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BY E-MAIL

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Dear Ms. Palumbo:

Re: Public consultation on the *Competition Act*'s new provisions on environmental representations

We are writing in response to the Deceptive Marketing Practices Directorate's public consultation on the *Competition Act*'s new provisions on environmental representations.

The views expressed in this letter are those of Torys LLP and do not necessarily reflect those of our clients.

The primary purpose of our submission is to set out some of the issues which we think would be helpful to have addressed in the Competition Bureau's guidance.

The new provisions have raised considerable concern in legal and business communities. These concerns stem from the reverse onus nature of the new law and possibility of significant financial penalties coupled with compliance requirements that are both stringent and nebulous. These concerns are compounded by the possibility of private litigation based on a novel "public interest" leave test.

There has been some suggestion that the amendments are designed to ensure that there will be "truth in advertising". That sort of characterization does not address legitimate issues being raised by stakeholders about how to comply with the new law. However, the idea that the amendments should focus on advertising and the concept that businesses should take reasonable steps to verify the truthfulness of their environmental representations are reasonable principles that should underpin any interpretation of paragraphs 74.01(1)(b.1) and (b.2).

A key area of concern relates to environmental and climate-related representations in ESG and sustainability reports and similar voluntary disclosures.

As matters currently stand, the new law has led some businesses to determine that it is preferable to cease making voluntary disclosures that could constitute environmental representations rather

than risk sanction. That surely cannot be Parliament's intention. It is important for businesses to be able to discuss openly what they are doing with respect to "protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change". A wide variety of stakeholders, including the investor community, consumers, suppliers, employees and Canadian governments have all supported this sentiment. The law should not create a disincentive for businesses to discuss environmental issues transparently. It is important for business owners and other stakeholders, including the general public, to understand what businesses are doing in connection with the environment and climate change, so that investors and consumers can make informed commercial decisions.

An overbroad interpretation of the new provision could also deter otherwise desirable business activities. For example, businesses in other jurisdictions subject to their own environmental reporting rules may be deterred from doing business in Canada if they cannot access ESG information from Canadian customers, suppliers or investee companies because those Canadian companies are concerned about reporting due to *Competition Act* concerns.

More generally, at a time when the regulatory requirements for climate-related reporting are under active consideration by the Canadian Sustainability Standards Board and Canadian securities regulators, it would be discouraging and counter-productive if the Act created misalignment with other, domestic, Canadian regulators and standard-setters.

We note that this sort of thinking seemed to be shared by the Standing Senate Committee on National Finance, which said the following in its report on Bill C-59:

> [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.
>
> Furthermore, while [...] 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, such as those set out by Environment and Climate Change Canada.

We therefore encourage the Bureau to take a purposive interpretation of the new provisions, especially the requirements regarding "promoting" products or business interests and requirements to substantiate representations based on an "adequate and proper test" and an "internationally recognized methodology". Businesses acting in good faith to report on their behaviour and support their representations according to reasonable processes, standards or metrics should not be liable for contraventions of the legislation based on narrowly defined or impossible to meet rules. Such an approach would in our view be fully consistent with the objective of having "truth in advertising".

There are ways this can and should be done that are in complete alignment with the statutory requirements.

In our view, subsection 74.01(1) can and should be interpreted to exclude representations made in ESG or sustainability reports for informational or reporting purposes or where required by law. The subsection requires that representations be made to "promote" a product or business interest. Not all statements made by businesses are "promotional" in nature. In particular, environmental and climate-related representations in ESG and sustainability reports and similar voluntary disclosures are not generally being published for "promotional" reasons. Rather, these disclosures are generally being published for informational purposes to report on a business's ESG activities.

There is an important and meaningful difference between representations "reporting" on activities, and representations "promoting" activities. The Commissioner of Competition seemed to endorse the view that the provisions are focused on advertising aimed at consumers, and not mandatory or voluntary disclosure, in a speech yesterday to the Canadian Bar Association. He said the changes "[mean] that advertisers are expected to have a foundation for their environmental claims, so that they're not deemed false or misleading for consumers." We agree. A statement to this effect in any guidance would go a long way to addressing stakeholder concerns about the new provisions.

