ENSERVA™
333 5 Ave SW Suite 310
Calgary, AB T2P 3B6
403.264.4195
enserva.ca

Enserva Member Brief
Competition Bureau's Draft Guidelines on Anti-Greenwashing Provisions in the Competition Act

January 22, 2025

Overview

On December 23, 2024, the Competition Bureau of Canada released draft guidelines to clarify business obligations under the new anti-greenwashing provisions introduced in Bill C-59 in June 2024. These provisions impose stringent requirements for substantiating environmental claims in marketing, with the stated aim of protecting consumers and promoting fair competition.

However, the draft guidelines fail to provide sufficient clarity, leaving significant uncertainty about compliance expectations and creating potential regulatory risks.

Enserva will submit feedback on the Competition Bureau's draft guidelines, raising concerns about their vague terminology, non-binding nature, and lack of clear enforcement priorities, which create significant uncertainty for businesses. We will also address the legal challenges posed by the private right of action, reverse onus provisions, and overlap with securities legislation. This feedback will be in addition to our ongoing advocacy with political officials and policy makers to have the new greenwashing provisions rescinded.

Background

The changes to the Competition Act mandate that environmental claims be backed by "sufficient and appropriate" testing or validated using an undefined "internationally recognized methodology." While framed as measures to curb greenwashing, these provisions have created significant uncertainty and operational challenges for businesses, particularly in the energy sector, where nuanced and technical claims are common.

In response to widespread concerns, the Bureau released these draft guidelines to provide further clarity. There is currently an open consultation for feedback on the proposed guidelines, which closes on February 28, 2025.

Notable Elements of the Guidelines

The guidelines, which are non-binding, reflect the Bureau's interpretation of enforcement under the anti-greenwashing provisions. Businesses should consider them practical advice but recognize that courts and the Competition Tribunal will ultimately determine how these provisions are applied.

The guidelines outline four core provisions relevant to environmental claims and six principles intended to guide compliance:

- The four provisions focus on substantiating claims, including two new provisions introduced under Bill C-59. These new provisions address claims about the

environmental benefits of products and business activities, requiring evidence-based validation using “internationally recognized methodologies.”

- The six principles, adapted from the Bureau’s Deceptive Marketing Practices Guide, provide a high-level framework for truthfulness, accuracy, and adequate testing.

The Bureau has confirmed it will not enforce the new greenwashing provisions retroactively (s. 74.01(1)(b.1) and (b.2)). However, existing deceptive marketing provisions, including those on false or misleading statements and performance claims testing (s. 74.01(1)(a) and (b)), remain enforceable for claims made before June 2024.

While these elements signal an attempt to align environmental marketing with fairness and transparency, the ambiguity reduces practical utility.

Key Issues of the Draft Guidelines

1. **Undefined Terms and Methodologies**

   The draft guidelines highlight significant gaps in clarity regarding key terms and concepts, particularly in relation to the new provisions under sections 74.01(1)(b.1) and (b.2). These provisions rely on terms like "adequate and proper substantiation" and "internationally recognized methodology," which remain undefined in the Competition Act and largely untested by Canadian courts. While the Bureau intends to interpret these terms according to their ordinary meaning, this approach leaves broad and ambiguous standards that may significantly expand the scope of claims subject to scrutiny.

   For example, the guidelines suggest that a methodology may be deemed "internationally recognized" if acknowledged in two or more countries, but they provide limited guidance on what constitutes recognition, who can confer it, and whether such recognition must be governmental or industry-based. The guidelines advise that businesses ensure methodologies are suitable for the Canadian context, adding further layers of complexity. Moreover, the Bureau’s emphasis on due diligence in methodology selection and application suggests that complaints will not only question the choice of methodology but also its implementation and representation. This ambiguity creates substantial challenges in navigating compliance, particularly for claims like "net-zero" or "carbon neutral," where multiple methodologies may exist but lack clear standards for adequacy or application.

