



2 December 2022

Commentary

Please don't tell: What is greenwashing? - a regulatory glosse

On November 24, 2022, the Federal Council put into force an "Ordinance on Reporting on Climate Issues." Not too fast. Not until January 2024, the ordinance will apply to all large public companies and FINMA supervised entities. One thing it won't do. It will explicitly not define what greenwashing means. To this end, the Swiss Federal Council banned a footnote that the banks found objectionable. He and his administration deserve a gloss for this heroic act.¹

Background

The ordinance fleshes out the rules on "transparency on non-financial matters" anchored in the [accounting provisions of the Swiss Code of Obligations](#) (CO) in June 2022 by the indirect counter-proposal to the corporate responsibility initiative and in force since January 1, 2022. These, in turn, were also driven by international efforts to require large companies, and banks in particular, to report transparently on how climate risks affect their business and what good they themselves are doing for the climate. In the official language of the [explanatory report](#), this sounds like this: "*Public reporting should, on the one hand, include the financial risk that a company takes on through climate-relevant activities, and on the other hand, it should disclose what impact the company's business activities have on the climate (so-called double materiality).*" (Translation)

International standards

The [Task Force on Climate-related Financial Disclosures \(TCFD\)](#), created in 2015 by the [Financial Stability Board \(FSB\)](#) and chaired by

Michael Bloomberg, has set soft standards on this topic. The Federal Council is primarily guided by its recommendations. They are now to be implemented in a "*binding*" manner (Translation, [explanatory report](#)). But not quite binding. Thus, the obligated companies can also fulfill the reporting in "*other ways*" (Art. 2 para. 2 let. a V). However, this only applies to "*climate concerns*", i.e. in particular the CO₂ targets. The other "*other environmental concerns*", "*social concerns*", "*employee concerns*", "*respect for human rights and the fight against corruption*", which require transparency according to [Art. 964b CO](#), are not covered by the Ordinance. The Federal Council does not explain whether enforcement ordinances are also planned for this. The obligated companies can also waive this extended reporting on climate issues altogether if they explain this "*clearly and justifiably*" ("*comply or explain*", [Art. 2 Para. 2 Letter b Ordinance](#)). The [EU Directive 2014/954](#) on Corporate Social Responsibility reporting is not mentioned in the ordinance, but only in the explanatory report. In contrast to the TCFD, the EU Directive is not mentioned in the Ordinance, although the law also refers to "*European regulations*" ([Art. 964b para. 3 CO](#)). After all, Switzerland does not want to

¹ Addendum: In a [media release](#) dated December 16, 2022: the Swiss Federal Council published a "[position paper](#)" on greenwashing and announced that a working group headed by the State Secretariat for International Financial Matters SIF should examine by the end of September 2023 "to examine the best way to implement the Federal Council's position on the prevention of greenwashing."

voluntarily adopt EU law. The global standards of the TCFD are less objectionable. After all, there are two representatives of Swiss companies in the TCFD.

Obligated companies

The text of the ordinance does not comment on the scope of application. Thus, the provisions of the law ([Art. 964a para. 1 CO](#)) apply. Accordingly, the new provisions apply to all "public interest entities" that employ more than 500 persons and have a balance sheet total of at least CHF 20 million or sales revenue of at least CHF 40 million in two consecutive financial years. All banks, insurance companies, securities firms, managers of collective assets and fund management companies supervised by FINMA are deemed to be public interest entities ([Art. 964a para. 1 item CO](#), Art. 2 item c and Art. 9a [Audit Supervision Act](#), Art. 18 para. 1 [BankA](#), Art. 126 para. 1 item a [CISA](#), Art. 28 [ISA](#)). This means that it is not only the large banks and insurance companies that are obliged to provide climate transparency, for which corresponding [FINMA](#) rules have already been in force since July 2021 ([RS 2016/01](#) and [2016/02](#)). Once again, FINMA has pushed ahead and has subsequently been overtaken by the legislator.

Private law?