We recommend that your guidance also confirm:

- that the word "test" will be broadly interpreted to include methodologies or any other reasonable means of substantiating a representation;
- that domestic methodologies that are generally consistent with, or that have been informed by, international methodologies can be said to be "in accordance" with them and therefore sufficient for compliance purposes; and
- that an "internationally recognized methodology" includes any applicable business systems, procedures and practices that are used internationally to vet disclosures (given that the phrase "internationally recognized methodology" does not require that the methodology be published by an international standard setter, or that the methodology specifically pertain to environmental or climate-related matters).

These are just some examples of the interpretive issues that should be addressed in the Bureau's forthcoming guidance. The attached appendix includes a more comprehensive list of issues, which we encourage the Bureau to address in its forthcoming guidance as well.

The foregoing notwithstanding, like many other commentators, we believe there ought to be legislative amendment to rectify deficiencies in the law as drafted.

We would be pleased to discuss any of the matters set out herein.

Thank you for the opportunity to provide input on these new provisions and for your attention to this letter.

Yours truly,

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Appendix

General application

- *Definition of "person".* Subsection 74.01(1) of the Act requires that representations be made by a "person". How does the Bureau intend to define "person" for these purposes? Our view is that it ought to be limited to corporations and natural persons (individuals). That approach would be consistent with a reasonable legal interpretation of the word. It would also make the misleading representations provisions of the Act internally consistent, insofar as the financial penalties contemplated in subsection 74.1(1) only apply to corporations and individuals. (For greater certainty, such an interpretation would mean partnerships, trusts and other entities would not be subject to subsection 74.01(1)).

- *Representations to the public.* Would representations made to an entity's specific stakeholders, *e.g.*, limited partners of a privately held partnership, constitute representations "to the public"? What about responses to investor or customer questionnaires or RFPs that are made public? In our view a narrow interpretation would help ensure open communications on environmental matters.

- *Promoting business interests.* What does it mean to "promote" a product or business interest? In our view, not all statements made by businesses are "promotional" in nature in the sense of advertising a product or business interest. Similarly, if a business is required to make a disclosure due to statutory, regulatory or contractual obligations, we think it reasonable to conclude that the new provisions do not apply because the business is not making representations to "promote" a product or business interest. Bureau guidance should specifically state that mandatory or voluntary "reporting" is not subject to subsection 74.01(1) because it is not "promoting" a product or business interest. The Bureau should also describe what it sees as "promotional" activities and where it thinks the line ought to be drawn between promotional activities and other activities. (Moreover, if an entity is not an ordinary commercial actor selling products, it seems reasonable to think that it can comment on environmental matters without risk of contravention of subsection 74.01(1). We think that that ought to be confirmed in guidance.)

- *Historical representations.* How should businesses treat historical representations that were compliant with the Act when made but which may now contravene the new provisions? For many businesses, removing historic information is unappealing because the representations are contained in records that they wish the marketplace to see (e.g., old annual reports). On the other hand, updating representations is unrealistic because the nature of the record makes it impossible to update (e.g., old press releases) or the sources of information are too voluminous to review (e.g., all publicly available company records for years or decades). In some cases, information must remain public due to regulatory requirements; without clarity on this issue, there is a risk that businesses may face liability for both removing and retaining such disclosure. It would be helpful if the Bureau's guidance would clarify that historical representations are not caught by the new rules, or at least that they will not be subject to Bureau enforcement action.

- *Disclaimers.* What is the Bureau's view on disclaimers, especially disclaimers relating to historic representations or reliance on third parties? For example, a clarification that historic representations are not current representations. In our view, there is a material difference between "fine print" disclaimers in advertisements where the overall effect is to mislead the average consumer, and fair and clear disclaimers intended to achieve precisely the opposite: alert readers and provide them with additional information. The latter ought

to be recognised in your guidance as reasonable and appropriate in the right circumstances, including with respect to historic information.

- *Reporting on third-party activities*. How do you intend to treat representations repeating or reporting on third-party activities? Numerous businesses describe activities of their clients or suppliers. As a practical matter, it will be difficult in many cases for businesses to verify the validity of third-party environmental representations that on their face seem reasonable. Even if they understand what constitutes a test or methodology, businesses may not have access to underlying information sufficient to make a compliance assessment and, even if they do, doing so would often be burdensome. If such representations are "in scope", businesses ought to be able to rely on representations made by third parties that on their face seem reasonable, with appropriate disclaimers.

