Competition Bureau
ATTN: Commissioner Matthew Boswell
Deceptive marketing practices Directorate
50 Victoria Street
Gatineau, Quebec K1A 0C9
Via email: greenwashingconsultationecoblanchiment@cb-bc.gc.ca

September 5, 2024

Re: Consultation on *Competition Act's* New Greenwashing Provisions

Dear Commissioner Boswell:

The Canadian Association of Petroleum Producers (CAPP) is a non-partisan, research-based industry association that advocates on behalf of our member companies, large and small, that explore for, develop, and produce oil and natural gas throughout Canada. Our associate members provide a wide range of services that support the upstream industry.

CAPP is opposed to the *Competition Act*'s amendments related to environmental representations with respect to the benefits of a business or business activity included in Bill C-59, and believes these amendments should be fully repealed. However, CAPP and our members have worked in earnest to provide the Competition Bureau with recommendations in response to the technical questions posed in your consultation. Our goal is to support the Competition Bureau in developing a workable solution with standards for businesses to ensure that healthy discourse about environmental performance can continue in Canada, a discourse which is essential to building our economy today and for the future.

Debates around the environment and environmental policy are some of the most important issues facing Canadians today. Parliament's approach with this legislation and its threat of very significant penalties will limit the ability of Canadians to participate in meaningful discourse around climate and environmental policy. The effect of this legislation is to silence the energy industry, and those that support it, in an effort to clear the field of debate and promote the voices of those most opposed to Canada's energy industry.

Implementing a vague law with exceptionally high penalties, with no consultation, and which has an outsized impact on the country's largest industries is both anti-democratic and anti-business.

Any regulatory changes must consider impacts to Canada's ability to compete globally in attracting investment and how they may encourage or impede Canada's already struggling productivity, including amendments to the *Competition Act*.

These *Competition Act* amendments hamper business' ability to gain public support for their projects and products and will therefore serve to drive investment away from Canada and into other jurisdictions. This approach will contribute to Canada's challenges in attracting investment, particularly investment into projects and technologies aimed at lowering emissions. In addition, companies face a high risk of being unfairly and unnecessarily targeted and pulled into long, drawn out legal proceedings in defence of reasonable statements. Without clear guidance as to how the Competition Bureau plans to handle such frivolous and vexatious claims, this will have a chilling effect on companies' disclosure and participation in climate and environmental policy discussions.

We recognize and respect the Competition Bureau's role in this consultation process is to develop guidance and that the Competition Bureau is not in a position to truly fix the fundamentally flawed amendments hastily made to the *Competition Act*. A law must provide a clear line of sight to compliance, but the new and vague "greenwashing" amendments do not, and we are skeptical that any amount of guidance can provide Canadian businesses with the confidence to openly discuss their environmental ambitions and progress with Canadians.

As already stated, the best solution to this issue is to repeal the recent amendments to the *Competition Act* and take the time to have a fulsome discussion on the issue of greenwashing, something that did not happen in this instance and we believe is a missed opportunity.

We ask that the Competition Bureau take into account the following comments that we have gathered from our members as it drafts guidelines for the new greenwashing provisions. Fundamentally, we are asking for fairness across industries and sectors in the application of the legislation, clarity on the guidelines for compliance, and alignment with environmental disclosure rules and requirements already in place.

In addition, we direct your attention to the **attached Appendix 1** that sets out our detailed response to the specific consultation questions posed by the Competition Bureau.

A. The new rules should apply equally across all industries and sectors.

The *Competition Act* applies broadly to all persons making representations relating to business or business activities. This includes all types of organizations in Canada, including not-for-profit groups involved in raising capital for charitable and non-profit purposes.

While the changes to the *Competition Act* are meant to encourage accuracy and comparability in environmental-related disclosure, the changes have already begun to, and will continue to, disproportionately affect certain industries over others. Companies engaged in sustainability-related activities will have corresponding disclosure related to such activities and, notwithstanding the volume of resources dedicated to developing and substantiating such disclosure, the lack of clear substantiation requirements make it so that *any* environmental-related statement, claim, or other disclosure could be a potential target for a complaint.

If the intent of the new greenwashing provisions is to create a more transparent, measured, and factual discourse relating to environmental matters, it is essential the standards apply equally to all participants operating in all sectors and industries. In the same way that parties carrying out certain business activities are under the microscope, the Competition Bureau should make it clear that parties, such as climate advocacy groups, advancing claims against those businesses are subject to the same standards in respect of their own communications and representations.

In order to clarify when the Competition Bureau will challenge an environmental claim (i.e., the risk that companies operating within certain industries and sectors will become automatic targets), the Competition Bureau should explicitly state that all businesses, not-for-profits, and advocacy groups will be held to the same standards.

