NET ZERO PLANS DESERVE CLOSER ATTENTION THAN THEY ARE GETTING

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Although certainly not without controversy, environmental, social and governance ("**ESG**") initiatives of all kinds have today become a priority for companies and stakeholders alike. Among these, the publication of plans, strategies and similar documents regarding an organization's carbon footprint is becoming more prevalent. While they may have different titles, such as "net zero plans", "net zero roadmap", or "plan for carbon neutrality" (all referred to here as "**Net Zero Plans**"), what they have in common are disclosure of internal practices and data with respect to the organization's carbon footprint together with a public commitment to reach certain objectives within a given time frame with respect to reducing that footprint.

This isn't just marketing, smart stakeholder relations or good corporate citizen activity. These initiatives if not carefully thought through, drafted, published and implemented come with a number of liability risks not the least of which is the risk of being found to have engaged in what has come to be referred to as "greenwashing", the making of misleading "green" claims with respect to an organization's business or activities.

As noted in our previous Bulletins, Squeaky "Clean": Competition Bureau Combats Greenwashing, and Green or Grey: Regulators Target Greenwashing, Misleading Environmental, Social and Governance (ESG) Claims, the primary only source of liability in this area in Canada is the federal *Competition Act*, which prohibits the making of "false or misleading" representations to the public. The Competition Bureau, in charge of enforcing the *Competition Act* has indicated that greenwashing is a high enforcement priority and has taken recent action against a variety of organizations in this regard. Any Net Zero Plan when published is a "representation to the public" made for a business purpose. Thus, if it is false or misleading in a material respect, the organization could be the target of enforcement proceedings (as well as a target of stakeholder litigation).

There is an obvious temptation to self-servingly misdescribe an organizations green attributes or to overstate what is achievable in emission and impact reduction. A forward-looking aspirational claim about future net zero or other sustainability issues is not likely a performance claim about a product (which triggers an obligation to have substantiation based on an adequate and proper test prior to making the claim) but the Competition Bureau's stated interest in these claims and their suggestions in the nature of best practices lead to a conclusion that care be taken. Based on recent work with Net Zero Plans for our clients we can offer the

following practical suggestions:

1. All statements of fact should be clear, precise, true, accurate, complete and amply supported, ideally by independent data and sources. In particular, statements made regarding specific impact reductions or green attributes must be backed up by reliable and verifiable data. All such supporting information and data should be preserved so that they can readily be accessed in the event of a legal challenge or regulatory action. Have an outside expert and/or legal counsel with the right expertise vet the green claims being made is also recommended.
2. Any Net Zero Plan will be primarily forward-looking. Careful attention should be paid to the use of expressions such as "we will" where it may be more appropriate to instead use expressions such as "we plan to" and "we anticipate". All such claims must above all be reasonable and achievable in light of current knowledge and technology.
3. Drafting a Net Zero Plan, assembling the necessary support and data and promoting the plan should not be solely the work of engineers, PR, stakeholder relations or marketing people. Legal should be involved. For example, consideration should in some circumstances be given to whether elements of the planning and analysis necessary to putting together a Net Zero Plan should be conducted under legal privilege .
4. Be clear when a claim is being made about the organization as distinct from its partners such as suppliers about whose practices full information may not be available or reliable.
5. Ensure that the resources (both human and financial) necessary to carry out the Net Zero Plan commitments are there and remain adequate through the life of the plan.
6. In addition to the plan itself, any marketing or publicity around it should also be reviewed in light of the above suggestions. Marketing comes with its own risks as the "headline" statements that a company makes will not have the detail and nuance contained in the plan itself.

ESG practices and their disclosure are not going to vanish despite the headwinds they may be currently facing in certain jurisdictions. It is inevitable that organizations of all types will continue to develop and publish Net Zero Plans and that liability and remedies for them when they fall short will remain a rapidly developing area both in Canada and abroad.

The federal Minister of Finance if the Fall Economic Statement (November 21, 2023) announced an intention to amend the Competition Act to prohibit "greenwashing" claims. The *Fall Economic Statement Implementation Act, 2023* includes a new provision to be added to the Competition Act. It states as follows:

> (b.1) makes a representation to the public in the form of a statement, warranty or guarantee of a product's benefits for protecting the environment or mitigating the environmental and ecological effects of climate change that is not based on an adequate and proper test, the proof of which lies

on the person making the representation;

This new provision will have the effect of imposing the “adequate and proper test” requirement on such claims. It is not immediately clear whether claims about the future will be subject to this requirement. It appears not, based on the wording above.

While this provision focuses solely on claims about “products”, greenwashing claims may be made not about products but about, for example, business practices, or a company’s supply chain processes. As more fully fleshed out in our previous bulletin, such claims could lead to stakeholder litigation or regulatory action under securities laws.

McMillan will continue to monitor developments in this area and how they may impact your organization and businesses.

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A Cautionary Note