SWISS GOVERNMENT TO SHINE A LIGHT ON GREENWASHING

In 2022, the Swiss government will crack down on greenwashing. Large financial companies are now subject to new disclosure requirements. Collective investment schemes which advertise as "sustainable" are also subject to increased scrutiny, paving the way for more compliance control by authorities and recourse for investors. Importantly, climate compatibility indicators for all types of financial products are being assessed.

> LALIVE's Corporate Responsibility Series is part of LALIVE's commitment to the United Nations Global Compact, a voluntary initiative based on CEOs' and companies' pledges to implement sustainability and to take steps in support of the United Nations Sustainable Development Goals.

From 2022, Switzerland's largest banks and insurance companies must comply with **new disclosure requirements**. They will need to provide greater transparency and comparability of climate-related risks on their balance sheets, based on recommendations from the Task Force on Climate-related Financial Disclosures (TCFD).

Significant financial institutions must publish, annually:

- a report on the governance structure they have put in place to identify, evaluate, manage and monitor climate-related risks; and
- a description of the risks in the short, mid and long term, and their influence on commercial strategy, with quantified information (key numbers and objectives) related to climate risks.

In 2021, The Swiss Financial Market Supervisory Authority ("**FINMA**") carried out several **on-site inspections** of fund managers, looking at the management of funds with a focus on sustainability. In November 2021, it published guidance on preventing and combatting **greenwashing,** [1]

[1] FINMA Guidance 2021/5, available at: https://www.finma.ch/en/news/2021/11/20211103-finma-aufsichtsmitteilung-05-21/.

focusing on the **risks of misleading clients** in cases where financial products or services are labelled as “green”, “sustainable” or “ESG” (environmental social and governance).

Since there are no legal definitions or regulatory requirements on the use of these terms, FINMA is limited in its ability to act against abusive uses of them. However, under Swiss laws relating to collective investment schemes:

1.1.1.1 the name of the collective investments must not be confusing or misleading, in particular as regards the investments made;

1.1.1.2 the fund documents must meet the minimum content requirements; and

1.1.1.3 persons who manage or represent collective investment schemes or hold the assets of these schemes in safekeeping – and their agents – must fulfil loyalty, due diligence and disclosure obligations.

On this basis, FINMA considers that a reference to sustainability may constitute greenwashing (deception) in the fund industry when:

1.1.1.4 no sustainable investment strategy or policy is implemented;

1.1.1.5 the investment policy allows for a significant proportion of non-sustainable investments, which are not in line with the sustainability approach pursued;

1.1.1.6 information about the sustainability approach decided is provided in the investment strategy/policy (e.g., best-in-class approach, approach integrating ESG considerations, stewardship), but that approach is not implemented;

1.1.1.7 the investment strategy/policy is only regarded as sustainable because of exclusionary criteria that are currently widely used, without a distinct sustainability component that goes beyond this;

1.1.1.8 terms such as “impact” or “zero carbon” are used without any means of measuring or verifying the stated impact or savings; and

1.1.1.9 the fund documents only contain very general information about the corresponding investment strategy/policy and/or permissible investment selection, and how sustainability considerations are factored into the investment decision process.

FINMA also looks at the **organisation** of the entity managing the funds. Sustainability must be fully integrated into the investment decision-making process and the entity must:

- have specialist expertise and knowledge in the field of sustainability, with a sustainability strategy specified by the governing body; and
- further assess, monitor and validate adequately the external sustainability-related data it uses.

In late 2021, the **Swiss Federal Council** announced its ambition to make Switzerland a global leader in matters of sustainable finance.[2] It asked the financial market to strive for more transparency, by adopting comparable and meaningful **climate compatibility indicators**, such as indicators of implied temperature increase, to allow investors to easily classify and select investments by their climate impact. By the end of 2022, departments in charge of finance and the environment must:

- present a report on the implementation of these recommendations by the financial industry; and
- in collaboration with FINMA, make concrete proposals on what needs to change in the regulation of financial markets, in order to prevent greenwashing.

[2] Swiss Federal Council press release dated 17 November 2021, available at: https://www.sif.admin.ch/sif/en/home/documentation/press-releases/medienmitteilung.msg-id-85925.html.

Such developments should help establish comparable **standards** to **quantify the climate-related impact of financial products**, giving investors more guidance in their decision-making and providing grounds for recourse in cases of mis-selling.

To secure compliance, the government will have to ensure regulatory compliance and give deceived investors the necessary tools to claim damages where there has been mis-selling. This may require rethinking the definition of damage under Swiss law.

Contact the authors:

Nicolas Ollivier

Partner

nollivier@lalive.law

Joanna Didisheim

Associate

jdidisheim@lalive.law