Competition Bureau Canada
ATTN: Commissioner Matthew Boswell
Deceptive Marketing Practices Directorate
50 Victoria Street
Gatineau, QC, K1A 0C9

February 25, 2025

Dear Commissioner Boswell,

Thank you for the opportunity to contribute to the Competition Bureau's (hereafter, "the Bureau") public consultation process in response to the draft guidance on the new greenwashing provisions in the *Competition Act* (hereafter, "the Act").

The Business Council of Alberta (BCA) is a non-partisan, non-profit organization composed of the chief executives and leading entrepreneurs of Alberta's largest enterprises. We are dedicated to building a better and more prosperous Alberta within a strong Canada.

BCA and its members strongly support the ideals of accuracy and transparency, and our members work tirelessly to uphold these values in all that they do—including when making public statements about the environmental benefits of their products, services, and/or business activities.

When it comes to the new draft guidance, BCA is pleased to see the Bureau clarify the scope of claims captured under the greenwashing provisions—namely, that marketing and/or promotional materials made to the public are captured, but not statements in regulatory/securities filings or those made to investors (unless these same claims are later used in marketing materials).

Notwithstanding this small clarification, the vast majority of the concerns we raised in our original submission to the Bureau's earlier public consultation process last September remain unaddressed. In that earlier submission, we argued that the new greenwashing provisions are inherently flawed. They are ill-defined, poorly constructed, and lack consideration of the unintended consequences that would likely result. The draft guidance has done little to address these concerns.

Furthermore, our submission from last fall also expressed concern about the Bureau's guidance in its "Deceptive Marketing Practices Digest – Volume 7" bulletin released last July. This bulletin advised companies to "avoid aspirational claims about the future," and to "be careful about their forward-looking claims to ensure that they are factual rather than aspirational." The same advice is reiterated in the Bureau's latest draft guidance which seems little more than an elaboration on the Volume 7 digest, leaving us with the impression that the Bureau has not seriously incorporated the feedback of the submissions.

Companies are founded on aspirational claims. Every business aspires to bridge the gap between what's possible now and what can be possible in the future. This is how they innovate and create value, including when they try to achieve environmental targets such as net-zero emissions by 2050.

Companies must be able to speak about their environmental aspirations even as they acknowledge that the path to fully meeting them may not yet be entirely clear. Innovation is the bridge between intention and result. Unfortunately, the Bureau's draft guidance does not allow well-intentioned businesses to publicly communicate their environmental ambitions unless they are certain and explicit about the entire pathway to achieving them.

Frankly, as we indicated in our original submission, slow and unpredictable government policy formulation and decision making regularly creates an uncertain business investment environment. This uncertainty can make it impossible for businesses to determine their timeline for turning their ambition into reality, and hence, meeting your criteria for statements.

For example, businesses recently waited over three years for the federal carbon capture investment tax credit to move from its initial announcement to becoming law. Even now, businesses continue to wait for proposed clean tech investment tax credits to become law—and now that their enacting legislation died on the order papers with the unscheduled prorogation, uncertainty looms over whether they will ever be enacted. The Bureau's draft guidance, under the scenario just articulated, would hold a company liable for making a claim based on a government commitment and policy path that has literally fallen apart. It is highly inappropriate for a federal entity to discourage companies from making public environmental claims or ambitions, especially when these claims' veracity and viability is fundamentally challenged by the government's own shifting policies and timelines. You are essentially killing Canadian business ambition, innovation and prosperity through your guidance.

Preventing businesses from promoting their environmental goals—despite having an unclear path—only discourages progress. In fact, Environment and Climate Change Canada (ECCC) agrees. In their written submission to the Bureau last September, ECCC stated that "it may be counterproductive to potentially hamper the ambition of companies and create a situation where they are reluctant to announce well-intentioned aspirational commitments and take real action for fear of legal risk."

Concerning legal risk, the Bureau's draft guidance does not—and cannot, given the Competition Tribunal's role in interpreting the new legislation—create policy certainty for businesses that are seeking to communicate their improvements to, or the benefits of, their environmental performance in the near- to mid-term. Until the courts adjudicate on the greenwashing provisions and provide greater clarity, the legal risk of unintentional non-compliance encourages businesses to take whatever steps they need in order to avoid unwittingly becoming a defendant in a drawn-out legal battle.

