BILL C-59: COMPENSATION IMPLICATIONS

HUGESSEN CONSULTING

Authors: Julia Hunt & Emily Magisano

Key Takeaways

- Recent changes to the Competition Act may have implications for companies using environment-related metrics in their incentive plans.
- Boards and Management should engage with legal counsel to confirm compliance with the new policy, including:
  1. Reviewing the methodology for measuring environment and climate-related metrics; and
  2. Considering how these metrics are disclosed.

Background

Bill C-59 (Fall Economic Statement Implementation Act, 2023) became law in Canada as of June 20, 2024. This amendment brings large-scale changes to the Competition Act, including addressing "greenwashing" (false or misleading claims made about the environmental benefits of a product or policy).

The scope of the amendments includes public "representations" regarding "business activity for protecting or restoring the environment or mitigating the ... causes or effects of climate change, that [are] not based on adequate and proper substantiation in accordance with internationally recognized methodology [1]."

Bill C-59 puts the onus on the party making the representation to prove that it is appropriately supported, and will allow private parties to bring cases directly to the Competition Tribunal.

Compensation Implications

Environment and climate-related metrics in compensation programs are likely considered public representations within the scope of Bill C-59. This will be relevant for companies across Canada, as the prevalence of these measures continues to increase. In 2023, 52% and 30% of TSX60 companies included an environmental metric in their short- and long-term incentive programs, respectively.

The types of environmental and climate metrics we observe are wide-ranging, from highly quantitative carbon reduction goals, to process-based objectives such as establishing an internal roadmap. At this stage, it is not clear which types of metrics would be subject to this bill.

In our experience, environmental and climate-related metrics used for incentive plans are often reflective of targets and achievements disclosed in sustainability reports. These may have robust internal processes and methodologies, including in some cases third-party verification or audits, and compliance with international reporting standards. However, it remains unclear what may be required to prove "adequate and proper substantiation" at this time.

Pending further guidance, we suggest that companies with environmental and climate-related ESG metrics in their incentive plans consider the following questions (as proposed by Torys LLP)[2]:

1. Do representations of ESG targets and achievements fall within scope of the new requirements?
2. Have ESG targets / metrics been tested or substantiated, and using what methodology?
3. If metrics have not been tested or substantiated, is it possible to do so? If not, should they be modified or removed?

Conclusion

Companies are facing increasing pressure from stakeholders to transparently and accurately disclose progress towards their climate-related objectives. While the intent of Bill C-59 is clear, the lack of specific guidance has created uncertainty for Canadian businesses.

Broader implications on target-setting and disclosure of achievements are uncertain as companies await further guidance from Canada's Competition Bureau on the definition of "adequate and proper substantiation" and "internationally recognized methodology". On July 4, 2024, the Bureau announced that it will be developing guidance on an "accelerated basis in consultation with a broad range of stakeholders"[3].

While this guidance would have been useful prior to the law's implementation, in the absence of further information, we recommend that companies consider the questions laid out herein with input from legal counsel to identify whether action is needed with respect to environment-related metrics in incentive programs.

Hugessen Consulting helps boards make the right decisions on executive compensation and its governance and board effectiveness within an environment of heightened complexity and scrutiny. With offices in Toronto, Calgary and Montreal, the firm's mission is to be the leading provider of advice on executive compensation, director compensation, performance measurement and assessment, and related governance to the compensation committees of companies in Canada and the U.S.

Disclaimer

The information provided in this article does not, and is not intended to, constitute legal advice. Readers of this article should contact their legal counsel to obtain advice with respect to any particular legal matter.

References

1. Parliament of Canada. (2024, June). *Bill C-59 (Royal Assent)*. https://www.parl.ca/DocumentViewer/en/44-1/bill/C-59/royal-assent
2. Torys LLP. (2024, June). *Prove it: Competition Act amendments require companies to back up environmental claims*. https://www.torys.com/our-latest-thinking/publications/2024/06/competition-act-amendments-require-companies-to-back-up-environmental-claims
3. Competition Bureau. (2024, July). *Competition Bureau statement regarding guidance on Competition Act's new greenwashing provisions*. Government of Canada. Retrieved from https://www.canada.ca/en/competition-bureau/news/2024/07/competition-bureau-statement-regarding-guidance-on-competition-acts-new-greenwashing-provisions.html