Canada Climate Law Initiative | L'Initiative canadienne de droit climatique

Submission to the Competition Bureau Canada on the proposed guidelines for environmental claims under the *Competition Act* consultation

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To:
Deceptive Marketing Practices Directorate
Competition Bureau
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The Canada Climate Law Initiative (CCLI) appreciates the opportunity to make recommendations to the Competition Bureau of Canada regarding the proposed guidelines on environmental claims under the *Competition Act*.[1]

The CCLI has identified two areas of importance in the proposed guidelines. The first pertains to the clarification of the scope of the new provisions under the *Competition Act*. This clarification is a welcome and positive development, as it confirms that shareholder-focused disclosures are not subject to these provisions, unless used as promotional materials, providing much-needed clarity for companies. The second concerns the proposed guidelines' lack of specificity, which risks creating uncertainty for companies navigating the updated regulatory framework.

The welcome clarification of the scope of the new provisions

Firstly, the CCLI welcomes the recent clarification regarding the application of the new provisions in the *Competition Act* related to environmental claims. Since these provisions came into effect on 20 June 2024, numerous companies have retracted their public climate-related disclosures, including their annual reports, Taskforce on Climate-related Financial Disclosures (TCFD) reports, Environmental, Social, and Governance (ESG) reports, and sustainability reports alike.[2] This widespread withdrawal has had a

[1] *Competition Act*, RSC 1985, c C-34.
[2] Rujuta Patel & Andrew Pollock, "Amendments to Competition Act could result in 'greenhushing'" (11 November 2024), online: *Lexpert* https://www.lexpert.ca/news/legal-insights/amendments-to-competition-act-could-result-in-greenhushing/389606.

profound impact on shareholders, as it limits their ability to make informed decisions about their investments concerning climate change.

The Competition Bureau states that the purpose of the *Competition Act* "is to maintain and encourage competition in Canada" and that the Bureau advocates to "ensure that businesses continue to prosper in a competitive and innovative marketplace".[3] The withdrawal of climate-related disclosures represented a significant regression in corporate transparency and accountability, prompting widespread concern about whether companies would continue to voluntarily disclose their climate-related risks and opportunities.

The clarification in the proposed guidelines, specifying that the provisions pertain to "representations made to the public for the purposes of marketing and promotion, rather than representations made solely for a different purpose", is a positive development. The explicit acknowledgement that shareholder-facing disclosures, such as reports directed at investors, fall outside the scope of marketing-focused scrutiny unless used for promotional purposes, is welcomed by the CCLI. This clarification allows companies to continue providing essential information to shareholders without fear of inadvertently contravening competition laws.

Additionally, the CCLI supports the important caveat outlined in the proposed guidelines that materials from shareholder disclosures will be considered marketing representations and subject to oversight by the Competition Bureau should they be repurposed in marketing and promotional materials. This approach strikes a balance between promoting transparency and ensuring accurate and non-misleading marketing practices. However, as discussed below, further clarification on the extent to which shareholder disclosures could be considered marketing materials would be beneficial in addressing companies' potential liability under the *Competition Act*.

Greater specificity, not less

While the CCLI acknowledges the usefulness of the proposed guidelines, we believe they could benefit from greater specificity and detail. While some nuances of the new provisions will inevitably be clarified through existing and future case law, more detailed guidance would enhance certainty for companies navigating these regulations. For example, the inclusion of clear and practical examples of what constitutes non-compliant environmental claims is a welcome feature. The underlying principles are also presented in a straightforward manner, providing companies with a helpful starting point.

However, the CCLI raises concerns about potential issues stemming from a lack of specificity in the clarification regarding the use of securities-related disclosures as marketing materials. To illustrate this concern, we present an example. If a company makes unsubstantiated climate-related disclosures in its TCFD Report, intended solely for shareholders and not the general public, but references this report in its Annual Report—also intended for shareholder consumption—and then advertises the Annual Report on social media, it remains unclear if this would constitute marketing or promotional material.

[3] Competition Bureau, "Our Mandate", online: *Government of Canada* https://competition-bureau.canada.ca/how-we-foster-competition/our-organization/our-mandate.