B. "Internationally recognized methodology" is undefined.

Under the new greenwashing provisions, environmental representations do not need to be false or materially misleading to be actionable. They can be true but still violate the new provisions unless they can be substantiated in accordance with "internationally recognized methodology."

Businesses should not be subject to significant penalties or other prohibitions or restrictions on disclosure, especially if they are established to be true, without having clear guidance on what currently is, or in the future will qualify as, as an "internationally recognized methodology".

There are many international methodologies for sustainability and climate related disclosures that various international organizations have established. However, the extent and scope of adoption of these various international methodologies among countries and businesses has not been consistent. As such, there is no substantive way to discern what constitutes an "internationally recognized methodology". Guidance is required for business to assess whether an international methodology is "internationally recognized" for purposes of complying with the *Competition Act*. Specifically, the Competition Bureau should clarify what criteria businesses should apply as existing international methodologies are modified, or new international methodologies are published.

C. Canadian federal regulatory and provincial reporting frameworks and standards already exist and are actively being further developed.

The guidance should reflect that methodologies for sustainability and climate related disclosures that are required to be followed for Canadian federal or provincial reporting purposes, or to meet Canadian federal or provincial regulatory requirements, also meet the standard even if they may not be an "internationally recognized methodology".

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 "internationally recognized methodology". Many Canadian companies have implemented ambitious ESG-related targets.

Businesses should feel confident that if the sustainability and climate-related disclosures can be substantiated in accordance with Canadian federal or provincial regulatory requirements (e.g., Compliance with Alberta Directive 17 – Measurement Requirements for Oil and Gas Operators), they will be considered to be substantiated in accordance with internationally recognized methodology for purposes of the *Competition Act*.

The guidance should be clear that if/when Canadian federal and provincial organizations, such as the Canadian Securities Administrators or the Canadian Accounting Standards Board, adopt their own sustainability and climate change disclosure methodologies, or adopt modifications to internationally recognized methodologies, then sustainability and climate change disclosures will be considered to be substantiated pursuant to the applicable Canadian federal or provincial standards.

In addition, the *Competition Act* should not prevent companies from complying with their requirements under other legislation, instruments, agreements, etc. The new rules are meant to protect the public by regulating the types of representations that companies can make to the public. It is unclear, however, how the new rules will apply to representations made in documents which are not directed toward the public but are or become publicly available. The guidance should be clear that the new rules only apply to public statements made with respect to the environmental benefits of a business or business activity, and do not apply to communications generated for other purposes (e.g., to meet regulatory requirements, communicate with Indigenous groups, commercial partners, or other parties, complete funding and other types of applications, etc.).

D. Safe harbours are required.

Applicable securities legislation and the *Competition Act* should not conflict. Sustainability and climate-related disclosures that are not actionable under applicable securities legislation should not be actionable under the *Competition Act*. Guidance is required as to how the obligations under securities legislation can be reconciled with the new provisions of the *Competition Act*.

Investors and other stakeholders are increasingly asking for more information about the sustainability and climate mitigation activities being undertaken, or proposed to be undertaken, by all companies. Securities legislation has addressed the potential increased liability of companies for providing this type of disclosure by providing a "safe harbour" for forward-looking sustainability and climate related disclosures that are made pursuant to applicable securities legislation.

Under securities legislation, reporting issuers have liability for disclosing misleading and false information. However, that liability is subject to materiality standards and other thresholds, as well as appropriate due diligence defenses, depending upon the type of information disclosed (often referred to as "safe harbours"). Reporting issuers must have a reasonable basis for making forward looking statements, and in other cases, must have made a reasonable investigation to establish the accuracy or veracity of the information disclosed. Having a reasonable basis for the information or having undertaken a reasonable investigation are far different standards than the requirement to "substantiate in accordance with internationally recognized methodology" required under the *Competition Act*.

As part of its "safe harbour" protocol, Canadian securities law permits reporting issuers to include a disclaimer for forward-looking information on all published materials prepared for investors. These disclaimers typically state that investors may not take legal action against company management for forward-looking information that proves to be inaccurate.

To ensure a level-playing field between reporting issuers and private companies, this "safe harbour" for sustainability and climate related disclosures involving forward-looking information should apply to all companies.

The business landscape and disclosure regimes evolve over time with the influence of technology, experience and shifting demands. Private companies, as well as small junior and large, established reporting issuers alike, should be able to talk about their environmental ambitions without fear of reprisal under the *Competition Act*.

E. Different methodologies exist for gathering data.

Businesses should not be subject to penalties or other prohibitions or restrictions on disclosure if the methods they use for gathering data, and the types of data upon which they rely, are reasonable and appropriate in the circumstances.

Businesses use various types of data 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 within protocols, data reported through internal corporate reporting systems, federal and provincial data and statistics, and other sources as required by relevant reporting guidelines.

