The CSA has competition: The Competition Act introduces new prohibitions on misleading environmental claims

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How should securities registrants approach the new Competition Act provisions on greenwashing?

Securities industry participants are keenly aware of the regulatory risks and expectations around environmental, social and governance (ESG) disclosure for investment funds, as the industry continues to interpret and implement CSA Staff Notice 81-334 (Revised) ESG-Related Investment Fund Disclosure (ESG Staff Notice). Against the backdrop of evolving investor expectations, international ESG disclosure standards, and the ESG Staff Notice, firms also will want to become familiar with the new provisions targeting misleading environmental benefit claims (greenwashing) introduced in June through Bill C-59, *The Fall Economic Statement Implementation Act*, 2023 (Bill C-59).

Bill C-59 introduces changes to the *Competition Act*, making it significantly easier for the Commissioner of Competition to succeed in enforcement actions for greenwashing, as well as introducing a related private right of action.

Investment fund managers (IFMs) making ESG-related claims about their funds will already be carefully reviewing their offering documents, continuous disclosure materials and sales communications to ensure they accord with the ESG Staff Notice, in addition to the general prohibition on misleading communications in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*. The *Competition Act* provisions now necessitate that all types of securities registrants and other firms perform the same type of critical analysis of all publicly facing environmental benefits claims - even those that are not considered to be “sales communications” by securities regulators - to ensure compliance with the new *Competition Act* provisions.

The new *Competition Act* provisions on misleading environmental claims

From a securities registrant standpoint, the term “greenwashing” has been used broadly by securities regulators to capture the concept of an IFM making exaggerated or misleading claims about the importance of ESG factors in the investment process for its funds. Under the *Competition Act*, the concept of greenwashing is narrower in that it relates to the *environmental* and *climate* aspects of ESG claims, but broader in that it captures all types of firms.

Under the *Competition Act*, a business is engaged in reviewable conduct if it is directly or indirectly promoting the supply or use of a “product” or any business interest by making a representation to the public that is false or misleading in a material respect. The term “product” includes services of any kind, such as management and portfolio management services, as well as deeds and instruments in relation to, or evidencing the title or right to property, such as an interest in an investment fund.

Bill C-59 introduces two new forms of reviewable marketing practices under Section 74.01(1) of the *Competition Act*, to specifically address misleading environmental benefits claims made to the public, both of which may be applicable to securities registrants and investment funds:

- Any statement, warranty or guarantee of a product’s benefits for protecting or restoring the environment or mitigating the environmental, social and ecological causes or effects of climate change that are not based on adequate and proper testing; and
- Any representations 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 are not based on adequate and proper substantiation in accordance with internationally recognized methodology.

These new provisions will shift the onus to the advertiser to prove that any environmental claims are based on adequate and proper testing or substantiation.

Guidance issued by the Competition Bureau on July 22, 2024 (the July Guidance) states that, when assessing a claim, the Commissioner of Competition must consider the “general impression” conveyed by the claim, as well as its literal meaning. In making this determination, the Commissioner will consider the entire advertisement, including the words, graphic elements and overall layout of the representations.

These changes will make it easier for the Commissioner to take enforcement action and soon, for private parties to seek relief with respect to products and businesses engaged in greenwashing.

Private right of action

As of June 20, 2025, the changes will also broaden the reach of the law by enabling private parties (which could include environmental activists and climate advocacy groups), to bring cases for deceptive advertising practices directly before the Competition Tribunal. Previously, there was no private right of action and the Commissioner needed to rely on the general misleading advertising provisions of the

Competition Act to take action against greenwashing and to prove that the environmental claims were materially false or misleading.

"Adequate and proper" test

Over the years, the Commissioner has challenged a wide variety of product performance claims in different industries. While the phrase "adequate and proper" is not defined in the *Competition Act,* it is evident from case law and guidance from the Competition Bureau that adequate and proper testing must be conducted before a claim is made and the requirements for such testing will depend on the nature of the claim and its general impression. However, it is unclear how this test will apply to the phrase "business or business activity".

Additionally, the phrase "adequate and proper substantiation in accordance with internationally recognized methodology" is not defined in the *Competition Act.* Until there is case law or guidance from the Competition Bureau on what this means, it is not clear how the vast array of potentially conflicting methodologies will satisfy the test in the *Competition Act*. Following Royal Asset of Bill C-59 in late June and in response to a large number of questions about the interpretation of the new provisions, the Competition Bureau said it will develop guidance on an accelerated basis and, on July 22, launched a public consultation to gather stakeholder input. The consultation period closes on September 27, 2024.

The July Guidance issued on July 22 by the Competition Bureau stresses that the Bureau cannot tell business when or how they can make specific environmental claims but instead provides a list of suggestions for businesses when considering making environmental claims. These tips are straightforward - be honest, be specific in respect of comparative claims, avoid exaggeration. While these tips also reference ensuring that claims are adequately and properly tested, the guidance does not elaborate on what this means in the context of the new provisions, stating instead that further guidance is forthcoming.

Why are these significant changes important to securities registrants?

The changes will not only make it easier for the Commissioner to take action against greenwashing, but it will also soon be easier for private parties to do so as well. As of June 20, 2025, private parties who can show "public interest" can seek leave to bring actions for deceptive advertising directly before the Competition Tribunal. Therefore, individuals and businesses will no longer need to rely on the Competition Bureau to take action with respect to their greenwashing complaints. The new private right of action may also potentially create a class action type of regime, without the need for certification.

The Competition Tribunal may impose considerable administrative monetary penalties, which could be the greater of $10 million ($15 million for subsequent violations), three times the value of the benefit derived from the conduct, or up to 3 per cent of the offending corporation's annual worldwide gross revenues.

Key takeaways and practical considerations

In light of these new *Competition Act* provisions, securities registrants should not only review, assess and update offering documents, continuous disclosure materials and sales communications for funds to ensure that they meet the CSA's best practices and guidance, but also assess all their public-facing environmental benefit claims – regardless of whether the claims are made in respect of an investment fund.

Firms should consider whether environmental and climate claims made in public-facing communications meet the test of being based on "adequate and proper testing or substantiation", which may necessitate additional policies and procedures to ensure that all marketing materials are truthful and based on substantiation that is current, fully relevant and that supports the general impression created by the claims.

It remains to be seen whether the new *Competition Act* provisions will have an impact on the asset management industry. There is a possibility of regulatory arbitrage by private parties wishing to bring greenwashing claims against investment funds or securities registrants, as well as the added complexity and risk associated with two governmental bodies having the authority to determine that a fund or securities registrant has made a misleading greenwashing representation.

For now, it is clear that compliance with expanding Canadian legal and regulatory standards impacting ESG-related statements continues to become more nuanced and, perhaps, more challenging, for securities registrants.

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