not be deterred or impeded, for fears of the unintended consequences of the pursuit of greenwashing actions.*

The uncertainty of the scope and meaning of these provisions coupled with significant penalties and private rights of action have had a dramatic silencing effect on the public disclosure of environmental claims and aspirations. As the Bureau has undoubtedly witnessed, many companies have pulled their sustainability and/or environmental reports from their websites and attempted to sanitize their public record as much as possible pending further guidance from the Bureau. While not all industries reacted in the same way, the reaction of many companies in the energy industry is based on the reasonable belief that they will be the initial targets for private actions. This is evident from public statements made by climate advocacy groups and prominent individuals, including the following statements made by Catherine McKenna, former Canadian Minister of the Environment and Chair of the United Nations Climate Action Group:

> *This isn't one or two cases of misleading advertising. This is an industry that has been lying about the fact that fossil fuels cause climate change for decades. It's a trend for the industry that wants to continue burning its products while people pay the price … And now they're in a different phase, where they're trying to create the perception that they're part of the climate solution, when they're actually a major part of the problem.*[1]

In our view, the energy industry, including the fossil fuel industry, **must be part of the climate solution**. It is unrealistic and naïve to think otherwise. The Bureau's guidance should not undermine the role that companies in the energy sector are playing to address climate change while ensuring that consumers have affordable, reliable energy, and supporting Canada's energy security imperative.

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[1] https://nationalmagazine.ca/en-ca/articles/law/business-corporate/2024/banning-fossil-fuel-advertising.

Our comments are focused on providing the Bureau with a better understanding of the concerns that have been raised by the clients we serve, together with suggestions and recommendations on how the Bureau's guidance can address these concerns or, at a minimum, provide greater clarity to businesses so that they have greater confidence in what they are able to disclose without violating these provisions.

Our comments are divided into three sections, as follows:

Part 1: Meaning of "Internationally Recognized Methodology"

Part 2: Alignment with Applicable Securities Laws

Part 3: Additional Comments

PART 1: MEANING OF "INTERNATIONALLY RECOGNIZED METHODOLOGY"

What is an "Internationally Recognized Methodology"

A. Clarifying the Inherent Vagueness of the Term

We note that one of the Bureau's consultation questions is "*What internationally recognized methodologies should the Bureau consider about the environmental benefits of the business or business activities?"* In our view, this question incorrectly assumes that everyone understands what an "internationally recognized methodology" (**IRM**) is, in the first instance. The term, however, is inherently vague. Certainly, there are international methodologies (**IM**) that have been published, but how will businesses know when an IM is an IRM? Given the significant penalties associated with violating these provisions, the Bureau's first order of business should be to provide businesses with guidance on what the characteristics of an IRM are. And while we appreciate that the meaning of this term will be more fully fleshed out as cases are brought by the Bureau or private parties, given the penalties and privates rights of action, the Bureau should have *some idea* of what they are looking for when assessing whether or not a disclosure that is alleged to contravene Section 74.01(1)(b.2) is "substantiated in accordance with internationally recognized methodology". The Bureau and the Competition Tribunal (**Tribunal**), after all, are the authorities that will determine whether the reverse onus provisions have been satisfied.

The task of identifying attributes of an IRM may be challenging, but it is necessary. There are a number of IMs related to sustainability and climate-related disclosures, but each is designed for a specific purpose and they are not, or may not be, consistent.[2] Some are more well known than others, and all of them are rapidly changing. How can businesses satisfy the reverse onus provisions of these provisions unless they know with what to substantiate their disclosures? At what point does an IM become or qualify as an IRM for the purposes of the CA? Conversely, when does an IRM cease to be an IRM and become simply an IM?

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[2] See, e.g., Task Force on Climate-related Financial Disclosures (**TCFD**) (which has been taken over by the IFRS Foundation) https://www.fsb-tcfd.org/about/; CDP Worldwide (**CDP**) at https://www.cdp.net/en/info/about-us; Sustainability Accounting Standards Board (**SASB**) Standards at https://sasb.org/about/; Global Reporting Initiative (**GRI**) at https://www.globalreporting.org/about-gri/. Several countries have adopted national legislation that draws on one or more of these and other international standards, in whole or in part, such as the United Kingdom's Sustainability Disclosure Requirements (Sustainability Disclosure Requirements: Implementation Update 2024); the European Sustainability Reporting Standards (ESRS), supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards; the U.S. Security Exchange Commission's Climate Disclosure Rules 17 CFR 229 ss 1500-1508 , which have been voluntarily stayed pursuant to a consolidated administrative law challenge; California's Climate Corporate Data Accountability Act Senate Bill 253. Climate related financial disclosure protocols are also found in the securities laws of many countries, which are based, in whole or in part, on various international methodologies for sustainability and climate risk disclosure. The SASB Standards and TCFD also reference the Greenhouse Gas Protocol (**GHG Protocol**), which claims to supply "the world's most widely used greenhouse gas accounting standards and guidance" https://ghgprotocol.org/.

