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Deceptive Marketing Practices Directorate
Competition Bureau
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Attention: Josephine Palumbo, Deputy Commissioner, Deceptive Marketing Practices Directorate

Subject: Competition Bureau Consultation Regarding the Draft Environmental Claims Guidelines published on December 23, 2024

Dear Ms. Palumbo,

We are writing to provide Suncor's feedback on the Competition Bureau's draft environmental claims guidelines published on December 23, 2024, which relate to the new greenwashing provisions added to the *Competition Act* on June 20, 2024.

In our previous submissions to the Bureau in September 2024, we expressed our concerns relating to the greenwashing provisions. Specifically, we set out that the new law:

1. invites parties to abuse Canadian legal and regulatory regimes by seeking to silence dissenting voices, to the detriment of constructive discourse on how best to advance sustainability initiatives and mitigate climate change;
2. generally inhibits both required and voluntary environmental communication between companies and regulators, investors, the public, Indigenous groups, and other stakeholder consultation participants; and
3. will result in decreased legal and regulatory regime certainty, leading to "green-hushing," a less desirable jurisdiction for environmental and climate research and development as well as a decrease in scientific, commercial, and technological investment and innovation.

The Bureau's guidelines failed to resolve these issues. Instead, the guidelines raise even more questions and do not provide the certainty businesses require to engage in meaningful discussions about their environmental performance. However, even if the guidelines were clear and specific, the issue remains that they are not binding and will not dictate how parties approach the new provisions. No amount of guidance from the Bureau can fix the inherently vague, overreaching and globally unprecedented legislative language of the greenwashing provisions. Suncor's position remains unchanged; as drafted the greenwashing provisions must be repealed.

1. Non-Binding Guidelines and Private Litigants

One of the main issues with the guidelines is the fact that they are non-binding. The guidelines include a disclaimer that they do not constitute "a binding statement of how the Commissioner will proceed in specific matters." Instead, the Commissioner's decisions "will depend on the particular circumstances of the matter in question." They also state that the Competition Tribunal, which will ultimately rule on applications brought under the greenwashing provisions, is not bound by the guidelines. In that context, businesses cannot confidently rely on the guidelines. The Competition Tribunal may disregard them entirely and the Bureau can ignore its own guidance.

At the same time, the new private rights of action coming into effect on June 20, 2025, broaden who can bring a legal action before the Competition Tribunal and invites private parties to abuse Canadian legal and regulatory regimes. Private applicants that bring legal actions under the greenwashing provisions will likely include environmental activists, politically motivated actors, and other parties whose motives for bringing the legal action are to target and silence specific voices in the discourse on climate change. The *Competition Act* will become a political tool, and businesses will have to take on significant costs to defend their legitimate environmental claims and aspirations against parties advancing their own agendas, and often with ulterior motives.

While the Bureau has the right to intervene in cases brought by private applicants, this does not arise until after the Competition Tribunal has granted leave to the applicant to file a legal action. This raises concerns that private applicants, and not the Bureau, will shape how the new provisions are discussed and interpreted before the Competition Tribunal. Beyond that issue, the Bureau's right to intervene is futile if the Bureau will not commit to upholding or enforcing its own guidelines. It is critical that the Bureau curtail the ability of private litigants to weaponize the greenwashing provisions for purposes outside the scope of the *Competition Act*. To do so, the Bureau must intervene at the outset of private applications and firmly uphold its interpretation of the new provisions as set out in the guidelines.

The combination of the greenwashing provisions and the new private rights of action means that companies will be required to choose between transparent disclosure and taking on significant costs defending themselves against frivolous and vexatious litigation. The inevitable result is "green-hushing." Canadian businesses – particularly those in the energy industry – will be prevented from publicly disclosing their environmental performance and future goals.

2. Documents Produced for a "Different Purpose"

The guidelines say that the new greenwashing provisions will target representations made to the public "in marketing materials for the purpose of promoting a product or business," and that the Bureau is not focused on representations made for a "different purpose," such as "in the context of securities filings." This language creates more questions than answers.

Canadian businesses are expected to communicate with their stakeholders and the public for a variety of reasons other than marketing and promotion. Regular environmental communications include Indigenous and other stakeholder consultations, regulatory filings, securities disclosures, statements of future plans and proposed processes, information provided to investors and the government, and disclosures that outline business practices.

Given the breadth of representations made by companies, and the many reasons for making them, much greater detail and certainty is required. Statements that will be subject to the greenwashing provisions should be clearly and narrowly defined as statements made exclusively for advertising or promoting a product or service to the public. All other representations should be explicitly excluded. Then, a predominant purpose test can be used to determine whether a statement falls within the definition. If the predominant purpose of the statement is for any other reason (e.g., to provide investors or stakeholders with key information about a company's operations and future projections) the statement should not be subject to the greenwashing provisions.

Even if the above recommendation is implemented, the reality is that the greenwashing provisions, as written, will diminish the quantity and quality of communications companies are willing to make. As discussed above, private litigants will not be bound by the guidelines and will be motivated to test the boundaries of the unclear legislative language of the new provisions. No amount of specificity added to the guidelines can mitigate the risks posed by the legislation, which is compounded by any lack of Bureau enforcement of such guidelines.

