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Delivered By Email: greenwashingconsultationecoblanchiment@cb-bc.gc.ca

Deceptive Marketing Practices Directorate
Competition Bureau
50 Victoria Street
Gatineau, Quebec
K1A 0C9

Dear Sirs and Mesdames:

RE: Competition Bureau - Consultation - Competition Act's New Greenwashing Provisions

The Investment Funds Institute of Canada (**IFIC**) is pleased to provide the Competition Bureau with our comments on the Competition Act's new greenwashing provisions.

IFIC is the voice of Canada's investment funds industry. IFIC brings together approximately 150 organizations, including fund managers, distributors and industry service organizations to foster a strong, stable investment sector where investors can realize their financial goals. IFIC operates on a governance framework that gathers member input through working committees. The recommendations of the working committees are submitted to the IFIC Board or board-level committees for direction and approval. This process results in a submission that reflects the input and direction of a broad range of IFIC members.

SUMMARY

IFIC supports the regulatory objectives of the new greenwashing provisions in the Competition Act to ensure that environmental claims relating to protecting or restoring the environment or mitigating the causes or effects of climate change are accurate and substantiated.

While the intended benefits of these new greenwashing provisions are clear and supported by IFIC, IFIC wishes to highlight that with respect to the securities industry, and the investment fund industry in particular, extensive regulation and oversight by the Canadian Securities Administrators (**CSA**) and the Canadian Investment Regulatory Organization (**CIRO,** together with the CSA, the **Securities Regulators**) to guard against potential greenwashing already exists. As a result, we respectfully ask that the Competition Bureau defer to the Securities Regulators as it pertains to greenwashing concerns. A key goal of the Securities Regulator's oversight and compliance audits is to ensure that claims made by registered firms are not misleading, exaggerated or unsubstantiated.

The regulatory objectives of applicable securities law and the new amendments to the Competition Act concerning greenwashing are aligned. However, introducing the Competition Bureau into the securities regulatory framework risks creating confusion, overlapping or contradictory standards, and unnecessary complexity in regulating the activities of investment funds, investment fund managers, portfolio managers and dealers. Therefore, in accordance with the Memorandum of Understanding (**MOU**) between the

Competition Bureau and the Ontario Securities Commission (**OSC**) dated November 25, 2014,[1] IFIC urges the Competition Bureau to cooperate and coordinate its activities concerning greenwashing enforcement with the OSC by deferring to the OSC (and for that matter, the other CSA members and CIRO). Further, we ask that the Competition Bureau recognize the established, internationally aligned, ESG-related guidelines published by the CSA for this purpose (**CSA ESG Guidance**).

DETAILS

Investor Protection

One of the major purposes of Canadian securities legislation and its enforcement is to protect investors from unfair, improper and or fraudulent practices.[2] In general, the Securities Regulators have numerous rules that prohibit misleading claims. For example, all registrants must deal fairly, honestly and in good faith with their clients and ensure that statements provided to investors are fair and not misleading.[3] Firms registered with the Securities Regulators must not hold themselves out in a manner that could reasonably be expected to deceive or mislead any person regarding the products or services they provide.[4]

There are securities rules for sales communications by public investment funds that have detailed requirements and restrictions. Part 15 of National Instrument 81-102 – *Investment Funds* (**NI 81-102**) provides that an investment fund is prohibited from, among other things, issuing a sales communication that is untrue or misleading.[5] More specifically, NI 81-102 also provides that a fund must not include misleading statements in its sales communications and the CSA ESG Guidance elaborates that this includes a prohibition against misleading statements about the environmental, social, and governance (**ESG**) performance or ESG-related outcomes of the fund e.g. inaccurate claims about (a) the fund's ESG performance or results, or (b) the existence of a direct causal link between the fund's investment strategies and ESG performance or results.