In the "*Message from the Commissioner of Competition*" regarding environmental claims and the CA that is currently posted to the Bureau's website (**Message from the Commissioner**) the Bureau states "we are not experts in environmental sciences". Unfortunately, the Canadian legislature has determined otherwise. The Bureau is required to assess whether a disclosure is "substantiated in accordance with internationally recognized methodology". This "scientific standard" has become a "legal standard" that the Bureau will be enforcing. If it does not currently have the expertise, it will need to obtain it very quickly. It will, in fact, need that expertise to assess the submissions it will be receiving in its consultation process.

Recommendation # 1

The Bureau's guidance should clarify what criteria businesses should apply when considering whether an IM is an IRM for the purposes of the CA.

B. Applicability of (and Conflicts with) Canadian Federal and Provincial Reporting Standards

The term "international" is typically defined to include more than one country. So how do Canadian federal and provincial reporting standards and methodologies fit in? Concern with the use of the term "international" was raised in the observations made in the 17th Report of the Standing Senate Committee on National Finance:

> *"... while clause 236 (1) of Bill C-59 notes the importance of internationally recognized methodology to substantiate such claims, the Committee believes that the analysis should also include federal and other Canadian best practices, ... "*

A number of jurisdictions in Canada have regulatory reporting requirements that require the disclosure of specified sustainability and climate-related information and/or metrics. This reporting must be done in accordance with methodologies that are specified by regulation and may differ from an IRM. For example, if a company's sustainability and climate-related disclosures can be substantiated in accordance with Canadian federal or provincial regulatory requirements, such as Alberta Directive 017: Measurement Requirements for Oil and Gas Operators, they should be considered to be substantiated in accordance with IRM for the purposes of the CA. Companies that have reporting obligations under other Canadian federal or provincial rules and regulations should be able to publicize those same disclosures using the metrics they are required to use for reporting purposes.

As discussed more fully below under the heading "*New Rules may Conflict with New Canadian Climate-Related Disclosure Standards*", when Canadian federal and provincial organizations, such as the Canadian Securities Administrators (**CSA**) or the Canadian Sustainability Standards Board (**CSSB**), adopt their own sustainability and climate change disclosure methodologies, or adopt modifications to IRMs, then sustainability and climate change disclosures should be considered to be substantiated in accordance with IRM for the purposes of the CA.

Recommendation # 2

The Bureau's guidance should clarify that disclosures made by companies that are substantiated in accordance with their federal and provincial reporting obligations will be considered to be substantiated in accordance with IRM.

What are the limitations of IRMs

There are a number of limitations of IRMs that the Bureau needs to consider, including: (A) the scope and purpose of IRMs, (B) the impact of the "over-all impression" on specified IRM protocols, (C) methodologies for calculating emissions and (D) forward looking information (**FLI**) and scenario analysis. We discuss each of these more fully below.

A. Scope and Purpose of IRMs

Investors and other stakeholders are increasingly asking for more information about the sustainability and climate mitigation activities and initiatives being undertaken, or proposed to be undertaken, by companies. IRMs are designed to provide standards for disclosure of such information to investors and other stakeholders. The SASB standards, for example, are designed to "help companies around the world identify, measure and manage the sustainability-related risks and opportunities that most directly affect *cash flows, access to finance and cost of capital*." These disclosures associated with the SASB standards target relatively sophisticated investors and stakeholders.

The SASB standards are quite clear:

> *Corporations have many important stakeholders and a variety of channels through which they may already be communicating some sustainability information, including websites, sustainability reports, voluntary industry reporting, government agencies, and corporate social responsibility reports.* ***However, SASB standards are developed for use in statutory financial filings for the benefit of investors and others who rely on such filings****.*[3]

Simply put, an IRM is not designed to target a "credulous consumer" that wishes to buy a product or service with advertised environmental benefits. We discuss this further under the section entitled "*Investor Protections*" below.