This regulation is legally interesting in several respects. It starts with the legal basis. Private accounting law is indirectly used to pursue broad social goals such as climate protection. Does this not make it public law? Memories of reading about the distinction between private and public law and "formal private law" are awakened. One fall from grace leads to the next. Normally, private law is not concretized by decrees of the Federal Council. At least not as here without an explicit delegation norm. In the explanatory report, the Federal Council justifies this with the freedom of choice that the ordinance grants companies in the implementation. Moreover, implementation in a separate law would have taken too long. Because of the "transversal" character of the CO regulations beyond the financial institutions, the Federal Council does not want to leave it for a long time with the regulations that only apply to large banks and insurance companies. However, the ordinance is not really "transversally" driven. The financial sector is in the foreground after all. Otherwise, the Federal Department of Finance would not have been responsible for this specification of private law. Rather, it would have been the Federal Office of Justice in the FDJP, which is generally responsible for "sustainable corporate governance" and also wrote the [report](#) on this

subject, which was published by the Federal Council on December 2, 2022.

Greenwashing banned from the explanatory report

FINMA, which is still not averse to fast, low-threshold regulation, issued a supervisory communication in November 2021 on the prevention of green-washing in collective investment schemes ([Supervisory Communication 05/2021](#)). It bases this on the prohibition of deception in the Collective Investment Act ([Art. 12](#)). In the supervisory notice and on its [website](#), FINMA misses binding legal provisions in the FIDLEG on obtaining the "sustainability-specific preferences of clients at the point of sale". Accordingly, it welcomes the [self-regulation of the Bankers Association](#) of June 2022 in this regard, but does not yet recognize it as a [minimum standard](#). The supervisory communication describes greenwashing as "the risk that investors and customers are misled - consciously or unconsciously - about the sustainable characteristics of financial products and services." (translation).

The new regulation does not mention greenwashing. In the [explanatory report](#) on the consultation, however, the Federal Council found that climate reporting by companies could not only "increase the transparency of the financial sector vis-à-vis clients, owners, investors, the public or the supervisory authority in the case of sustainable investment opportunities". In fact, this could also "counteract so-called greenwashing". On this occasion, the Federal Council also defined greenwashing in financial products in a short footnote of the explanatory report.

Harmless? Unimportant? On the contrary. The footnote alarmed the associations of banks and asset managers, followed by Economiesuisse. They were not amused and found in their [consultations](#) that greenwashing was not just a question of the financial sector. Moreover, the definition was "not generally accepted" (translation) and therefore problematic. It should therefore be deleted from the explanatory report. One learns that careful lobbying also takes care of the details, such as a footnote in an explanatory note to a regulation.

The lobbying was successful. The Federal Council banned the footnote from the explanatory report on the ordinance. A paraphrase that could be dangerous in view of liability cases and enforcement proceedings was thus removed from an official document. However, the mysterious and ominous paraphrase is disclosed here: "If customers of

financial institutions are knowingly or unknowingly deceived or misled with regard to the sustainable characteristics of financial products and advisory processes, this is referred to as "greenwashing"". (translation) But please don't tell anyone.

What is Greenwashing?

Let it be admitted. A definition of greenwashing is not easy. Others have a hard time with it, too. For example, the EU Commission: "*The practice of gaining an unfair competitive advantage by recommending a financial product as environmentally friendly or sustainable, when in fact that financial product does not meet basic environmental or other sustainability-related standards.*" [Commission Delegated Regulation EU 2022/1288](#), rec. 16). Or the German BaFin in August 2021: "*Investment assets are being offered to investors as sustainable or bear reference to sustainability in their name, without actually pursuing a corresponding investment policy.*" (Translation, [Consultation 13/2021 on a draft guideline for sustainable investment assets, Preamble](#)). Or the UK Financial Conduct Authority FCA: "*Marketing that portrays an organization's products, activities or policies as producing positive environmental outcomes when this is not the case.*" ([FCA Discussion Paper DP18/8, N 4.7](#)) You see: a cacophony of greenwashing. A regulatory nightmare. But this is now to come to an end. The European Supervisory Authorities ("ESA") have had enough. They are currently getting to the bottom of the matter and have invited all interested parties in November 2022 in a "*call for evidence*" on "*greenwashing practices*" to tell them what the "key features" of green-washing are. Let someone else claim that the EU authorities are out of touch with practice. They have a bad feeling that there is greenwashing. But they don't know exactly. It is complicated. So they invite everyone, especially the potential green-washers, to give them a definition. As you can see, the Swiss Federal Council and the administration are in good company. Perhaps, with time, the realization will come: a definition of greenwashing would somehow be useful. Who knows whether the objectionable footnote will soon be released from its banishment.