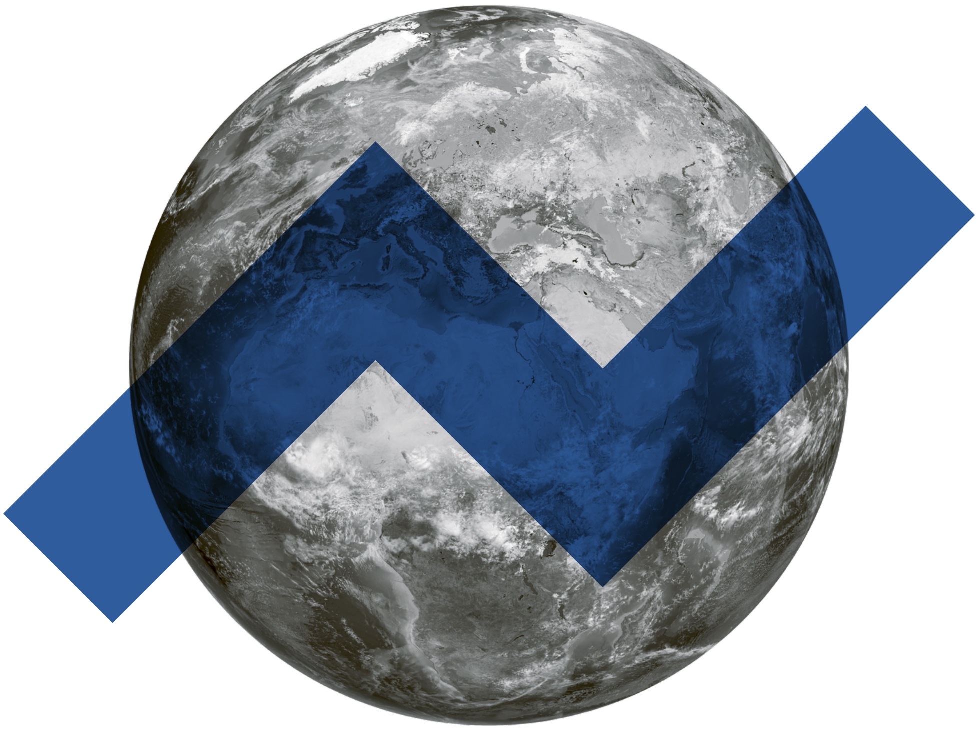
N

Monthly
Newsletter
July 2022

Banking & Finance



Regulatory developments in "Sustainable Finance"

Olivier Favre, Dominic Wälchli

Key Take-aways

1.
Swiss listed companies and companies supervised under financial market regulations, provided they reach a certain size, are required to prepare a report on climate information.

2.
Pursuant to new self-regulations of the Swiss Bankers Association, in 2023, new binding ESG-standards for investment advice and portfolio management will be introduced.

3.
Beyond this, Switzerland does not yet have specific legislation in place to prevent greenwashing on the level of financial products.

1 Introduction

Sustainable Finance refers to financial market participants taking **environmental, social and governance criteria** (ESG) into account. The financial sector shall enable **sustainable economic growth** without negatively impacting the environment, the climate and society.

The consultation period, initiated on 30 March 2022, on the ordinance on climate reporting (**Climate Reporting Ordinance**, and the draft of this Ordinance, the **D-Climate Reporting Ordinance**) ended on 7 July 2022. This is part of the reporting on environmental matters in relation to the **reporting on non-financial matters** according to article 964b of the Swiss Code of Obligations of 30 March 2011 (**CO**). The reporting obligation entered into force on 1 January 2022 as part of the implementation of the indirect counter-proposal to the initiative "For responsible businesses - protecting human rights and the environment", with a transitional period for implementation until 1 January 2023.

The Climate Reporting Ordinance is intended to improve **sustainability in the financial sector** (*sustainable finance*) and strengthen the position of the Swiss financial market with respect to sustainable financial services. From a financial market regulatory perspective, transparency regarding environmental criteria is considered an important measure for the implementation of sustainable finance.

2 Recommendations of the Task Force on Climate-related Financial Disclosures

Established by the Financial Stability Board in 2015, the TCFD developed a set of recommendations for **effective financial reporting on climate issues**. The recommendations aim at promoting a comparable, complete, understandable, objectively verifiable and consistent reporting on the approach to climate-related risks and opportunities as well as the actual and potential impact of climate-related risks and opportunities on business operations, strategy and financial planning.

The TCFD recommendations are not legally binding, but are considered an **international recognized standard**.