The SASB standards represent a form of "sustainability accounting" which has a distinct purpose and aim related to assessing financial value:

> *Sustainability accounting refers to the measurement, management, and reporting of such corporate activities... Like financial accounting, sustainability accounting has both confirmatory and predictive value, so it can be used to evaluate past performance and be used for future planning and decision support. As a complement to financial accounting, it helps provide a more complete view of a corporation's performance on material factors likely to affect its ability to create long-term value. ... Like financial accounting information, sustainability accounting information captures past and current performance, and can also be forward-looking to the extent that it helps management describe known trends, events, and uncertainties…SASB metrics—both qualitative and quantitative— will thus* ***be of interest to investors and creditors****, thereby helping to communicate and to more completely represent company performance.* [4]

These IRMs are designed to solicit information that investors and stakeholders want to hear about and are usually included in a company's annual "ESG Report" or "Sustainability Report" (**ESG Reports**). ESG Reports are fulsome reports that are generally published (or updated) annually, setting out the type of information investors are looking for. Institutional Shareholder Services (**ISS**) and Glass, Lewis & Co (**Glass Lewis**) are global corporate governance and proxy voting organizations that release annual voting recommendations for institutional investors relating to public companies. While following ISS and Glass Lewis recommendations is not a legal requirement, many public companies follow such recommendations to the extent possible, as such is the expectation of their shareholders, particularly their institutional investors.

ISS, in particular, releases issuer-specific annual reports entitled *Proxy Analysis & Benchmark Policy Voting Recommendations* in advance of annual general meeting season. The information included in these reports varies from one issuer to the next, and they often include ISS' analysis of a particular company's disclosure across various categories, including environmental-related disclosure. ISS also 'grades' the company's disclosure and assigns a 'quality score' based on disclosure and transparency practices. Based on ISS' findings, it also recommends how securityholders should vote in

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[3] SASB Conceptual Framework, February, 2017 https://sasb.ifrs.org/wp-content/uploads/2019/05/SASB-Conceptual-Framework.pdf?source=post_page#:~:text=For%20the%20purposes%20of%20SASB,reporting%20of%20such%20corporate%20activities, at p.6.

[4] SASB Conceptual Framework, February, 2017 at pp. 2, 4.

respect of director elections. *A determination that a company has insufficient environmental-related disclosure could mean a recommendation to vote against certain directors*.

Glass Lewis provides general recommendations that many issuers follow in order to avoid Glass Lewis recommending voting against their directors. In 2023, Glass Lewis added a new discussion category to its recommendations: *Board Accountability for Climate-Related Issues*. The discussion states that "clear and comprehensive disclosure regarding climate risks, including how they are being mitigated and overseen, should be provided by those companies whose own GHG emissions represent a financially material risk" and that "the boards of these companies should have explicit and clearly defined oversight responsibilities for climate-related issues". In circumstances where companies do not have sufficient climate-related disclosure and/or oversight, Glass Lewis may recommend voting against responsible directors.

Reliance on an IRM to help a company "identify, measure and manage the sustainability-related risks and opportunities that most directly affect cash flows, access to finance and cost of capital" has been turned on its head by the potential liability associated with these disclosures under the new greenwashing provisions.

In short, IRMs were not designed for the purpose to which they are now being used under the CA.

Recommendation # 3

The Bureau's guidance should clearly distinguish between (a) disclosures provided to investors and other stakeholders, including governance and proxy voting organizations, who are assessing the value of the business and share price, and (b) disclosures to consumers who wish to buy a product or service that purports to have certain environmental attributes and benefits. Investors and other stakeholders are not "credulous consumers" and should not be treated as such.

Recommendation # 4

The Bureau's guidance should clearly recognize that most IRMs were not designed for the purposes of the greenwashing provisions of the CA and how the Bureau intends to address this limitation should be clearly outlined in the guidance.

B. Relationship of the "over-all impression" test and use of IRM Protocols

Representations have been held to be misleading if they give an "over-all impression" that is inconsistent with the representation itself. In certain cases, this test may conflict with the requirements of an IRM. For example, common claims of greenwashing include representations that over-emphasize reductions in emissions intensity when absolute emissions are increasing, or over-emphasizing investments in non-fossil fuel-based energy or assets when such investments represent only a small portion of the capital a business is allocating to those activities.