   The use of ambiguous language, such as "likely consider," further undermines confidence in the guidelines, forcing speculation on compliance expectations.

2. **Non-Binding Nature**

   The guidelines are explicitly non-binding, meaning they hold no legal weight. They focus on explaining concepts and deferring to the “ordinary meaning” of ambiguous terms, as opposed to offering concrete guidance to industry. This undermines their utility, as courts, private litigants, and enforcement bodies are not obligated to follow them. As a result,

businesses cannot confidently rely on the guidelines to avoid regulatory or legal challenges.

3. **Private Right of Action and Reverse Onus**
   A significant legal risk introduced by the new provisions is the private right of action, allowing private parties to seek leave from the Competition Tribunal to bring complaints regarding allegations of greenwashing. The draft guidelines contain no guidance or clarification around this amendment, though the Bureau has stated that additional guidance will be provided at an unspecified future date.

   Additionally, the reverse onus requirement in sections 74.01(1)(b.1) and (b.2) creates substantial challenges for businesses defending against greenwashing claims. While the guidelines suggest that businesses must "back up" rather than "prove" their environmental claims, this distinction is unclear. Once a private action is approved as being in the public interest, the onus shifts to businesses to demonstrate that their claims were substantiated through adequate and proper testing or internationally recognized methodologies.

4. **Overlap with Securities Legislation**
   The guidelines state that the Bureau's primary focus is on marketing and promotional representations directed at the public, rather than disclosures made "solely" or "exclusively" for other purposes, such as securities filings intended for investors and shareholders. Clarification was not provided as to how complaints involving securities disclosures might be handled under the new anti-greenwashing amendments.

   A key ambiguity lies in determining whether marketing or promotional objectives could be considered ancillary purposes of securities filings. If so, such documents might fall under the scope of the new provisions, despite their primary intent being regulatory compliance or investor communication. This raises concerns about the potential overlap between securities legislation and the Competition Act, creating an added layer of legal and regulatory uncertainty.

5. **Vague Enforcement Priorities**
   The guidelines provide limited detail on how enforcement actions under the new anti-greenwashing provisions will be pursued, emphasizing that outcomes will largely depend on the discretion of the Commissioner and the circumstances of each individual case. It is important to note that the provisions came into effect on June 20, 2024 and do currently have the force of the law.

   At this time, the Bureau's overarching Competition and Compliance Framework—which lays out its overall approach to enforcement—has not been updated to reflect the new provisions.

Next Steps

To mitigate risks and influence the development of a more practical regulatory framework, businesses should:

1. **Advocate for Clearer Standards**: Participate in the public consultation process (deadline: February 28, 2025) to demand precise definitions and standardized methodologies.
2. **Monitor Regulatory Developments:** Track enforcement actions and judicial interpretations to adjust compliance strategies proactively.
3. **Engage Industry Alliances:** Collaborate with sector organizations to present unified positions on practical regulatory solutions.

Conclusion

The Competition Bureau's draft guidelines fall significantly short of providing the clarity and certainty businesses require. Without clear and reliable definitions or enforceable standards, the guidelines risk imposing undue burdens while failing to achieve their stated goals of protecting consumers and promoting fair competition. The pose a serious threat of driving competition out of the Canadian market in the face of significant risk and uncertainty.

The energy sector must take an active role in advocating for practical regulatory approaches driven by sound policy that support meaningful environmental marketing without stifling innovation or communication.

In addition to submitting feedback during the open consultation, Enserva will continue advocating with policymakers and officials to rescind the greenwashing amendments due to the uncertainty they create for industry and the harm they pose to Canada's global competitiveness.

Additional Resources

KPMG Canada | The Competition Bureau's anti-greenwashing guidance

McCarthy Tétrault | Competition Bureau Releases Long-Awaited - if Provisional - Greenwashing Guidelines

Alberta Enterprise Group | Canadian Sustainability Standards Board Fails Canadians