Competition Bureau Publishes Draft Greenwashing Enforcement Guidelines

The Competition Bureau (the Bureau) has published draft guidelines on the anti-greenwashing provisions of the *Competition Act* (the Act) that came into effect on June 20, 2024. The draft guidelines helpfully provide the Bureau's perspective on these provisions, although they do not entirely resolve the considerable ambiguity the provisions contain. Additionally, questions remain, particularly around private enforcement.

The Bureau is accepting comments on the draft guidelines until February 28, 2025.

What you need to know

- The draft guidelines provide insight into the Bureau's intended approach to enforcing the anti-greenwashing provisions of the Act. For example, the draft guidelines indicate the Bureau will focus on marketing and promotional representations—*not* on representations made exclusively for a different purpose, such as securities filings. The draft guidelines also describe how the Bureau will assess whether claims about the environmental benefit of a business or business activity are adequately and properly substantiated "in accordance with an internationally recognized methodology", but

stop short of resolving the considerable ambiguity of the legislative amendments.

- The draft guidelines merely set out the Bureau's enforcement approach; they are not binding on courts or the Competition Tribunal (Tribunal), and do not limit the interpretive arguments that might be advanced by private litigants (who will be able to seek leave to advance claims under this part of the Act as of June 20, 2025). Therefore, questions remain as to how the Tribunal will screen and adjudicate private enforcement action.

Background

Last year, amendments to the Act came into effect requiring environmental and climate change-related representations to be backed up by adequate and proper testing, or by substantiation in accordance with an internationally recognized methodology. The new rules created widespread uncertainty and disruption, with many businesses expressing concerns about the legislation and its unintended consequences.

In response, the Bureau provided interim guidance to help businesses comply with the new provisions while it undertook a consultation on formal enforcement guidelines. The interim guidance provided the following key principles for businesses to consider when making environmental representations: (i) be truthful, and not false or misleading; (ii) ensure claims are properly and adequately tested; (iii) be specific about what is being compared in the context of comparative claims; (iv) avoid exaggeration; (v) avoid vague environmental claims in favour of clear and specific ones; and (vi) avoid aspirational claims about the future.

The draft guidelines expand on these principles and aim to address the comments made during the consultation process (including those submitted by Torys LLP).

Key takeaways

The key takeaways from the draft guidelines are as follows:

- **The Bureau will focus its enforcement efforts on representations made to the public for the purposes of marketing and promotion.** Representations made exclusively for a different purpose, such as to investors and shareholders in the context of securities filings, will not be a Bureau enforcement priority; however, the Bureau acknowledged that there may be information in those filings that is also used for promotional purposes, which would therefore be covered under the anti-greenwashing provisions. In addition, the Bureau's position on this issue would not preclude a private litigant from attempting to pursue a claim against a business in connection with mandatory filings, even if such a claim ultimately proved unsuccessful.
- **The Bureau described how it plans to assess whether claims about the environmental benefit of a business or business activity are adequately and properly substantiated "in accordance with an internationally recognized methodology".** According to the draft guidelines, the Bureau will likely consider a methodology to be internationally recognized if it is recognized in *two or more* countries. The methodology need not be adopted by the governments of those countries; industry-developed methodologies may be acceptable in certain circumstances, although the Bureau did not clarify what it means for a methodology to be "recognized". The Bureau will start with the assumption that methodologies required or recommended by Canadian governmental programs are consistent with internationally recognized methodologies. However, this starting assumption does not mean that the Bureau will ultimately conclude that all Canadian government methodologies are internationally recognized, and the

Bureau cautions businesses to exercise diligence in verifying that assumption. Finally, according to the draft guidelines, businesses need not use the "best" methodology available (so long as the one being used is reputable and robust) and third-party verification will only be required where it is called for by an internationally recognized methodology (though the draft guidelines indicate that verification may help improve the credibility of certain claims).

- **Businesses must ensure that claims about the environmental benefit of a product and performance claims are adequately and properly tested.** This is consistent with prior law, which required that any performance claim (environmental or otherwise) be supported by evidence gathered from *actual testing* (i.e., a procedure intended to establish the quality, performance or reliability of something). Other types of evidence, such as long-term consumer use, technical books, bulletins and manuals, anecdotal stories and studies or sales of similar products, would not be considered as having been gathered from actual testing.
- **Businesses can avail themselves of a due diligence defence.** The Act allows the Tribunal or a court to award various remedies, including payment of administrative monetary penalties. But if a business establishes that it exercised due diligence to prevent a misleading representation from being made, the only remedy that can be ordered is a prohibition order restricting the business from engaging in that conduct. Businesses can exercise due diligence by ensuring that they maintain an effective corporate compliance program and appropriately verifying the reputability and robustness of testing techniques or methodology substantiation used to support environmental claims.
- **The Bureau will not pursue enforcement action against breaches of the anti-greenwashing provisions prior to**

their coming into force on June 20, 2024. However, the draft guidelines also indicate that the general deceptive marketing practice provisions will still apply for representations made before that date. In addition, the anti-greenwashing provisions may still apply in respect of ongoing representations, even if they were initially made before that date. It also remains unclear whether the Tribunal would adopt the Bureau's approach in the context of private enforcement action. Therefore, businesses should exercise caution with respect to publicly accessible historical materials containing environmental representations.

Questions and next steps

While the draft guidelines help businesses understand how the Bureau will likely enforce the anti-greenwashing provisions, a number of key questions remain:

- Although the Bureau's perspective on these issues is helpful, there remains some uncertainty around how businesses should substantiate forward-looking claims. The draft guidelines indicate that all claims should be true and adequately and properly substantiated; however, the application of these principles to forward-looking targets can prove challenging given the external variables and uncertainty that might influence whether such targets can be achieved. Therefore, it remains important for businesses to express any material uncertainties and assumptions underlying their forward-looking targets, and to develop a credible plan to achieve them (even if that plan is necessarily iterative).
- The draft guidelines do not address how claims about intangible products, such as financial products, can be actually tested; however, they do indicate that "raising funds" is an example of a business activity, at least

opening the door for the view that certain financial activities should be substantiated in accordance with an internationally recognized methodology instead.

- After June 20, 2025, in order to bring an application to the Tribunal, a private litigant will have to show that it would be in the public interest to do so before leave is granted. Until such cases are brought, the Tribunal's approach to the public interest test will remain an open question.
- The guidelines will not apply to private litigants, and do not bind the Tribunal or courts. In adjudicating cases, the Tribunal may or may not follow the Bureau's enforcement approach. It remains to be seen, for example, whether environmental activist groups could successfully pursue enforcement action against businesses for representations that were not intended for promotional purposes, including any such representations in mandatory securities or voluntary sustainability filings and disclosures.
- The Bureau plans to update their guidance with respect to private access to the Tribunal, which we expect will provide greater clarity on the circumstances in which the Bureau may intervene in private cases.

The Bureau is accepting comments from the public on the draft guidelines until February 28, 2025, after which it will finalize the guidelines.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Authors: Ian Li, Tyson Dyck, Omar Wakil, Claire Seaborn

Torys LLP