The Message from the Commissioner specifies that environmental claims should not be exaggerated, noting:

> *"While small changes can add up, when it comes to the environment, they should never be marketed as big ones ... [businesses] should consider if focusing on one environmental benefit of a business's practices conveys the general impression that the business pollutes much less than it actually does."*

However, and as we note below, an IRM may require companies to focus on those activities. Emissions intensity reduction mitigation activities are activities that investors want businesses to disclose and that represent legitimate efforts by businesses to address climate risks. A reduction in emissions intensity is, after all, an emission that has been avoided. That is important and businesses need to talk about their efforts in these areas. A reduction in emission intensity with a corresponding increase in absolute emissions also generally would mean that a company is growing its business and potentially improving its productivity, which are two things we should be encouraging Canadian businesses to do.

(i) Use of Defined Terms

In order to make information accessible and understandable to investors, an IRM may establish definitions for various terms and protocols related to presentation of metrics, which may have different meanings for different industries. Those terms may or may not be shared across different IRMs or may have a meaning that is different between IRMs or not commonly understood by the general public because they are designed to fulfil the purpose of the specific IRM. SASB, for example, defines "sustainability" with respect to the environment by reference to "financially material sustainability information".

> *For the purposes of SASB standards, sustainability refers to corporate activities that maintain or enhance the ability of the company to create value over the long term.*[5]

For a regular consumer, this definition may have little meaning. They may interpret the term "sustainability" in relation to the environment in a much different way. As such, there is potential for the "over-all impression" test applicable under the CA to conflict with the use of a specific term under an IRM. However, in order to "substantiate" a disclosure "in accordance with an IRM", use of the appropriate terminology is required. Otherwise, the value or purpose of using the IRM may be undermined for its intended audience.

Recommendation # 5

The Bureau's guidance should make it clear that businesses are entitled to use terminology defined by the IRM they are using to substantiate their representations.

(ii) Presentation Protocols

IRMs may also prescribe protocols for presentation of disclosures so that investors understand where the information is located when reading reports (i.e., ESG Reports) that have adopted that IRM. An IRM may require disclosure of reduction mitigation measures being undertaken in respect of one aspect of the business (e.g., reductions in emission intensity or reductions in emissions pertaining to a specific facility) separately from over-all emissions reductions or increases. Such mitigation measures are considered "financially material" under the applicable IRM, and so are required to be disclosed. However, the presentation protocol may provide for disclosures about reduction mitigation measures to be disclosed in respect of a part of a business (e.g., reductions in emission intensity or reductions in emissions pertaining to a specific facility), while the over-all environmental or ecological impact of the business is found in a later part of the disclosure (e.g., which may, for example, show an increase in absolute emissions).

The presentation protocols were not designed with the "over-all impression" test applicable under the CA in mind. As such, placement of emissions reductions activities in one area of a report, when over-all emissions are disclosed elsewhere in the report, should not be held to be a misleading or exaggerated environmental claim or one that gives the over-all general impression that the business pollutes much less than it actually does.

Recommendation # 6

The Bureau's guidance should make clear that the "over-all impression" of any single disclosure should be assessed on the basis of the presentation guidelines recommended by the IRM and not on how close together or far apart the two different disclosures are.

[5] SASB Conceptual Framework, at p.2. See also, p. 9.

(iii) Applicability of an IRM to Selective Disclosures

While the methodologies and protocols contemplated in an IRM are designed to solicit information of significance to investors, and the same may be provided in a fulsome ESG Report, the business cannot then provide inconsistent information to the public on its websites, news releases, advertisements or social media posts. These types of disclosures generally have a larger and over-all less sophisticated audience and, of course, space constraints. As such, it becomes even more difficult to satisfy the "over-all impression" test. Businesses need to understand how they can satisfy the "over-all impression" test in their shorter, more public facing disclosures while ensuring consistency with their more fulsome disclosure documents.

Recommendation # 7

The Bureau's guidance should be clear that if selective information substantiated in accordance with an IRM is disclosed on a website, news release, advertisement or media post references, it will not be determined to give a contradictory "over-all impression" provided the more fulsome analysis is made easily accessible to the reader (via a website link, QR code, or other readily accessible means).