- *Representations by foreign subsidiaries*. To what extent will a Canadian parent be liable for representations made by foreign subsidiaries with respect to representations not directed at Canadians? Similarly, in what situations will the Bureau taken enforcement action against foreign entities with respect to representations focused on non-Canadians? There are different scenarios where this could happen. For example, a foreign entity could make a representation directed at customers in a foreign jurisdiction that is accessible to Canadians on a webpage or other social media and that on its face has no geographic limitation. It would be helpful if the Bureau's guidance would clarify that such representations are not caught, or at least that they will not be subject to Bureau enforcement action.

<u>Testing and methodologies</u>

- *Promotion of a product vs. business activity*. What should businesses do where it is unclear whether they are promoting a "product" or a "business activity"? For example, where a business supplies only one product, such as a natural resource business, certain representations could relate to both its product and its business activity. In those cases, it would seem reasonable to permit businesses to choose the most appropriate manner to substantiate the relevant statements.

- *Testing*. Similarly, can a "test" be a "methodology"? In some cases, the accuracy of a product-related representation can be substantiated by an international methodology. If a test is any reasonable procedure for the verification of a representation, which we think it should be, a test should include a methodology. (That could also solve the issue raised above with respect to uncertainty about whether a single product business is making representations regarding products or its business activities.)

- *Intangible products and services*. How should businesses interpret the testing requirement with respect to intangible products or services such as financial products or services? For example, is a green bond a product for this purpose and, if so, what kind of adequate and proper testing would the Bureau expect a company to reasonably conduct to support the environmental benefits of a green bond? Here too, we think an ability to rely on a "methodology" may offer a solution.

- *Substantiation*. How does the Bureau interpret the term "substantiate"? In our view, the term should broadly accommodate any reasonable information or evidence that supports the representation in question, including that based on internal or domestic metrics.

- *International methodologies - domestic methodologies*. What should a business do where

it is required by domestic law to support a representation in accordance with a provincial or federal methodology? For example, where it must follow a provincially or federally prescribed standard or methodology for making disclosure about the environmental aspects or benefits of a product or service. In this regard, we note that there are already many provincial and federal environmental regulations – not international regulations – requiring reporting of specific environmental and climate-related information (such as industrial greenhouse gas emissions or fuel emissions intensity). We also note that the enactment of mandatory climate-related disclosure standards will likely be at the domestic, not the international, level. Similarly, the federal government has been working to develop a domestic sustainable finance taxonomy. To be clear, this question differs from the query above regarding whether statutory disclosures are made to "promote" a product or business interests. This question is whether all representations made by a business that are compliant with domestic statutory methodologies will be compliant with the Act. In our view, a business should not be offside the Act if it made a representation in an advertisement that was fully compliant with its statutory obligations and identical with its statutory disclosure. Holding businesses to different standards for the same representations in different contexts would risk inconsistency and marketplace confusion. Similarly, it seems unfair to deny a business the opportunity to promote the fact that it is compliant with domestic standards simply because such standards do not constitute a test or international methodology.

- *Internationally recognized methodologies – common principles*. Could a (domestic) methodology that is reflective of a common international practice be "internationally recognized"? In our view, a domestic Canadian methodology that reflects an international approach, or has themes that are common across other jurisdictions, should be recognised as being "internationally recognized" insofar as it aligns with what is being done in other jurisdictions. It would be helpful, for example, if the Bureau were to consider the final sustainability standards published by the Canadian Sustainability Standards Board or OSFI's Guideline B-15 – Climate Risk Management, which are based on but may differ from international standards in some respects, as "internationally recognized".

- *Internationally recognized methodologies – types of methodologies*. If there is an international approach on adequate and proper business disclosure generally, would that be acceptable under paragraphs 74.01(1)(b.1) and (b.2)? The legislation does not require that a methodology be an "environmental" test or methodology, and we do not think it ought to be. A broad interpretation would seem consistent with the idea of trying to ensure "truth": that businesses should be required to take reasonable steps to try to verify what they are saying, even if there is no internationally recognised environmental methodology.

- *Internationally recognized methodologies – internal methodologies*. Can businesses rely on internally developed protocols based on one or more international standards or methodologies? International methodologies are subject to change as science, technology, and reporting expectations progress. In some cases, methodologies conflict or do not exist. Some businesses therefore create their own methodologies where there are gaps. These internal methodologies refer to, use and expand on internationally recognized methodologies, but do not necessarily follow a single methodology, or follow it completely. Sometimes companies will have to adapt existing methodologies to fit their businesses. This is common in climate and sustainability reporting, an emerging area where the disclosure regimes have not yet matured, and market practice can play an important role in leading to the development of common standards. In our view, it would be reasonable to interpret the phrase "in accordance with" an internationally recognised methodology as not meaning "precisely following, without any modification".