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 the data upon which they base their business decisions, from day-to-day operations to large-scale strategic business decisions and investments 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.

The Competition Bureau guidance should clarify that data businesses use in regulatory reporting and other corporate documents will be determined to be substantiated if it is the product of a reasonable and appropriate data gathering process.

F. The new rules discourage the use of scenario analysis and aspirational target-setting generally.

Disclosures related to scenario analysis should not be viewed as representations that are subject to the new greenwashing provisions.

Several international methodologies encourage companies to undertake and disclose 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. Nor are they aspirational statements. They are simply a method of exploring alternatives that may alter the basis for "business-as-usual" assumptions. While conducting scenario analysis can be resource-intensive (i.e. expensive) and is hypothetical and forward-looking in nature, many companies develop such disclosure because it is highly regarded by international standard setting bodies and sought after by investors. The guidance should be clear that scenario analysis will not be subject to the new *Competition Act* provisions.

Conclusion

Climate change and protecting the environment are among the most important issues facing Canada today. Industry has long participated in these public policy discussions and contributed to them in a meaningful way. Industry's contributions arise not just from statements about how they operate, but through the disclosures made to regulators and other parties. Not only have the changes to the *Competition Act* already severely limited industry's ability to provide much of this information and cut off their participation in this crucial public discussion, but they have limited companies' ability to communicate important information to their shareholders, Indigenous partners, and other stakeholders. The guidance that the Competition Bureau provides will clarify and re-open that discourse while still protecting against misinformation and false statements.

We appreciate the opportunity to provide these comments.

Sincerely,

CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

Lisa Baiton
President & Chief Executive Officer

Attachment
DM#428689

About CAPP

The Canadian Association of Petroleum Producers (CAPP) is a non-partisan, research-based industry association that advocates on behalf of our member companies, large and small, that explore for, develop, and produce oil and natural gas throughout Canada. Our associate members provide a wide range of services that support the upstream industry.

CAPP's members produce nearly three quarters of Canada's annual oil and natural gas production and provide approximately 450,000 direct and indirect jobs in nearly all regions of Canada. According to the most recently published data, the industry contributes over $70 billion to Canada's GDP, as well as $45 billion in taxes and royalties to governments across the country. CAPP is a solution-oriented partner and works with all levels of government to ensure a thriving Canadian oil and natural gas industry.

We strive to meet the need for safe, reliable, affordable, and responsibly produced energy, for Canada and the world. We are proud to amplify industry efforts to reduce GHG emissions from oil and gas production and support Indigenous participation and prosperity.

Appendix 1: CAPP Detailed Response to Competition Bureau Consultation Questions

We believe the recent amendments will impact businesses across Canada, irrespective of their sector, from resource extraction to retail sales and agriculture. Clear guidance from the Competition Bureau is critical to ensure all businesses can confidently communicate their environmental accomplishments and future ambition.

1. **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?**
    - Businesses require the ability to communicate their environmental performance across a wide and ever-evolving array of topics and using multiple methodologies. Different stakeholders are interested in different information. Responding to stakeholder interests and concerns can improve understanding of industrial environmental performance.
    - Businesses require assurances regarding how they can confidently publicise environmental performance and benefits, including, but not limited to:
        - Historic environmental performance,
        - Forward-facing environmental ambition and targets,
        - Environmental performance related to emissions and releases, water usage, species protection, land disturbance, and reclamation,
        - Actions taken to mitigate, or intended to mitigate, environmental impacts,
        - Environmental performance as compared to their national and international peers,
        - Environmental performance based on various metrics, for example: total emissions, emissions intensity per unit production, emissions as compared to water usage, and emissions over time.

2. **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?**
    - Some specific regional environmental criteria of interest may be unique to Canadian stakeholders and businesses, including for example actions related to local species protection in a given region. At the same time, we believe an appropriately inclusive definition or framework to determine "internationally recognized methodology", as described in our response to question 3 below, could provide the necessary flexibility to publicise otherwise unique environmental actions.
    - Other qualities, such as the carbon intensity of fuels, cannot be empirically tested. Performance metrics calculated using models that incorporate numerous assumptions and datasets, such as life cycle analysis models, can be proprietary and may lack the transparency associated with a narrow definition of a substantiated internationally recognized methodology.