C. Quantitative Disclosures

There are a number of IRMs used by businesses to calculate absolute greenhouse gas (**GHG**) emissions and emissions intensities as well as to assist businesses to develop corresponding reduction targets. A well known IRM is the GHG Protocol, which purports to "set the standard to measure and manage emissions." It becomes apparent as one reviews the measurement standards that the methodology is not a single or simple "formula".

There is no single method for gathering data to calculate the quantity of GHG, NOx or SOx emissions or other sustainability metrics that are often disclosed by companies. Emission statistics are rarely derived directly, even for Scope 1 emissions, and are clearly not directly derived for Scope 2 or Scope 3 emissions. As a result, most emissions are calculated using one or more methods that indirectly measure emissions. An IRM permits a company to choose among a variety of methods to calculate data that cannot be obtained directly. The information or data sources that businesses use may be derived from multiple sources, including SCADA/metered data, engineering and other professional estimates, manufacturer data, gas and other substance composition details, default factors as specified with the IRM itself, data or other statistics derived from publicly available sources, such as Statistics Canada, or as required by, or in accordance with, Canadian provincial or federal reporting frameworks.

While third party data verification is a best practice, the costs associated with third party verification may be financially burdensome for small businesses. Businesses are responsible for collecting and analyzing data upon which they base their business decisions, from day-to-day operations to large scale strategic business decisions, including whether or not to invest in capital projects. It is very much in businesses' interest to collect and utilize the best (i.e., most relevant and precise) data possible to inform those decisions.

Recommendation # 8

The Bureau's guidance should acknowledge that the choice of methodology and the evidence or data used to provide inputs into the methodology will come from multiple sources with differences in their quality; it should accept the data businesses use to quantify their emissions, provided such data is reasonable and appropriate having regard for the information that is available to them at the time.

D. FLI and Scenario Analysis

In the Message from the Commissioner, the Commissioner noted that:

> *"One of the bigger trends in complaints involves claims about environmental improvements that the business will accomplish in the future ... Some of these complaints also allege that businesses making such claims are making decisions and investments that will actually move the business further away from its stated environmental goals."*

The Message from the Commissioner also suggests that businesses should avoid aspirational claims about the future.

We wish to point out that IRMs, such as the SASB standards, encourage forward looking and aspirational statements simply by virtue of the information they require or ask companies to disclose.

The Task Force on Climate-related Financial Disclosures (**TCFD**) recommends that businesses developing climate-related financial disclosures make assumptions about future climate risks and opportunities which are expressly "*designed to solicit decision-useful, forward looking information on financial impacts*". FLI is, by its nature, information that involves an estimate or a projection. FLI may be clearly expressed as aspirational in nature or simply reflect possible mitigation that could be undertaken by a business to address the climate risks and opportunities it has identified. Such information generally includes both known and unknown risks and uncertainties. As such, actual results and future events could differ materially from those anticipated in such statements.

In addition to seeking FLI, many IRMs also promote "scenario analysis". Scenario analysis involves a business creating various hypothetical constructs about the future through the use of assumptions and postulating how the business would respond to those scenarios. It is often used in climate risk analysis to create a specific scenario and work back to present day to assess what steps would need to be taken for that scenario outcome to occur. Scenarios are not forecasts or predictions. As stated by the TCFD, in "a world of uncertainty, *scenarios are intended to **explore** alternatives* that may significantly alter the basis for "business-as-usual" assumptions."

We discuss more fully below, under the heading "*Safe Harbours*" how securities regulators have addressed this issue. We recommend the Bureau take a similar approach. Our specific recommendations are included in that section.

PART 2: ALIGNMENT WITH APPLICABLE SECURITIES LAWS

As we highlight below, there is a misalignment between the new greenwashing provisions under the CA and disclosures that are permitted or required by applicable Canadian securities legislation. Due to the wording of 74.01(1)(b.2) of the CA, the new provisions will apply to disclosures made by Canadian entities intended for their shareholders or other investors including disclosures mandated by, or otherwise subject to, applicable Canadian securities legislation.

Many Canadian public companies that do not provide products or services directly to consumers and do not advertise or market their businesses to consumers. Almost all of their public disclosures are intended for their shareholders and investors. As we discuss more fully below, such representations are already governed by a well-established disclosure and liability regime under applicable Canadian securities legislation. There is the very real potential for the new provisions to conflict with established Canadian provincial securities legislation.