3 Climate reporting in accordance with the Climate Reporting Ordinance

The purpose of the Climate Reporting Ordinance is to create **reliable and comparable data on climate considerations and climate targets** through the binding implementation of the TCFD recommendations, so that these can be taken into account in investment advice, balance sheets of investors and the financial system generally. Provided that a company complies with the requirements under article 3 D-Climate Reporting Ordinance, it is deemed to have fulfilled its obligation to report on environmental matters under article 964b para. 1 CO. Otherwise, the company must demonstrate – in the sense of "comply or explain" – how it has fulfilled this obligation in other ways or why the company does not pursue a concept for climate reporting.

The Climate Reporting Ordinance is expected to enter into force at the beginning of 2023.

Climate matters include - in the sense of the principle of "**double materiality**" - both the impact of the climate on companies and the impact of the company's activities on the climate (article 1 para. 2 D-Climate Reporting Ordinance).

The obligations under the D-Climate Reporting Ordinance shall apply to **Swiss companies** which cumulatively fulfil the following criteria:

1. **companies of public interest** as defined in article 2 lit. c of the Audit Oversight Act of 16 December 2005, i.e. listed companies pursuant to article 727 para. 1 no. 1 CO or companies which require authorization, recognition or registration by a financial market supervisory authority under a financial market law pursuant to article 3 FINMASA (e.g. banks, securities firms, insurance companies, fund management companies, asset managers or financial market infrastructures);
2. which, together with their controlled domestic or foreign undertakings, have an annual average of at least **500 full-time equivalent positions** in two consecutive financial years; and
3. which, together with their controlled domestic or foreign undertakings, have reached a **balance sheet total of at least CHF 20 million** or a **turnover of CHF 40 million** for two consecutive financial years.

The Climate Reporting Ordinance shall implement the TCFD recommendations.

Therefore, the Climate Reporting Ordinance is not applicable to **small and medium-sized enterprises** (**SMEs**).

According to the D-Climate Reporting Ordinance, the obligation to report on climate matters is fulfilled if it is done in accordance with the **TCFD Recommendations of 2017**, supplemented with the **Annex of October 2021**. Where possible, the supporting document **"Guidance on Metrics, Targets, and Transition Plans"** of October 2021 should also be taken into account.

The reporting shall take into account the following topics: **governance, strategy, risk management and indicators/ targets** (article 3 para. 1 D-Climate Reporting Ordinance). A **transition plan** shall be published, which takes into account the Swiss climate goals and, as far as possible and suitable, includes quantitative information and information on the basic assumptions and methods and standards used that are essential for comparability (article 3 para. 3 D-Climate Reporting Ordinance). The transition plan should in particular address the transition risks for the respective company, list the greenhouse gas emission targets and include the specific activities to reduce greenhouse gas emissions in the company and in the value chain and concrete other approaches for the transition to a low-carbon economy. Furthermore, as far as possible and suitable, quantitative CO_2 targets and, if applicable, targets for other greenhouse gases and information on all greenhouse gas emissions shall be presented (article 3 para. 4 D-Climate Reporting Ordinance). The effectiveness of the measures taken by companies is then to be demonstrated within the framework of a qualitative or quantitative overall assessment (article 3 para. 6 D-Climate Reporting Ordinance). Financial institutions are additionally required to include **forward-looking, scenario-based climate impact analyses** when considering the sector-specific guidance for financial institutions (article 3 para. 5 D-Climate Reporting Ordinance).

The SBA ESG-Guideline will apply for investment advice and portfolio management.

4 Impact of the Climate Reporting Ordinance on greenwashing

When financial institutions knowingly or unknowingly deceive or mislead clients about the sustainable characteristics of financial products and advisory processes, this is commonly referred to as **"greenwashing"**. Under the Swiss regulatory framework, there are currently no specific legal rules that relate to the fight against greenwashing on the level of financial products.

Whilst the Climate Reporting Ordinance applies to financial institutions and companies within its scope, it does currently not contain any **definitions of climate impact or sustainability indicators**, which create transparency in relation to all financial products and thus minimize the risk of greenwashing on a product level.

FINMA provided information **on its expectations regarding the current practice in the management of sustainability-related collective investment schemes** at fund and institution level on preventing and combating greenwashing in its supervisory guidance 05/2021 dated 3 November 2021 (**FINMA supervisory guidance 05/2021**) and warned financial service providers who offer sustainability-related financial products of **potential greenwashing risks** in the advisory process. However, FINMA also concluded that its powers to intervene with respect to greenwashing are currently limited.