The Companion Policy to NI 81-102 – which is guidance issued by the CSA - lists some of the circumstances in which a sales communication would be misleading. One such circumstance is where the sales communication contains a statement about the characteristics or attributes of an investment fund that makes exaggerated or unsubstantiated claims about the characteristics of the investment fund. Another is that a statement would be misleading if it lacks explanations, qualifications, limitations or other statements necessary or appropriate to make the statement not misleading. In addition, CSA staff are of the view that sales communications should not contain statements that are vague or exaggerated, or that cannot otherwise be verified.[6] This guidance applies to both current and future oriented information or claims. The CSA and the firms it regulates have a long history with these requirements such that they understand the appropriate standards of conduct and regulatory expectations.

Specific CSA ESG Guidance

Recently, securities regulatory expectations were developed to reduce the potential for greenwashing in the fund industry. In January 2022, the CSA issued the CSA ESG Guidance in the form of Staff Notice 81-334, ESG-Related Investment Fund Disclosure, which guidance was revised in March 2024.[7] The specific

[1] https://competition-bureau.canada.ca/how-we-foster-competition/collaboration-and-partnerships/agreements-domestic-partners/memorandum-understanding-between-commissioner-competition-competition-bureau-and-chair-ontario
[2] See section 1.1 of the Securities Act (Ontario).
[3] This requirement is found in section 2.1 of Ontario Securities Commission Rule 31-505 Conditions of Registration, section 14 of the Securities Rules (British Columbia), section 75.2 of the Securities Act (Alberta), subsection 33.1(1) of the Securities Act (Saskatchewan), subsection 154.2(2) of the Securities Act (Manitoba), section 160 of the Securities Act (Quebec), subsection 54(1) of the Securities Act (New Brunswick) and section 39A of the Securities Act (Nova Scotia).
[4] See section13.18 of National Instrument 31-103.
[5] CIRO has a similar rule that provides that a dealer member must not issue, participate in or knowingly allow the use of its name in any advertisement, sales literature or correspondence that contains an untrue statement or omission of a material fact or is otherwise false or misleading.
[6] CSA Staff Notice 81-334 (Revised) ESG-Related Investment Fund Disclosure.
[7] CSA Staff Notice 81-334 (Revised) ESG-Related Investment Fund Disclosure.

purpose of the CSA ESG Guidance was to provide regulatory guidance to investment fund managers on their disclosure and sales communication practices, "to reduce the potential for greenwashing, whereby a fund's disclosure or marketing intentionally or inadvertently misleads investors about the ESG-related aspects of the fund".

The CSA ESG Guidance is based on interpreting existing securities regulatory requirements and addresses areas of investment funds' disclosure, including investment objectives, names, investment strategies, risk disclosure, continuous disclosure and sales communications. This guidance specifically addresses disclosure in prospectus documents, Fund Facts, ETF Facts, Management Reports of Fund Performance, websites, and all sales communication materials. See **Appendix A** for additional details on the CSA ESG Guidance

The CSA ESG Guidance aims to bring greater clarity and consistency to ESG-related fund disclosure and marketing, helping investors make more informed decisions.[8] The CSA ESG Guidance specifically addresses investment funds that market themselves as focusing on ESG factors or incorporating them into their investment processes. Non-ESG Funds[9] should not refer to ESG in their sales communications, with the exception of limited factual information. The factual information about the ESG characteristics of a portfolio should not be framed in a way that suggests that the Non-ESG Fund is aiming to achieve any ESG-related goals or is trying to create a portfolio that meets certain ESG-related criteria. The CSA ESG Guidance is established in the marketplace and overseen by a sophisticated set of regulators that have jurisdiction over these issues.

An Internationally Recognized Methodology

Importantly, the CSA ESG Guidance was developed to align with international standards, particularly the sustainability-related practices, policies, procedures, and disclosure guidelines issued by the International Organization of Securities Commissions (**IOSCO**) in 2021[10]. IOSCO's standards comprise five key recommendations for securities regulators and policymakers, focusing on delivering consistent, comparable, and decision-useful information to investors, while also limiting the potential for greenwashing.[11]

The CSA ESG Guidance is in direct response to **Recommendation 2** of the IOSCO standards which states: *Securities regulators and/or policymakers, as applicable, should consider clarifying and/or expanding on existing regulatory requirements or guidance or, if necessary, creating new regulatory requirements or guidance, to improve product-level disclosure in order to help investors better understand: (a) sustainability-related products; and (b) material sustainability-related risks for all products.*

Accordingly, a representation to the public with respect to the benefits of a business or business activity of a fund, or its manager, for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is made in accordance the CSA ESG Guidance should be considered to be made in accordance with an internationally recognized methodology.