Recommendation # 9

The Bureau's guidance should ensure that the interpretation of the new provisions does not conflict with existing securities legislation or otherwise have a negative impact on the ability of Canadian companies to communicate with their shareholders and investors.

The following provides our views on certain considerations relating specifically to disclosures made by companies intended for their shareholders and investors that we believe the Bureau should contemplate when preparing the new guidance. These include: (A) the existing liability regime for disclosures governed by securities legislation; (B) investor protections; (C) the availability of "safe harbours" under securities legislation; and (D) adoption by securities regulators of Canadian disclosure standards.

A. Liability for Investor Disclosures should be governed Exclusively by Securities Legislation

Canadian public companies are subject to a well-established disclosure and liability regime under applicable Canadian securities legislation. Such public companies are required to make timely disclosure of all material information (including material information relating to environmental matters) in press releases, financial statements, annual information forms, management's discussion and analysis and other required disclosure documents. In addition, companies making public offerings of securities are required to provide disclosure of all material information in prospectuses and other disclosure documents.

To the extent that such disclosure documents contain misrepresentations, companies making such misrepresentations as well as the officers and directors of such companies and potentially certain other persons, will be subject to liability under provincial securities legislation. For example, Part 17 of the *Securities Act* (Alberta) and Part XXXIII of the *Securities Act* (Ontario) address how and when liability will apply when a company is selling securities to the public and there is a misrepresentation made in a prospectus, offering memorandum or other prescribed offering document. Part 17.01 of the *Securities Act* (Alberta) and Part XXIII.1 of the *Securities Act* (Ontario) address secondary market disclosure imposing liability on public companies to the extent any of there public disclosure (whether written or oral) contains misrepresentations.

The provisions of both the *Securities Act* (Alberta) and the *Securities Act* (Ontario) (as well as the securities legislation of the other provinces) relating to liability for misrepresentations are substantially the same. Such securities legislation provides a range of liability limits depending upon the specifics of the misrepresentation. There is a wealth of Canadian jurisprudence related to misrepresentations made under the provisions of applicable securities legislation. As a result, public companies and their advisors can evaluate whether a statement may or may not be considered a misrepresentation under securities legislation and appropriately evaluate the risk of making (or not making) certain statements, including statements relating to environmental or climate matters.

Under securities legislation a "misrepresentation" means an untrue statement of material fact, or an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made.[6] As a result, not only can a company (or other person) face liability for making an untrue statement but also for failing to make a material statement. Given the new provisions in the CA, this may put a company in a difficult position. Under securities legislation the company may be required to make representation or statement about their environmental performance or activities because it is material to its business, but such representations or statements may subject them to liability under the provisions of the CA. For instance, a company may be making material investments in efforts to mitigate its carbon emissions or improve its environmental performance and, as a result, under securities legislation will be required to disclose such investments and their intended benefits but there may be no way to substantiate such benefits in accordance with an IRM. As a result, the company will face potential liability whether it makes such disclosure or does not make such disclosure. It is unnecessary for the CA to provide an alternative liability regime governing such disclosure, especially a liability regime that has lots of uncertainties and no jurisprudence to understand how the new provisions will be interpreted and applied.

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[6] *Securities Act* (Ontario) Section 1(1)

B. Investor Protections

As we note above, most IRMs are designed to provide information to sophisticated investors about the activities of a business and the potential future value of the business. Many public companies do not advertise their products or services to the public (for example, oil and gas and mining companies) and as such all of their public disclosure is intended for their investors or shareholders; all of such disclosure would be subject to the liability regime under applicable securities legislation. As we note above, securities legislation already provides protection to investors for misrepresentations made by public companies including misrepresentations made related to environmental performance. If investors are the intended audience of disclosure, investors are the stakeholders that should be protected from misleading statements. It is difficult to see how other members of the public would have any legitimate or material stake in such statements.

This underscores our views above that the existing investor protection and liability mechanisms in applicable Canadian securities legislation are adequate and appropriate, and it is unnecessary for the CA to provide an alternative liability regime governing such disclosure.

Recommendation # 10

We recommend that the Bureau enter into a Memorandum of Understanding with the CSA agreeing to cede enforcement of the new provisions to environment and climate-related disclosures that are already governed by or subject to applicable securities legislation, to the applicable Canadian provincial securities regulators.