We recognize that the rulings of the Tribunal are outside of the Bureau's control. However, by the Bureau's own admission, its draft guidance is only helpful for companies "in the interim" because "it remains to be seen how the courts will interpret many of the key concepts set out in [these] new provision[s]." This means that the Bureau's draft guidance is, in fact, completely unhelpful to businesses since it offers no assurance against any future court decision. Until any such decisions are made, elevated legal risk will stifle public communication of, and investment in, environmentally beneficial business activities.

Ultimately, BCA recognizes that the Bureau cannot change the law; it has merely been tasked with the unenviable job of interpreting this flawed new legislation. This is why BCA has been clear in our conversations with, and submissions to, elected officials that the greenwashing provisions should be rescinded from the *Competition Act.*

That said, and this should not be viewed as BCA supporting the greenwashing provisions, we recognize that these provisions are now law. As a result, in the interim before recension, we believe the Bureau can improve its draft guidance by: **(1)** providing more tangible, practical examples of how businesses can make aspirational claims without incurring legal risk; and by **(2)** ensuring the Bureau is accountable to its core function—namely, by tying these practical examples into an unwavering Bureau commitment to focus on ***consumer*** protections only. This additional guidance, which could be provided in the form of more frequently asked questions, should address the following topics:

- How the Bureau limits the scope of its interpretation of "representations to the public" in light of its focus on consumer protections;

    - E.g., Is a comment made at, for example, a business conference considered a representation to the public if the primary audience is not consumers? How would a net-zero ambition truly be a risk to consumers?
- How the Bureau will determine whether a public environmental claim is “made for the purpose of promoting a product or any business interest”;
- Who is liable for making statements on behalf of a company through various mediums, including:
    - Whether comments by an employee are considered public representations of their employer; and
    - How high up within the company hierarchy an employee must be before their public comments are considered claims made by the business;
- How the Bureau will interpret the “general impression” conveyed by a claim versus a claim’s literal meaning;
- Company names that may connote their environmental performance, especially if “the environmental impact of all activities of the business must be taken into consideration”;
- The Bureau’s definition of “internationally recognized” methodologies, and how they may not align with the definition of “adequate and proper” substantiation;
- Whether the insertion of “internationally recognized” methodologies calls into question the veracity of methodologies required or endorsed by the Canadian government through its regulatory filings and various programs;
- Whether it is possible to substantiate the truthfulness of good-faith, aspirational claims made under realistic assumptions about the economy, the pace of technological advancement, and the unfolding policy and regulatory environment.

Furthermore, though it is outside the Bureau’s mandate, businesses will not be satisfied with the greenwashing provisions draft guidance until they fully understand the level of legal risk they face from the expansion of private access to the Competition Tribunal. Additional clarity is needed on how the following risks to businesses will be mitigated, if at all:

- The possibility of frivolous and vexatious claims, and the shifting of the burden of proof onto businesses to respond to these claims.
- Uncertainty about the Tribunal’s “public interest” threshold for granting leave for private applicants.
- The timing of a claim being made public after it has been granted leave.

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BCA understands that the law is the law, and the Bureau is in the unenviable position of interpreting the flawed legislation it has been given. However, we believe the greenwashing provisions, combined with expanded access to the Competition Tribunal for private parties, are unworkable and detrimental to business competitiveness and, frankly, Canadian prosperity. This is why BCA has been forthright in our requests to elected officials that the greenwashing provisions should be rescinded from the *Competition Act.*

Regardless—and this should not be read as BCA's support for the new provisions—the Bureau's draft guidance has not provided the maximum degree of certainty that it can (insofar as it can provide any certainty for businesses under the circumstances).

Ultimately, the new greenwashing provisions will negatively impact Canadian businesses' capital formation; appetite to take risk and innovate; and good-faith attempts at making environmental progress in uncertain conditions.

Thank you for the opportunity to provide input in this process.

Sincerely,

Adam Legge
President

CC: Hon. François-Philippe Champagne, P.C., M.P., Minister of Innovation, Science and Industry
Hon. Dominic LeBlanc, P.C., M.P., Minister of Finance and Intergovernmental Affairs
John Hannaford, Clerk of the Privy Council and Secretary to the Cabinet
Philip Jennings, Deputy Minister, Innovation, Science and Economic Development
Chris Forbes, Deputy Minister, Department of Finance
Samir Chhabra, Director General, Marketplace Framework Policy, Innovation, Science and Economic Development
Martin Simard, Senior Director, Corporate, Insolvency and Competition Policy, Innovation, Science and Economic Development
Ian Foucher, Chief of Staff, Ministry of Innovation, Science and Economic Development
Brandan Rowe, Chief of Staff to the Minister of Finance
Yash Nanda, Director of Policy, Office of the Minister of Finance