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15 September 2023

Mr Will Richard  
Assistant Director  
Mergers, Exemptions and Digital Division  
Australian Competition and Consumer Commission  
Level 17, 2 Lonsdale Street  
Melbourne VIC 3000

By Email: [Will.Richards@accc.gov.au](mailto:Will.Richards@accc.gov.au)

Dear Mr Richard

**Brookfield and MidOcean application for merger authorisation for proposed acquisition of Origin Energy – supplementary response to RFI**

We refer to:

- the S90(6)(b) notice issued by the ACCC dated 25 August 2023 (the **Notice**); and
- the Applicants' response to the Notice dated 29 August 2023 (the **Initial Response**).

Where this response uses terms defined in the Notice or the Initial Response, the terms have the same meaning as the defined term in the Notice or the Initial Response (unless otherwise stated).

Brookfield's supplementary response to question 4(a) in the Notice is provided in **Annexure A** to this letter, which is to be read in addition to, rather than instead of, Brookfield's response to that question in the Initial Response.

[Redacted]

[Redacted]

- [Redacted]
- [Redacted]

Please contact us if you have any questions in relation to this letter.

Yours sincerely

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## Annexure A

### Supplementary response to request for information in the Notice

Brookfield's supplementary response to question 4(a) in the Notice is set out below.

#### Q4 Without limiting questions 1-3, please:

(a) Outline how BGTF's fund mandate and '4A criteria', which we understand have been applied to screen Brookfield Global Transition Fund's (BGTF) initial investment in Brookfield L.P, would operate to ensure that BGTF continues to manage Brookfield LP in a manner that aligns with the BGTF fund mandate and 4A criteria.

- 1 As noted in paragraphs 31 and 32 of the Initial Response, the limited partnership agreements (*LPAs*) entered into by the limited partners of Brookfield LP set out the terms on which the investment is being made and BGTF manages Brookfield LP. The LPAs reiterate obligations in the PPM to ensure that the investment is made and BGTF manages Brookfield LP in accordance with the terms of the PPM. In accordance with Brookfield's disclosure obligations, any disclosures made by Brookfield cannot, among other things, contain any untrue statement or present information in a way that is otherwise false or misleading. This includes all disclosures made by BGTF in the PPM that was provided to investors. As set out below, the consequences of BGTF breaching these disclosure obligations derive principally from US anti-fraud law.
- 2 The BGTF manager is registered as an investment adviser under the US Investment Advisers Act of 1940 (the *Advisers Act*) with the US Securities and Exchange Commission (the *SEC*). As such, the manager is a fiduciary to its client (ie, BGTF) and is subject to a variety of rules under the Advisers Act, including anti-fraud provisions under Section 206 of such Act. One such provision (Rule 206(4)-8) prohibits the manager from:
  - (a) making any untrue statement of a material fact or omitting to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, to any investor or prospective investor in BGTF; or
  - (b) otherwise engaging in any act, practice, or course of business that is fraudulent, deceptive, or manipulative with respect to any investor or prospective investor in BGTF.
- 3 If BGTF were to not comply with a material representation in the PPM or other marketing materials, the SEC would likely deem such action a violation of this anti-fraud rule. The SEC could initiate enforcement proceedings for a violation, and penalties may include censure, fines, ordering remedial disclosures and other actions.
- 4 Although a breach of the PPM disclosure obligations may not technically be 'fraud', the SEC has been increasingly aggressive in pursuing these types of breaches in circumstances where the breach has resulted in a benefit to the breaching party, due to the associated conflict of interest. Even where the breach is a compliance violation resulting from poor administration (eg, breaching a diversification limit), this can still result in enforcement action by the SEC. Note that the SEC has signalled an increasing focus on seeking to ensure that investment advisers that claim compliance with certain 'ESG' criteria in their disclosures have policies and procedures in place to follow those criteria.
- 5 The SEC has wide latitude to impose fines and to order disgorgement if it determines that Brookfield was unjustly enriched as a result of a violation. In the SEC's recent enforcement action against Insight Venture Management LLC (*Insight*), where the adviser was accused of not following its disclosed practices around management fee calculations for investments that were deemed 'impaired', Insight was required to disgorge US\$865,000 and fined US\$1.5 million. In 2015, KKR was required to disgorge approximately US\$19 million and fined US\$10 million for misallocating broken deal expenses.

- 6 In addition, the offering of BGTF interests in the US is subject to the anti-fraud provisions of the US Securities Exchange Act of 1934. Accordingly, a material misstatement or omission in the PPM could result in a private right of action by investors requesting rescission of any sale of BGTF's interests.
- 7 Accordingly, BGTF is heavily incentivised to comply with the disclosures made in the PPM to avoid, among other things, the financial penalties and reputational damage that would likely result from a breach of its disclosure obligations.