C. Safe Harbours

If the Bureau is not prepared to cede regulatory authority to securities regulators for disclosures that are already governed by, or subject to, securities legislation, then we propose the Bureau adopt a similar approach to enforcement. We discussed FLI and scenario analysis more fully above. We have also noted above that under securities legislation, companies subject to securities laws have potential liability for disclosing misleading and false information. In this section, we discuss the fact that liability under applicable securities legislation is subject to material standards and other thresholds, including due diligence defences, which are referred to as "**safe harbours**".

Under applicable securities legislation, disclosures related to transition plans, scenario analysis, the use of an internal carbon price, as well as targets and goals, are generally classified as FLI, and, as such, have the benefit of these safe harbours. Companies subject to securities legislation must have a reasonable basis for the FLI they disclose, and in other cases, must have made a reasonable investigation to establish the accuracy or veracity of the information disclosed. However, as part of its "safe harbour" protocol, Canadian securities law permits reporting issuers to include a disclaimer or cautionary language for FLI on all published materials prepared for investors. Such disclaimers or cautionary language generally must identify FLI, explain how the information was developed, identify material factors that could cause actual results to differ from such FLI and caution investors from relying on such information. Provided that such disclaimers or cautionary language are included, applicable securities legislation protects a company from liability for FLI that proves to be inaccurate.

In the Message from the Commissioner, the Bureau expressly states:

> *As a reminder, the Bureau's advice on disclaimers and fine print is that if a claim creates a materially false or misleading general impression in itself, any reference is made to a disclaimer, then fine print may not help. In other words, do no rely on a disclaimer or fine print to cure an otherwise misleading environmental claim.*

The Bureau's position appears to be that there are no "safe harbours" for materially false or misleading general impressions. This is acceptable; there are no "safe harbours" for materially false or misleading representations under securities legislation either. The issue with the new provisions, however, is a business can violate Section 74.01(1)(b.2) even if the representation is true as **there is no requirement for the disclosures to be materially false or misleading to attract liability**. The CA is violated if the disclosures cannot be "substantiated in accordance with internationally recognized methodology". That is a far different test than the test required to establish that a representation is materially false or misleading. As such, we believe that the safe harbours, including the use of disclaimers, permitted under securities legislation, should apply to the application of Section 74.01(1)(b.2).

Recommendation # 11

The Bureau's guidance should adopt a safe harbour for general responses made by businesses that is the same as or similar to the safe harbour provisions applicable under securities laws for FLI as it relates to sustainability and climate-related disclosures.

D. New Rules may Conflict with New Canadian Climate-Related Disclosure Standards

Development of an environmental-related reporting regime in Canada was well underway before the recent changes to the CA came into effect.

Last year the International Sustainability Standards Board released two new international reporting standards: IFRS S1, *General Requirements for Disclosure of Sustainability-related Financial Information* and IFRS S2, *Climate-related Disclosures*; subsequently the CSSB adapted those standards and released its own proposed versions for companies in Canada: Canadian Sustainability Disclosure Standard 1, *General Requirements for Disclosure of Sustainability-related Financial Information* (**CSDS 1**) and Canadian Sustainability Disclosure Standard 2: *Climate-related Disclosures* (**CSDS 2**). The consultation period for these new standards recently closed. The standards ultimately adopted by the CSSB will be voluntary for Canadian issuers, and such standards will not, on their own, create reporting requirements.

Once the CSSB's final standards are released, however, the CSA will launch a fresh public consultation in order to develop new rules for environmental-related disclosure in Canada. The final rules will undoubtedly incorporate the standards adopted by the CSSB partially or fully into such reporting requirements. In the meantime, the CSSB and the CSA have formed a working group to communicate and effectively develop comprehensive environmental-related reporting standards and requirements. The extensive amount of time and resources that have already gone into these initiatives cannot be understated.

Not only are the changes to the CA unnecessary, but they undermine the work of the CSSB and CSA and may conflict with the standards and rules that the CSSB and CSA ultimately produce.

Recommendation # 12

The Bureau's guidance should clarify that disclosures made by companies that are substantiated in accordance with the standards adopted by Canadian federal and provincial organizations, such as the CSA, the CSSB or the Canadian Accounting Standards Board, will be considered to be substantiated in accordance with IRM.

PART 3: ADDITIONAL COMMENTS

In this Section we address: (A) application to personal views and opinions, (B) funding advocacy groups / challenging legislation; and (C) general and specific guidance.