Sharing the Annual Report on social media platforms could be interpreted as promoting the report to the public. If the Annual Report contains climate-related claims or includes references to TCFD, ESG, or sustainability reports, it remains uncertain if a company could face an investigation under the *Competition Act* for any claims made in those reports. Many companies use social media to announce the release of their Annual Reports, and many such reports reference TCFD or ESG reports and disclosures. This creates ambiguity about how the Bureau would approach such scenarios.[4] To clarify, this scenario does not include situations where complaints are brought against marketing campaigns that conflict with the information contained in a company's report,[5] but rather complaints brought against claims contained in those reports that are publicly disseminated.

Moreover, the CCLI emphasizes that it is essential for the final guidelines not to be diluted any further. The guidelines are already broad, and any reduction in their specificity could undermine companies' ability to confidently make legally sound decisions regarding their marketing strategies.

For instance, the United Kingdom's (UK) Competition and Markets Authority (CMA) guidance includes principles addressing the omission of information and the life cycle of products.[6] Similarly, the Australian Competition and Consumer Commission (ACCC) guidance includes a principle on the omission of information, as well as principles requiring businesses to explain any conditions or qualifications of their claims and to consider the impressions that visual elements—such as logos, pictures, and colours—may misleadingly impart to consumers.[7] Moreover, the UK and Australian guidance documents are more detailed, offering a greater explanation of each principle and providing comprehensive examples and case studies. These resources help businesses better understand the application of the principles by highlighting key requirements and common pitfalls.

In contrast, while the Canadian guidelines include examples related to the legal requirements under sections 74.01(1)(a), 74.01(1)(b), 74.01(1)(b.1), and 74.01(1)(b.2) of the *Competition Act*, they lack examples and case studies specific to the six principles of compliance. This omission makes it more challenging for companies to understand how to apply the principles in real-world scenarios.

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[4] Several questions about the Bureau's potential approach arise, such as Does a social media post (excluding paid advertisements) constitute advertising, promotion, or marketing? If a social media post is deemed to be advertising, promotion, or marketing, is the investigation limited to the specific wording of the post, or does it extend to the contents of linked or attached materials? If the post only promotes the Annual Report without explicitly making environmental claims, does this fall outside the scope of the Competition Act? Does referencing a secondary climate-related report, such as a TCFD Report, within the Annual Report constitute an environmental claim about the business or its activities?

[5] For example, Stand.earth's complaint against Lululemon Athletica Inc alleges that the company's "Be Planet" campaign—which claims that its products and actions contribute to improving the environment and restoring a healthy planet—contradicts its Impact Report. The report reveals an increase in emissions since the campaign's launch, making the claims potentially misleading to the public. See Stand.earth, "An application pursuant to s. 9(1)(b) of the *Competition Act*, RSC 1985, c C-34 requesting the Commissioner cause an inquiry to be made into the conduct of Lululemon Athletica Inc" (8 February 2024), online: *Stand.earth* https://stand.earth/wp-content/uploads/2024/02/ApplicationFeb.pdf.

[6] Competition & Markets Authority, "Guidance: Making environmental claims on goods and services" (20 September 2021), online: *Gov.uk* https://www.gov.uk/government/publications/green-claims-code-making-environmental-claims/environmental-claims-on-goods-and-services.

[7] Australian Competition and Consumer Commission, "Making Environmental Claims: A Guide for Business" (December 2023), online: *ACCC* https://www.accc.gov.au/system/files/greenwashing-guidelines.pdf.

Laws, along with their accompanying guidelines, should provide clarity and certainty, not ambiguity. Therefore, the CCLI strongly recommends that any amendments to the proposed guidelines enhance their specificity by incorporating additional detail and more comprehensive examples rather than weakening them. Greater specificity would enable companies to align their practices with legal requirements while ensuring transparency and accountability in their environmental claims.

We look forward to supporting your efforts and we welcome the opportunity to discuss our recommendations.

Sincerely,

On behalf of the Canada Climate Law Initiative,

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About the Canada Climate Law Initiative

The Canada Climate Law Initiative (CCLI), a collaboration of the law faculties of the University of British Columbia and York University, provides businesses and regulators with climate governance guidance so that they can make informed decisions in the transition to a net-zero economy. Powered by the nation's top expertise, we engage with boards of directors and trustees to ensure businesses, pension funds, and asset managers understand their legal duties with respect to climate change. Our legal research offers important insights into a rapidly transforming policy landscape.