However, it should be noted that even without specific provisions on greenwashing, **generally applicable legal requirements** must be complied with which are **intended to prevent the deception and misleading of clients**. For instance, article 12 para. 1 of the Collective Investment Schemes Act of 23 June 2006 sets forth that the designation of collective investment schemes must not give rise to confusion or deception. Also, the Federal Act against Unfair Competition prohibits deceptive conduct or conduct that violates the principle of good faith.

5 Guidelines of the Swiss Bankers Association regarding ESG

On a financial services level, the Swiss Bankers Association (**SBA**) has implemented self-regulation for member institutions addressing ESG criteria for investment advisory and portfolio management relationships in June 2022.

From January 2023, the guidelines for the financial service providers on the integration of ESG-preferences and ESG-risks into investment advice and portfolio management (the **SBA ESG-Guidelines**) will apply to members of the SBA. The purpose of the SBA ESG-Guidelines is to implement minimal standards for the consideration of ESG-preferences and -risks in investment advice and portfolio management, and to prevent greenwashing (article 1). The SBA ESG-Guidelines replace the Guideline for the integration of ESG considerations into the advisory process for private clients from June 2020. Non-members may implement the SBA ESG-Guidelines on a voluntary basis and register themselves on a list of the SBA.

Pursuant to the principles-based provisions of the SBA ESG-Guidelines, financial service providers shall enquire about ESG-preferences of their clients and take these into account when providing investment advice and portfolio management (article 11 and 12). Furthermore, it shall be ensured that the recommended investment solution and financial instruments are aligned with the ESG-preferences of the clients. Financial service providers have a duty to provide information, documentation and render of account (article 10, 13 and 14) with regards to the ESG-preferences, ESG-investment solutions and ESG-risks and ESG-characteristics of products. Finally, client advisors shall be trained in relation to ESG-matters (article 15).

The obligations do not apply in relation to institutional clients pursuant to article 4 of the Swiss Financial Services Act of 15 June 2018 (**FinSA**). Professional clients pursuant to article 4 FinSA can waive the application of the obligation to receive information, documentation and render accounts. The SBA ESG-Guidelines do not contain obligations regarding the inclusion of ESG-criteria in product information such as prospectuses, key information documents or marketing materials (see article 16).

In addition to the SBA ESG-Guidelines, the SBA also implements Guidelines for mortgage providers on the promotion of energy efficiency.

6 Outlook

The Climate Reporting Ordinance specifies **climate reporting obligations** for large Swiss companies.

In the absence of a specific legal framework, the Federal

Department of Finance, in cooperation with the Federal Department of the Environment, Transport and Energy, was tasked with preparing proposals by the end of 2022 on how financial market law could and should be amended for the prevention and combating of greenwashing.

From 2023, in the context of self-regulation by banks for investment advice and portfolio management, the SBA ESG-Guidelines will have to be taken into account pursuant to which member institution have to consider ESG-preferences of their clients and have to comply with a duty to provide information, documentation and render account on ESG-matters.

Considering the increasing regulation on ESG-related topics, not only companies that fall within the scope of the Climate Reporting Ordinance, but also SMEs, and in particular financial institutions, should **increasingly concern themselves with the implementation of climate reporting obligations, the reporting on non-financial matters in general as well as with measures to prevent greenwashing**.

For further information on ESG matters, please also see our ESG Practice Group page.

Dr. Olivier Favre
Partner Zurich
olivier.favre@swlegal.ch

Dr. Philippe Borens
Partner Zurich
philippe.borens@swlegal.ch

Caroline Clemetson
Partner Geneva
caroline.clemetson@swlegal.ch

Tarek Houdrouge
Partner Geneva
tarek.houdrouge@swlegal.ch

Schellenberg Wittmer Ltd is your leading Swiss business law firm with more than 150 lawyers in Zurich and Geneva, and an office in Singapore. We take care of all your legal needs – transactions, advisory, disputes.

Schellenberg Wittmer Ltd
Attorneys at Law

Zurich
Löwenstrasse 19
P. O. Box 2201
8021 Zurich / Switzerland
T +41 44 215 5252
www.swlegal.ch

Geneva
15bis, rue des Alpes
P. O. Box 2088
1211 Geneva 1 / Switzerland
T +41 22 707 8000
www.swlegal.ch

Singapore
Schellenberg Wittmer Pte Ltd
6 Battery Road, #37-02
Singapore 049909
T +65 6580 2240
www.swlegal.sg