- *Internationally recognized methodologies – industry or sectoral methodologies*. What should businesses do if there are methodologies supported or mandated by industry or sectoral standard-setting bodies, which are commonly used in the applicable industry or sector, but which may not be legally required or internationally applied (*e.g.*, due to the standards being tailored to address the uniqueness of particular jurisdictions)? Would adhering to such methodologies be acceptable under paragraphs 74.01(1)(b.1) and (b.2)? To what extent will the Bureau defer to an industry-specific standard setter or prudent industry practice in determining that representations are compliant? In our view, there are cases where prudent industry practice may be the most appropriate methodology, given that certain matters require local, industry-specific or subject matter expertise and that therefore do not lend themselves to international standards.

- *Forward-looking representations*. The Bureau in its latest *Deceptive Marketing Practices* Digest states that before making any aspirational claims, which would include net zero commitments, businesses should "have a clear understanding of what needs to be done to achieve what is being claimed" and "have a concrete, realistic and verifiable plan in place". How should this be achieved in the context of paragraphs 74.01(1)(b.1) and (b.2)? Achieving future goals is often highly uncertain and commonly depends on the occurrence of external events and assumptions that are beyond a business' control. In our view, Bureau guidance should expressly reflect an understanding of the challenges with respect to forward-looking statements. If readers are appropriately cautioned about the risks relating to the achievement of a particular environmental goal or objective, we do not think there ought to be risk of liability under the Act.

- *Due diligence defence*. Subsection 74.1(3) of the Act provides that "[n]o order may be made … if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring". Does the Bureau believe that it applies to paragraphs 74.01(1)(b.1) and (b.2)? If so, how does the Bureau envision this "due diligence" defence applying in the case of environmental representations? Regardless of whether that subsection applies technically to paragraphs 74.01(1)(b.1) and (b.2), we think Bureau guidance should specifically acknowledge that, as a matter of enforcement policy, it will not initiate proceedings against persons who would otherwise have benefitted from the defence.

- *Due diligence defence regarding old tests or methodologies*. Certain methodologies are recognized for a time but may become dated or contentious or otherwise fall out of favour. In our view, guidance should clearly state that businesses will not be held liable for reliance on a methodology is "recognized" at the time that a representation is initially made.

Administrative monetary penalties

- *Application of administrative monetary penalty provisions*. The administrative monetary penalty (AMP) provisions at subparagraph 74.1(1)(c)(ii) state that they apply to corporations; there is no reference to other entities or affiliates. It would be helpful if the Bureau's guidance could confirm that this provision only applies to corporations that have contravened the legislation and not to other entities or affiliates. We think this interpretation is uncontroversial, and consistent with the subsection 74.01(1) reference to "person", but that Bureau confirmation would provide clarity to the marketplace.

- *Calculation of administrative monetary penalties* – Similarly, there is no suggestion that the revenue calculations for administrative monetary penalties are based on the combined

revenues of the corporation that made a representation and its affiliates versus the revenues of the corporation that made the representation (and not its affiliates). It would be helpful if the Bureau could confirm that affiliates are irrelevant to the assessment of the quantum of any AMP.

- *Pursuit of administrative monetary penalties*. Clause 74.1(1)(c)(ii)(B) contemplates a potentially extraordinary administrative monetary penalty quantum. In what circumstances or under what criteria would the Bureau seek an AMP under this paragraph, rather than the amounts contemplated in clause 74.1(1)(c)(ii)(A)?

- *Director and officer liability*. The administrative monetary penalty provisions at subparagraph 74.1(1)(c)(i) of the Act apply to "individuals". It would be helpful if the Bureau in its guidance could confirm that this subparagraph does not apply to (a) directors or officers of a corporation or (b) the equivalent personnel within other entities.

Leave / private access

- *Public interest*. In our view, Bureau guidance ought to include a discussion of its view of the role of private enforcement and when it thinks a private case will be in the "public interest". We think this is appropriate because it is (also) the Bureau's role to commence proceedings when it is in the public interest. Stakeholders should understand how the Bureau views its role as acting in the public interest versus the role of third parties. In our view, the Bureau can and should be the primary enforcer of paragraphs 74.01(1) (b.1) and (b.2). We also believe that the Bureau should take an active role as intervenor in opposing private actions that are making allegations that are inconsistent with the Bureau's guidelines.