Competition Bureau releases Draft Guidelines on the New Greenwashing Laws

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On December 23, 2024, the Competition Bureau (**Bureau**) published **updated guidelines** (the **Draft Guidelines**) with respect to the application of Canada's new *Competition Act* (**CA**) greenwashing provisions enacted last June. The Draft Guidelines reiterate and expand upon the **six overarching principles for compliance** initially introduced in July of 2024, and respond to various frequently asked questions.

Similar to **BD&P's comment letter to the Bureau**, the focus of this article is on the applicability of the new section 74.01(1)(b.2) which prohibits businesses from making statements to the public, for promotional purposes, with respect to the benefits of a business or business activity for protecting or restoring the environment or mitigating the environmental and ecological causes or effects of climate change that is not based on adequate and proper substantiation in accordance with internationally recognized methodology (**IRM**).[1]

Below provides an overview of the clarification provided by the Bureau in the Draft Guidelines and where further clarity is required.

The Bureau's Cautionary Note

It is important, when reviewing the Draft Guidelines, to fully appreciate their limitations. The Bureau clearly notes in the Draft Guidelines that the Draft Guidelines are not law. Rather, they set out the Bureau's perspective on environmental claims, **not the perspectives of potential private applicants** or the perspective of the Competition Tribunal. As such, following the Draft Guidelines will not necessarily protect businesses from greenwashing claims brought by private applicants under the new private access provisions when those come into force on June 20, 2025.

Adequate and Proper Substantiation in Accordance with IRM

As noted above, the new legislation requires certain environmental claims to be adequately and properly substantiated in accordance with IRM; this is a brand-new legal test which is undefined in the CA. In the Draft Guidelines, the Bureau breaks down this phrase and elaborates on how it interprets each standalone element:

Methodology:

A methodology means a procedure used to determine something. While a methodology does not have to be part of a standard, many methodologies are found within standards. If a company uses a methodology contained within an internationally recognized standard, then the Bureau will generally consider the methodology to be internationally recognized as well.

Internationally Recognized:

The Bureau generally considers a methodology to be internationally recognized if it is recognized in two or more countries, however it does not necessarily need to be recognized by the governments of two or more countries to be considered appropriate (i.e., the Draft Guidelines state that methodologies set by industry, for example, may be suitable depending upon the circumstances). The Bureau's focus is on whether the methodology used results in adequate and proper substantiation. Businesses are not required necessarily to use the best methodology available but should use one that is reputable, robust, current, and context appropriate. In the event a government program requires/recommends that businesses use a particular methodology to substantiate environmental claims, the Bureau will start with the assumption that such methodology is consistent with IRM. Businesses, however, should still exercise due diligence to ensure that such methodology is indeed consistent with IRM and that it is adequate and proper having regard to all of the circumstances.

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[1] See complete wording of the provision **here**.

Adequate and Proper:

This is viewed by the Bureau as a flexible standard, to accommodate claims made in different contexts. While the courts have interpreted adequate and proper to mean fit, apt, suitable or as required by the circumstances, the Bureau cautions that it is unclear how the courts will interpret this standard in the context of the new provisions. In the Bureau's view, businesses should choose substantiation that is suitable, appropriate and relevant to the claim, and sufficiently rigorous to establish the claim in question. If there is more than one methodology that could be used to substantiate a claim, then any such methodology which leads to substantiation that is adequate and proper will meet the requirements of the provision.

Substantiation:

Substantiation means established by proof or evidence. While substantiation does not necessarily involve testing in a lab, businesses should ensure that the methodology selected is suitable for the claim, having regard to all the relevant circumstances. To effectively substantiate an environmental claim, companies are not required to publish how they substantiate such claim, nor are they necessarily required to obtain third party data verification (unless such is required by the methodology the company is using), however the Draft Guidelines suggests that such practices may be helpful.

Applicability to Disclosures made in the Context of Securities Filings

Another commonly expressed concern since the enactment of the new rules has been the potential conflict between the new rules and existing securities laws. However, the Bureau notes in the Draft Guidelines that the Bureau's focus of enforcement will be on representations made to the public for marketing or promoting a product or business and not for representations made for a "different purpose", such as to investors and shareholders in the context of securities filings. In other words, the Bureau (at least) is not interested in vetting securities filings for compliance with the new greenwashing provisions.

The Draft Guidelines further provide, however, that if the information from securities filings is then used in promotional or marketing materials, those representations will be considered promotional/marketing in such context.

The unanswered question is what is the meaning of "in the context of securities filings"? Does the representation need to be "required" to be disclosed in accordance with securities law? In addition, we note that most environmental disclosures made to shareholders and investors are made outside of securities filings, for example in environmental, social and governance and similar corporate reports (**ESG Reports**) and investor presentations. Are ESG Reports and investor presentations that include environmental claims representations made "for a different purpose" or are they marketing and promotional representations from the Bureau's perspective?

These are important questions that need further clarification from the Bureau.

Due Diligence Defence

The Draft Guidelines confirm that the due diligence defence provided for in the CA applies. This means that where a business can demonstrate that it exercised due diligence to prevent deceptive marketing practices from occurring, the business will not be ordered to pay an administrative monetary penalty or restitution or be required to publish a corrective notice.

What remains unanswered is what level of due diligence a business is required to undertake in order to avail itself of this defence. The Bureau's current approach to the due diligence defence sets a very high standard. The due diligence defense is currently only available if it forms part of a detailed and extensive compliance program that includes written policies, procedures, incentives and penalties, as well as training, monitoring and audit. While it remains to be seen if this standard will apply to prevent the imposition of administrative monetary penalties for violating the new greenwashing provisions, something more than "checking" will be required. Certainty, third party verification of environmental claims from a reputable verification organization will be helpful.

Unanswered Questions & Next Steps

When the new provisions came into effect, they were widely criticized for suppressing free speech by preventing companies from speaking publicly about their sustainability efforts. As currently drafted, the Draft Guidelines leave unanswered questions with respect to 'who can say what', for instance, whether executives promoting their business in a personal capacity or energy companies supporting energy advocacy groups could be found to violate the CA. It also remains unclear how the Bureau will treat environmental claims found in corporate disclosure documents which are neither securities filings nor advertisements (e.g. ESG Reports, investor presentations, etc.).

While the Bureau did provide high-level recommendations regarding how to avoid making a claim that creates a misleading general impression, there is no specific guidance provided regarding what metrics the Bureau will use in assessing the general impression of a claim. In addition, it remains unclear how the Bureau will make a fitness determination regarding a business' choice of methodology, and the evidence or data used to provide inputs into such methodology (or methodologies), especially when data is derived from multiple sources with differences in their quality.

As a final reminder, the Draft Guidelines are not law and represent the perspectives of the Bureau and not the perspectives of potential private applicants or the Competition Tribunal. Private parties will have the right to bring claims directly to the Competition Tribunal from and after June 20, 2025. Making environmental claims that comply with the Draft Guidelines may not be sufficient to protect businesses from claims made by private applicants.

The Bureau is collecting feedback from the public regarding the Draft Guidelines until February 28, 2025, following which it is expected to release expanded guidance. If you have any questions or would like assistance submitting your own comments on the Draft Guidelines, contact any member of our **Competition Law** or **Business Law** group.