September 27, 2024

Deceptive Marketing Practices Directorate
Competition Bureau
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RE: NEI response to the public consultation on the *Competition Act*'s new greenwashing provisions

To the Deceptive Marketing Practices Directorate,

Thank you for the opportunity to provide feedback on the *Competition Act*'s new greenwashing provisions (the **provisions**). We believe greenwashing is a risk for investors and that it complicates the investment decisions we take as a fiduciary to our clients. Adopting measures to eliminate greenwashing is in investors' and investment management firms' best interest.

With approximately $11 billion in assets under management, NEI Investments' approach to investing incorporates the thesis that companies can mitigate risk and take advantage of emerging business opportunities by integrating best environmental, social and governance practices into their strategies and operations. We are a Canadian firm with a long history in responsible investment.

Investment fund managers (**IFMs** and **IFM**) have a dual relationship to the provisions. They must consider them in the context of their own environmental claims, with respect to the funds they offer and their business activities. They must also consider them in the context of the environmental claims made by the companies they invest in as a fundamental aspect of the investment decision-making process.

We are concerned about the potential for unintended consequences of the provisions that could slow or even halt the advancement of, and investment in, the green technologies needed to manage past, current and future environmental damage. New companies seeking to raise capital in the public markets may find themselves challenged with how to present the potential benefits of their products or services to investors. Further, the incentive for incumbents to (voluntarily) apply their experience and financial resources to developing new technologies may be severely diminished if they do not feel they can present and discuss their strategies with existing stakeholders, including, of course, shareholders.

More philosophically, we feel the provisions in their current form are likely to reduce what we have heard a company in our investment portfolio that we have been engaging on these issues refer to as the "thinking out loud" aspect of the sustainability discourse that has defined its evolution to date. In so many cases, we do not yet know the solutions to these extremely complex and existential challenges, but the fact that many companies are willing to step up and make a concerted, transparent effort should be encouraged and rewarded (by investors), or at the very least, not *dis*couraged. Investors and other stakeholders are free to disagree with company positions and make public declarations of their own on the subject, which can advance the overall understanding of complex pathways for everyone. However, this dialogue can only occur if we allow for good-faith disclosures from all actors. We believe it is crucial to maintain a public forum that permits companies to make forward-looking statements (within their legal bounds as publicly traded issuers) regarding the potential for environmental benefits of their products or services, as well as their business activities.

Below we offer recommendations for the Competition Bureau (the **Bureau**) to consider as staff develop much-needed guidance on the provisions, after which we answer select questions posed by the Bureau.

Recommendation: *We encourage the Bureau to provide further guidance and clarification on the mechanism for private parties to bring actions against companies for instances of alleged greenwashing. This guidance should clarify the expectations that must be met for private actions to be successful and bring greater certainty for companies that frivolous claims will be strongly discouraged.*

The introduction of a mechanism for private parties to seek leave to bring actions directly to the Tribunal is a substantial change to the Competition Act. It is not difficult to see how such a mechanism could be abused and lead to a situation in which participants are essentially litigating the important topics of sustainability instead of having a reasoned public debate. A lack of clarity on the boundaries of this new provision will undoubtedly lead to a discouragement in material corporate sustainability-related disclosures. We understand that aspects of the provisions will become clearer after precedents have been set by the Tribunal, as it is not possible to address all possible permutations of how claims will be made in the future. That said, greater clarity on what the Bureau would consider appropriate grounds to bring actions to the Tribunal will benefit both companies and complainants.

We note that the risk of frivolous or vexatious claims is a threat from many different industry participants. Investors are under increasing pressure from a vocal minority of stakeholders to stop considering environmental and social factors in their investment process due to differing political perspectives. Companies are also facing pressure in the form of shareholder resolutions asking them to reduce or eliminate any actions that would be perceived to be addressing material climate-related risks. We are concerned that the current provisions have the potential to increase the ability of these participants to pressure companies to not take the actions required to address their environmental risks and/or impacts. This risk is particularly material for smaller companies looking to provide solutions to environmental challenges as they are unlikely to have the resources to either pay for legal representation or pay for potential fines.

Recommendation: *We believe that claims of environmental benefit and/or related forward-looking statements made by IFMs should remain under the exclusive purview of the existing securities regulatory regime.*

Echoing comments submitted by the Investment Funds Institute of Canada and the Portfolio Management Association of Canada, we would like to underscore that IFMs are well-regulated by existing regulatory bodies and securities laws that seek to ensure their claims are not mis-leading, exaggerated or unsubstantiated, including claims related to environmental benefits and impacts. The provisions have the potential to contradict existing securities guidance and law, creating the risk of confusion and unnecessary complexity for a broad range of stakeholders, including the everyday investor the provisions seek to protect.