IFIC respectfully suggests that in light of the extensive securities regulation of statements made by securities registrants and investment funds pertaining to environmental claims, and specifically the CSA ESG Guidance, that the Competition Bureau should accept the CSA ESG Guidance as an internationally recognized methodology for the purposes of the Competition Act's greenwashing provision. IFIC considers

[8] CSA Staff Notice 81-334 (Revised) ESG-Related Investment Fund Disclosure
[9] Funds that do not consider ESG factors in their investment process
[10] IOSCO, whose members regulate more than 95% of the world's securities markets, is an international body recognized as the global standard-setter for regulation in the financial markets. IOSCO's members consist of the securities regulators of over 130 jurisdictions - including Canada – and they work in concert to develop, implement and promote adherence with internationally recognized standards for financial market regulation.
[11] International Organization of Securities Commissions, "Recommendations on Sustainability-Related Practices, Policies, Procedures and Disclosure in Asset Management: Final Report" (November 2021), accessible at: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD688.pdf

this to be technically appropriate and the preferred approach for the policy reasons set out below. Further, given that guidance has been issued by the CSA and used by it in compliance audits, the Competition Bureau should wholly defer to the CSA (and the Securities Regulators more broadly) on ESG issues.

Adequate and Proper Testing

Concerning the requirement that a representation be based on "an adequate and proper test", we recommend that compliance with the CSA's rules and guidance should be sufficient. In addition to the many other reasons set out in this letter, we note that the Competition Bureau's experience and interpretations with respect to "an adequate and proper test" to date have focused on the evaluation of claims related to physical products. These interpretations may not be relevant in the context of non-physical products or service offerings, such as investment products and services, which are less amenable to scientific testing.

Compliance/Enforcement

The compliance and enforcement activities of the Securities Regulators protect investors, deter inappropriate practices and foster confidence in fair and efficient markets.

CSA staff expect investment funds that consider ESG factors and/or use ESG strategies in their investments to (a) establish, maintain and apply written policies and procedures that cover these activities and (b) have processes in place to ensure that their written policies and procedures are regularly updated, such as for changes in business practice, industry practice or securities legislation. CSA staff undertake compliance reviews of the expected actions, with a central goal of ensuring that related claims not be exaggerated or unsubstantiated.[12] Securities registrants are required to maintain records to accurately demonstrate compliance with securities legislation.[13]

In addition to setting clear regulatory expectations related to ESG disclosure practices, the CSA actively enforces these expectations when they consider a misrepresentation to have been made. Canadian Securities Regulators conduct ESG-focused reviews of the disclosure and sales communications of investment funds. For example, after the publication of the initial version of the CSA ESG Guidance in 2022, CSA staff conducted 112 ESG-focused reviews of fund regulatory disclosure documents and sales communications. The Securities Regulators mandate changes to regulatory disclosure documents and sales communications when there is a misrepresentation that deviates from the established guidance. These regulators have other compliance and enforcement mechanisms to take action where environmental claims are inaccurate and/or not appropriately substantiated.

Even if there is no specific breach of applicable securities law, the CSA may use its public interest jurisdiction to make orders in the public interest and impose sanctions.[14] This jurisdiction may be used where there is conduct contrary to the principles of securities legislation, such as where sales communications are unsubstantiated, false and/or misleading to the potential detriment to investors. Sanctions may include cease trading orders for the securities of mutual funds/ETFs, limitations placed on – or the revocation of - the necessary registration to engage in business, fines, disgorgement of profits obtained from misconduct, and mandatory enhanced disclosure. In settlement agreements, the CSA can negotiate restitution of losses and lost profits to be paid to investors.