3. **What internationally recognized methodologies should the Bureau consider when evaluating whether claims about the environmental benefits of the business or business activities have been "adequately and properly substantiated"? Are there limitations to these methodologies that the Bureau should be aware of?**
    - There are many reasons why an inclusive interpretation of "internationally recognized methodology" should be adopted by the Bureau. This would include, but not be limited to environmental performance based on:
        - Information reported to Canadian government regulators for compliance purposes, including carbon pricing, and any data collected using the same methodologies. Our federal and provincial regulators are global leaders and set reporting requirements, including data collection methodologies and requirements, based on what is technically feasible, appropriately accurate, safe, and consistent. Their requirements are often similar to those in other countries. In most cases provincial requirements are more attuned to regional operations and are therefore more robust and relevant than standards developed for global application. **In Canada, a business should be able to publicise what it reports to government**. It is also critical for consistency as a business should not be obligated to report one number to government and another number to the public due to a difference in acceptable calculation methodologies. Corporate referencing of regionally reported data, or data collected using regionally accepted methods, is common international practice and should be accepted by the Bureau.
        - Reporting requirements from jurisdictions outside Canada, which are by definition, internationally recognized methodologies, should be accepted. Businesses use this data to define their global performance.
        - Information published in news media or by credible sources such as peer reviewed journals, the standard means of communicating to, and educating, the public in Canada and abroad should be accepted. Good faith reliance on reasonable third party published data should be accepted as a common international practice.
        - Any guidance or methodologies set by securities regulators (or other provincial or federal regulators) should be deemed acceptable given regulated public disclosure requirements.
        - Any statements based on engineering best practices, including measurement, manufacturer specifications, or other generally accepted calculations. Performance claims that are based on credible data or assumptions, using commonly recognized engineering or accounting methods and mixes of corporate and public data should be deemed acceptable by the Bureau.
    - Forward-looking corporate targets and ambition statements should be accepted if structured similarly to statements made by: national governments, including Canada; international organizations such as the United Nations and its subsidiaries; supranational organizations such as the European Union; and sub-national (provincial or state) governments. Corporate environmental targets are often described in similar terms as government targets with

accountability being exercised variously by voters, shareholders, and customers. While CAPP recognizes the difficulty in defining an "internationally recognized methodology" for making claims about environmental targets, we suggest that the global community provides countless examples for reference.

- Environmental science is rapidly evolving and new methods and technologies for quantifying impacts and parameters are being regularly developed. Businesses need the flexibility to use the newest and most accurate methods to identify, quantify and communicate their performance to stakeholders and should not be penalized for changing and evolving best practices. For example, the recent changes to Canada's National Inventory Report, including the recalculation of previous years' emissions based on new methodologies, illustrates the importance and frequency of modifying and altering data based on new knowledge. Varied and evolving methods are the international norm for describing environmental performance and leads to better quality of data.

4. **What other factors should the Bureau take into consideration when it evaluates whether claims about the environmental benefits of businesses or business activities are based on "adequate and proper substantiation in accordance with internationally recognized methodology"?**
   - Even similar credible, accepted methodologies can result in different conclusions, and these should not be used to 'discredit' a given methodology. There does not exist one source of truth – so long as a particular methodology is reasonable and appropriate in the circumstances, it should not be discredited simply because a similar but different methodology has a different outcome or result.
   - Any forward-looking information, including targets, ambitions, and performance projections, are based on assumptions and subject to a degree of uncertainty. Failure to achieve an environmental target does not mean the target was established in bad faith.
   - Stakeholders may have particular interest in specific, regional environmental metrics. Companies require sufficient flexibility to use the methodology and terminology most suited to the jurisdiction and environmental aspect in question that also meets stakeholder expectations.
   - Multiple methodologies and technologies exist to describe environmental performance, but businesses require significant discretion to determine what methods are best suited to their unique operations. Different methods will produce different results and there will be cases were data accuracy increases using a case-specific methodology, rather than a one-size-fits-all approach designed for global application.
   - Any historic claims, made using methodologies reasonable at that time, should not become liabilities and require updating if and when new, more accurate methodologies are created.

5. **What challenges may businesses and advertisers face when complying with this new provision of the law?**
   - Companies face pressure from shareholders, institutional investors, insurance companies, and the public to be transparent and accountable to various environmental disclosures in addition to

regulatory reporting requirements. Credible, targeted, and interest-specific information improves public and stakeholder knowledge. A narrow definition interpretation of the new amendments will limit this transparency.

- The new provisions put Canadian businesses at a competitive disadvantage if businesses are prevented from communicating transparently about their environmental progress relative to competitors in other jurisdictions. This could have a significant impact on investment and Canada's reputation as an environmental leader could slip if business are unable to publicise their accomplishments or ambition.

6. **What other information should the Bureau be aware of when thinking about how and when to enforce this new provision of the law?**
   - The Bureau must create clear guidelines to provide certainty to businesses that the new requirements will not be used to impose an undue administrative burden on businesses. If the barrier to bring a claim to the Bureau is low, and the guidance is not clear and pragmatic so that companies can comply and other parties have the means to understand that claims are likely to be properly substantiated, the new provisions could create significant administrative burden for both the Bureau and companies. The legislation may be used maliciously and it could have a significant chilling effect on speech and further undermine the ability of Canadian businesses to honestly and transparently identify their environmental goals and performance.