Answers to select questions posed by the Competition Bureau

In keeping with our opinion that investment management firms ought to remain under the exclusive purview of existing securities regulators, we have elected to answer only those questions posed by the Bureau related to information gathering. We have not answered questions that imply that the new provisions would necessarily apply to IFMs.

Questions about products or services

1. Competition Bureau: *What kinds of claims about environmental benefits are commonly made about products or services in the marketplace? Why are these claims more common than others?*

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NEI: IFMs make claims about the positive environmental impact of certain funds. Such funds are typically recognized in the industry as "impact funds." For example, NEI manages impact funds with claims related to the amount of renewable electricity generated, the amount of wastewater treated and/or saved, and the level of carbon emissions generated by an investment in the fund relative to a comparable index. These types of claims appear to fall under the Bureau's definition of a "comparative claim," as defined in *The Deceptive Marketing Practices Digest - Volume 7* (the **Digest**). Again, it is our belief that the Bureau should defer oversight of claims of environmental benefit made by IFMs in connection to an investment in an impact fund to the existing securities regulatory regime.

2. Competition Bureau: *Are there certain types of claims about environmental benefits of products or services that are less likely to be based on adequate and proper testing? Is there something about those types of claims that makes them harder to test?*

NEI: We acknowledge that claims about an investment fund's impact on the environment as described above are hard to test. For example, there is no internationally recognized methodology to calculate the percentage of a fund's holdings that are earning green revenue in connection with electricity generation, water purification, recycling or any number of other business activities commonly thought of as "green." There *is* early-stage data available to inform this kind of analysis, and IFMs and other institutional investors are indeed seeking to present the results in their published materials with lengthy disclosures designed to help investors understand the limitations of the analysis. We would note that much of this material is intended for an audience with knowledge of investing and the investment industry, including associated disclaimer language.

For companies that are seeking to sell products or services expected to have an environmental benefit, such as reducing or avoiding greenhouse gas (GHG) emissions, there may also be a lack of standardized methodology or adequate test, as companies are often selling the *potential* environmental impact, which is by necessity a forward-looking exercise. For example, for a company that manufactures electric heat pumps, it would be near impossible to determine the potential impact that would come from the sale of its next 1,000 units because the emissions avoided will depend on the technology those units will be replacing (e.g., a natural gas-fired furnace that is anywhere from 60-90% efficient, heating oil, electric baseboards, etc.) and on the nature of the grid that would be supplying the electricity (e.g., coal-fired generation, wind, solar, nuclear, etc.). Yet this company is indisputably selling a product that serves to be a climate solution, even if the impact cannot be precisely quantified. We want such companies to be able to attract capital based on good-faith claims, with testing where reasonable, so that investors can increase their exposure to companies investing in climate solutions.

Questions about businesses or business activities

1. Competition Bureau: *What kinds of claims about environmental benefits are commonly made in the marketplace about businesses or business activities? Why are these claims more common than others?*

NEI: We posit that the most common claim about environmental benefits made by IFMs and other institutional investors is related to the internationally recognized goal of achieving net-zero carbon emissions by a certain time, typically 2050 or sooner. We observe that the Bureau cites this example in the Digest.

In recent years this "claim" (more on that word below) has become more common among companies, governments, IFMs and other types of institutional investors due to the global ambition to mitigate the effects of global warming, and the recognition that the financial sector has a critical and indisputable role to play in achieving that ambition. We note that our federal government has made this explicit commitment, thus

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company commitments to align with a goal of achieving net-zero emissions can be seen in this context as complying with stated government objectives.

We would emphasize that net-zero commitments from IFMs are unlikely to be phrased as "*claims* about environmental *benefits*," (emphasis ours). Word choice here is extremely relevant. Typically, when IFMs connect their business activities to net-zero goals (as NEI does), they make commitments to align their investment portfolios to a pathway to achieve the stated goals. They use forward-looking words and phrases such as targets, plans, goals, pathways, ambitions and other similar wording that does not explicitly characterize an environmental benefit as such. If a claim were to be made, it could be along the lines of stating that the investment portfolio is aligned to a net-zero pathway.