CIRO has compliance teams that examine dealers for compliance with conduct, trading, prudential and operating rules, and work with firms to ensure they continually meet high standards while providing financial services to their clients. Enforcement staff investigate possible breaches of CIRO rules and discipline firms

[12] For example, see CSA Staff Notice 31-325 – Marketing Practices of Portfolio Managers and OSC Staff Notice 33-756 for the requirement for matters to be substantiated.
[13] See section 11.5 of National Instrument 31-103.
[14] For example, see section 127(1) of the Securities Act (Ontario).

and individuals when regulatory misconduct is identified. Discipline can include fines, suspensions, and permanent bans or termination for both individuals and firms.[15]

Competition/Securities Regulatory Relationship

We note that the MOU between the Competition Bureau and the OSC dated November 25, 20214 provides, among other things, that each party, *"will, subject to their discretion and respective confidentiality obligations, cooperate and coordinate their activities, which include but are not limited to the following: a) notifying the other Participant with respect to a matter that is materially relevant to the other Participant, and that could be carried out by the other Participant under its mandate [*emphasis added*]*.

Further, in our view, if the Competition Bureau were to address the enforcement of greenwashing concerns in the manner set out above, by deferring to the CSA (and the Securities Regulators more broadly) when they carry out their mandates, this would be consistent with the intention and goals of effective regulation contemplated by the MOU. Absent this approach, there is a significant risk of creating overlapping and potentially contradictory oversight of securities registrants and investment funds without a corresponding increase in consumer protection. This overlap could lead to considerable uncertainty and complexity within the fund industry, as firms may struggle to navigate conflicting or unclear requirements. This would in turn result in an unnecessary increased regulatory burden as the investment fund industry deals with duplicative or even differing oversight. Consequently, securities registrants and investment funds might choose to limit their environmental disclosures to those disclosures strictly required by applicable law to avoid regulatory, legal and reputational risk, even when those disclosures are valid and beneficial to investors and other market participants. Such a scenario would not only stifle transparency but also make it more challenging for investors to access the information necessary to align their investments with their own environmental objectives, ultimately hindering the growth of sustainable investment products in the market. This could also risk putting the Canadian market at a disadvantage globally.

We note that contradictory regulatory approaches, different conduct standards and lack of familiarity with the Competition Bureau's approach could also add complexity and burden to Securities Regulators that attempt to reconcile a variety of legal approaches, interpretations, administrative practices, and regulatory objectives, thereby using scarce resources that could otherwise be used for non-duplicative regulation that protects both the Canadian securities markets and investors. In addition, duplicative regulation could also result in one regulator impacting another's area of primary responsibility. For example, the Competition Bureau could in theory make a determination that would affect an investment fund's Fund Facts or ETF Facts or other prescribed securities regulatory disclosures over which provincial securities regulators have primary jurisdiction.

Forward looking claims

Investment fund managers make claims relating to net zero targets, carbon neutrality, and having targets that are "science-based". These claims are often made in response to demands for information from different stakeholders (investors, consumers, suppliers, industry associations etc.) and they align with the growing consumer demand for environmentally responsible products and business practices. Forward-looking environmental claims, including those relating to net zero targets, climate-related opportunities and scenario analysis, are significantly more difficult to substantiate due to their long-term time horizon and limitations in available methodologies.

Science, innovation and regulation in this area is expected to evolve considerably. This means that the assumptions underlying these claims are likely to shift over time. As indicated above, the CSA's position is that these types of forward-looking claims should include sufficient explanations, qualifications, limitations or other statements necessary or appropriate to make the statement not misleading.

[15] https://www.ciro.ca/about-ciro

The Competition Bureau should not discourage companies from disclosing their aspirational goals, including those relating to net zero, as long as they substantiate these goals with key intermediary targets, such as when their decarbonization plan will be released and include appropriate qualifying disclaimers.

Investors (including portfolio managers of investment funds) often consider corporate public commitments to decarbonization in their investment decisions. While the new amendments to the Competition Act may help ensure the credibility of such statements, they may also discourage companies from making public decarbonization pledges in order to reduce their exposure to legal and compliance risk. Therefore, we urge the Competition Bureau to consider, in its guidance, an allowance for claims about the future and recognize the inherent uncertainty of such claims, so as to not discourage well-meaning companies from publicly stating their ambitions and to decarbonize.