3. Internationally Recognized Methodologies

The purpose of the *Competition Act's* deceptive marketing provisions is to target, and ultimately prevent, marketing or promotional claims made to the public that are false or misleading. However, under the greenwashing provisions, an environmental claim does not need to be false or misleading to be actionable. The unprecedented requirement to substantiate an environmental or climate change claim in accordance with an internationally recognized methodology (**IRM**) is an ill-conceived pandering to undefined and

uncertain political and social activism that does not represent Canadian laws, society, or the will of Canadians.

If an IRM does not exist for a specific claim, the Bureau's position is that the claim should not be made. This is egregiously inflexible. Businesses should be entitled to substantiate their claims, which are neither false nor misleading, using any reasonable method. Certainly, there are other, and in many cases better, ways to substantiate an environmental or climate change related claim.

More specifically, the fact that the Bureau is only willing to start with the apparently rebuttable assumption that methodologies required or recommended by government programs in Canada are consistent with IRMs is insufficient, such methodologies should be unconditionally accepted by the Bureau. It is illogical to prevent Canadian businesses from using Canadian methodologies specific to Canadian industries and circumstances, simply because the methodology is not recognized by another country.

Canada has energy resources and industries, such as the oil sands, which are unique to Canada. Many established methodologies used by the oil sands industry may not fall within the Bureau's definition of an IRM because they are not recognized outside of Canada. As a result, by meeting their environmental reporting requirements using methodologies recognized, and in fact demanded, by Canadian provincial and federal governments and applicable regulatory bodies, oil sands producers will risk exposing themselves to actionable offenses under the greenwashing provisions. This will lead to situations where certain information reported to the government will be withheld from businesses' public disclosures and will result in less transparency and public trust in Canadian businesses. The simple and necessary solution is that Canadian methodologies that are regulated, established, or reasonably evidenced should automatically satisfy the greenwashing provisions.

4. Forward-Looking Environmental Claims

Considering the critical importance placed on the fight against climate change, Canadian businesses should be encouraged to set aspirational environmental goals and to engage in scenario analysis. However, the guidelines make it very challenging for businesses to make forward-looking environmental claims without exposing themselves to the risk of frivolous and vexatious litigation.

Canadian companies are urged to make Net Zero commitments to align with Canada's federally announced decarbonization strategy. Given the future-oriented nature of Net Zero commitments, the guidelines are unworkable, requiring businesses to (i) "have a clear understanding of what needs to be done," (ii) "have a concrete, realistic and verifiable plan in place," and (iii) "have meaningful steps underway to accomplish the plan." Working towards a target requires flexibility, particularly in the context of evolving policies and scientific developments.

The new provisions and guidelines set an impossible and unprecedented standard for forward-looking statements not found in other areas of law. For example, securities legislation provides a "safe harbour" for forward-looking statements if it can be established that (i) the company has a reasonable basis for the statement, and (ii) the company (a) discloses that the statement is forward-looking, (b) cautions that actual results may vary from the statement, (c) discloses the assumptions used to develop the forward-looking statement, and (d) describes the company's policy for updating forward-looking information.[1]

Continuous, candid, and transparent disclosure is a cardinal principle in securities law. Imposing different standards on disclosures under the *Competition Act* than under Canadian securities regulations subordinates the firmly established securities law regime and creates an absurd conflict. Companies will expose themselves to potential liability under the greenwashing provisions by publishing material information that they are legally required to disclose under securities legislation. To come in line with

[1] Canadian Securities Administrators National Instrument 51-102: Continuous Disclosure Obligations, Part 4A

securities law, claims about the future should be considered properly substantiated under the greenwashing provisions where assumptions underlying the claim are disclosed.

Further conflicts arise where international organizations, such as the Task Force on Climate-Related Financial Disclosure (**TCFD**), recommend that businesses engage in scenario analysis. This involves businesses disclosing different climate-related scenarios to better understand the implications of climate change on their organization and to test the resilience of an organization against environmental impacts. Suncor has been a leader in this area, being the first oil and gas company in North America to support the TCFD. As such, it is particularly concerning to us that the guidelines' failure to mitigate the risks posed by the greenwashing provisions will reduce businesses' engagement in these constructive practices and will stifle future resilience against climate change.

Conclusion

The greenwashing provisions do not add protections from false and misleading statements. Those protections were already in place under the *Competition Act*. The reality of the new provisions is a system of "green-hushing." Canadian businesses, and the energy industry in particular, are prevented from participating in public discussions on environmental issues and from communicating important information to the public and their stakeholders.

The risks that businesses will face by making environmental representations are extremely high and costly under the greenwashing provisions. The guidelines do not provide clarity on the highly ambiguous legislation. Moreover, the fact that the guidelines are not binding on the Bureau, Competition Tribunal or private parties renders them purposeless and ineffectual. The only solution is that the legislative amendments that have led to this counter-productive, legal quagmire must be repealed.

Suncor is happy to discuss the above submission with the Bureau.

Sincerely,

SUNCOR ENERGY INC.

Jon Mitchell
Chief Sustainability Officer