A. Application to Personal Views and Opinions

The guidance should clarify whether or not executives of businesses, acting in their personal capacity, have a higher risk of liability under these provisions. For example, can an executive express their views and opinions in their individual capacity (on social media, for example) without being concerned that they are "indirectly promoting" their corporation's business, business activities or industry group? Are such executives at greater risk of liability? Are their rights to free speech disproportionately diminished by virtue of the legislation?

As a general principle, Section 74.01(1)(b.2) applies to persons who make representations promoting business interests; however, the guidance should be more specific so that personal views and opinions are not silenced.

Recommendation # 13

The Bureau's guidance should address circumstances where an executive, purporting to act in their personal capacity, could be found in violation of these provisions for directly or indirectly promoting the business interests of the executive's company.

B. Funding Industry Advocacy Groups / Challenging Legislation

The guidance should clarify whether there is, or in what circumstances there may be, the potential application of these provisions to companies that provide funding to industry advocacy groups and/or that seek or lobby to oppose or repeal climate-related legislation or proposed legislation.

If, for example, an industry advocacy group makes a representation that violates Section 74.01(1)(b.2), could companies that provided funding to the industry advocacy group be found to violate these provisions on the basis that they are "indirectly promoting" their business or business activities? Would it depend upon what level of input and/or control the companies had in the making of the representation? From a technical perspective, those that provide funding to industry advocacy groups are not "making the representation". However, if the Bureau is of the view that there are circumstances where those that fund an industry advocacy group could be found in violation of Section 74.01(1)(b.2), those circumstances should be outlined in the Bureau's guidance.

In addition, is there an increased risk of liability for businesses that advocate for, or fund energy advocacy groups to advocate for, changes or modifications to, or the repeal of environmental and/or climate change legislation?[7] Does it make a difference if the legal challenge is premised on the unconstitutionality of the legislation?

Does the Bureau consider that these types of activities invalidate a business' representations with respect to its sustainability and climate change disclosures on the basis that, without disclosing such activities, the business' representations give a general impression that the business is doing more for the environment than it actually is?

Recommendation # 14

The Bureau's guidance should address circumstances, if any, for potential liability or increased risk of liability for a business that either: (a) funds an industry advocacy group that makes a representation in violation of Section 74.01(1)(b.2); or (b) advocates for or funds energy advocacy groups to advocate for, changes or modifications to, or the repeal of, environmental and/or climate change legislation.

C. General and Specific Guidance

We understand the statement of the Commissioner in the Message from the Commissioner that:

> *"Some businesses would like the Bureau to set out exactly what they can and cannot say when it comes to environmental claims. However, that is not how the Competition Act works… The Bureau does not tell business what they can and cannot say, but can offer key tips for them to consider when assessing their environmental claims."*

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[7] The Report of the United Nations Climate Action suggests that "Non-state actors cannot lobby to undermine ambitious government policies either directly or through trade associations or other bodies. Instead they must align their advocacy as well as their governance and business strategies with their climate commitments".

While the Commissioner's guidance on these provisions will help Canadian businesses to better understand the restrictions that will be placed on their dialogue, it is also important for the Commissioner to understand why general principles, without specific examples, may not be sufficient for businesses to engage in the energy transformation dialogue once again. The guidelines, while persuasive, are not binding on the Tribunal or any court of law. And while we respect the work that the Bureau does, as well its close adherence to its guidelines, businesses are very concerned about the rights of private action that will come into effect on June 20, 2025 and the anticipated attempts that will be made by climate change advocacy groups to further restrict meaningful dialogue, views and opinions of clients that produce or rely on energy produced from hydrocarbons. As such, more specific guidance from the Bureau addressing the concerns we have raised in our comments will be helpful.

CONCLUSION

Thank you once again for the opportunity to provide you with our comments. We hope they provide you with a better understanding of the concerns that have been raised by many businesses, and that they will be useful to you in your preparation of guidance related to Section 74.01(1)(b.2).

If you have any questions on our comments or if we can clarify or expand on any of them, please feel free to contact Alicia Quesnel (akq@bdplaw.com), Ted Brown (ebb@bdplaw.com), Mardi McNaughton (mmcnaughton@bdplaw.com) or Rob Martz (rmartz@bdplaw.com) of our office.

Yours truly,

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