CONCLUSION

IFIC supports the objectives of the new greenwashing provisions in the Competition Act. We respectfully urge the Competition Bureau to carefully consider the existing regulatory framework established by the CSA and CIRO and its enforcement to be adequate and appropriate for addressing greenwashing concerns with respect to the investment fund industry. Duplicative or contradictory oversight could create confusion, increase compliance burdens, and potentially stifle product innovation and valuable environmental disclosures that are requested by investors and other stakeholders to their benefit. By recognizing the robust, established, internationally aligned ESG-related guidelines from the CSA, the Competition Bureau can avoid regulatory overlap, promote consistency, and enhance the effectiveness of greenwashing prevention in Canada's investment fund industry.

Yours sincerely,

THE INVESTMENT FUNDS INSTITUTE OF CANADA

By: Andy Mitchell
President and CEO

ADDENDIX A

In order to provide investors with meaningful disclosure about the ESG-related outcomes of a fund, CSA staff encourage ESG Objective Funds[16] to disclose, as part of the summary of the results of the fund's operations in continuous disclosure materials, the ESG-related aspects of those operations, including the fund's progress or status with regard to meeting its ESG-related investment objectives. For example, in the case of a fund whose investment objectives state that the fund will invest in companies that contribute to the fight against climate change, CSA staff are of the view that investors would benefit from continuous disclosure that explains which companies the fund has invested in during the relevant period and how they have contributed to the fight against climate change. CSA staff are of the view that all ESG Objective Funds, not just impact funds, funds with a measurable ESG-related outcome, or funds that use certain ESG-related metrics or key performance indicators, should be able to report on whether they're achieving their ESG-related investment objectives. An ESG Objective Fund that uses any ESG strategies as part of its investment selection process in order to meet its ESG-related investment objectives can report on whether its portfolio composition is meeting its ESG-related investment objectives and whether the ESG strategies have been successfully applied during the time period covered by the report. As part of the summary of the results of the fund's operations in continuous disclosure materials, staff encourage both ESG Objective Funds and ESG Strategy Funds[17] to disclose any key quantitative metrics used by the investment fund manager to assess whether the fund has satisfied any ESG considerations included in its investment objectives and/or investment strategies.

Staff encourage ESG Objective Funds that intend to generate a measurable ESG outcome to report in their continuous disclosure whether the fund is achieving that outcome. For example, where a fund's investment objectives refer to the reduction of carbon emissions, staff are of the view that investors would benefit from disclosure that includes the quantitative key performance indicators for carbon emissions. CSA staff also encourage ESG Objective Funds to provide investors with additional periodic information on how they are meeting their ESG-related investment objectives. In order to be able to provide useful disclosure about the fund's progress or status with regard to meeting its ESG-related investment objectives, staff encourage IFMs to regularly assess, measure and monitor the ESG performance of the ESG-Related Funds[18] that they manage.

For market transparency, an investment fund is required to maintain a proxy voting record and make its most recent annual proxy voting record available on its designated website, as well as promptly send it to any securityholder upon request. CSA staff encourage all funds, particularly ESG Objective Funds and ESG Strategy Funds that use proxy voting in relation to ESG matters as a principal investment strategy, to make all of their annual proxy voting records, including historical records from previous years, available on their designated websites.

Staff encourage all ESG Objective Funds and ESG Strategy Funds that use engagement in relation to ESG matters as a principal investment strategy to provide disclosure about: (a) past engagement activities on their designated websites; and (b) how the fund's past engagement activities align with the ESG-related investment objectives and/or strategies of the fund as part of the summary of the results of the fund's operations in the MRFP.

[16] Funds whose investment objectives reference ESG factors
[17] Funds whose investment objectives do not reference ESG factors but that use ESG strategies, where the consideration of ESG factors plays a significant role in their investment process
[18] Collectively, ESG Objective Funds, ESG Strategy Funds, and funds whose investment objectives do not reference ESG factors but that use ESG strategies, where the consideration of ESG factors plays a limited role in their investment process