Recommendation: *Permit and support companies to make aspirational claims about the future while holding them accountable for having a clear understanding of what needs to be done; for disclosing concrete, realistic plans including interim targets; and for taking meaningful steps toward accomplishing the plan and disclosing such steps. Provide clear examples of corporate disclosure the Bureau believes would meet these criteria.*

When it comes to carbon emissions reduction, or any forward-looking statement about a company's intention to improve its environmental performance, we do not agree with the Bureau's recommendation in the Digest that companies should "avoid aspirational claims about the future." We believe that aspirational claims are necessary demonstrations of commitment, akin to any strategic target or goal. It is common practice for a company to issue guidance about projected revenue and earnings over the next quarter or year —is that not also aspirational, rather than factual? It is not reasonable or even possible for a business to "*ensure* that [forward-looking claims] are factual rather than aspirational" (taken from the Digest, emphasis ours).

Having said that, we strongly agree with the Bureau's view, to quote the Digest, that businesses should:

- Have a clear understanding of what needs to be done to achieve what is being claimed;
- Make sure to have a concrete, realistic and verifiable plan in place to accomplish the objective, with interim targets; and
- Be sure there are meaningful steps underway to accomplish the plan.

We frequently engage companies in our investment portfolio to encourage them toward these same ends, and we appreciate the importance of taking concrete steps with respect to aspirational claims. We consider companies that cannot or do not exhibit the behaviours above to be at higher risk of underperformance due to the impacts of climate change, relative to companies that do exhibit these behaviours. We also believe that a lack of any substantive disclosure on how a company plans to achieve its aspirational targets may, in certain cases, qualify as a potential greenwashing risk.

2. Competition Bureau: *Are there certain types of claims about the environmental benefits of businesses or business activities that are less likely to be based on 'adequate and proper substantiation in accordance with internationally recognized methodology'? Is there something about those types of claims that makes them harder to substantiate?*

NEI: If we continue with the example of investment fund managers' claims about portfolio alignment to a net-zero pathway, it is fair to acknowledge that this would be challenging to substantiate "in accordance with internationally recognized methodology."

The determination of an investment portfolio's alignment to a net-zero pathway is, *currently*, to a certain extent discretionary and proprietary. It is based on a nascent yet rapidly evolving ecosystem populated by international and regional frameworks, guidance, data sets, methodologies, standards, regulations and other inputs and factors—not to mention the growing influence of the actual risks of climate change on investment

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portfolios that is driving these commitments in the first place. This ecosystem is rapidly evolving internationally and domestically, with significant progress made in the past year. It demonstrates a strong, industry-driven commitment to transparency and rigour when it comes to claims of environmental benefit, especially with respect to aspirational claims about the future (e.g., the intention to achieve carbon emissions neutrality in a certain timeframe).

In our experience reviewing the sustainability and climate reports published by industry peers as well as by a broad array of companies across all sectors, great effort is being made to be as thorough, detailed and transparent as possible as to how net-zero alignment is determined, and to how progress is being tracked. What matters is that the participants in this ecosystem are *trying*; they recognize and disclose the limits of their analysis and the risks of placing undue reliance on it, and they continually push for more and better results. We would not want to see this honest effort stifled at a time when it is most needed by investors and IFMs to help manage the risks of climate change.

Another important aspect of sustainability claims or statements that would be difficult to substantiate with an "internationally recognized methodology" would be those issued by or on behalf of Indigenous businesses, organizations or communities that are based on traditional ecological knowledge. We encourage the Bureau to consider guidance on how these kinds of disclosures or claims will be treated. The Bureau would need to develop this guidance through consultation with Indigenous peoples to ensure it adequately addresses Indigenous concerns, and to ensure it aligns with the expectations of the federal government's obligations under the United Nations Declaration on the Rights of Indigenous Peoples Act.

Recommendation: *We believe that existing international and domestic frameworks, guidance and methodologies, including those set by the International Sustainability Standards Board, Net Zero Investment Framework, Partnership for Carbon Accounting Financials, Greenhouse Gas Protocol, Canadian Securities Administrators, and the forthcoming disclosure standards set by the Canadian Sustainability Standards Board, should be considered loosely and collectively as appropriate "internationally recognized methodology" for supporting a company's environmental claims, particularly in connection with aspirational claims about the future. We encourage the Bureau to follow these developments in connection with implementation of the provisions.*

Thank you once again for the opportunity to provide recommendations for the Bureau's forthcoming guidance in respect of the provisions. We look forward to reviewing the results.

Sincerely,

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