

FINRA'S FIRST CAUTION ON ESG

On January 10, 2023, the Financial Industry Regulatory Authority ("FINRA") issued its 2023 Report on FINRA's Examination and Risk Monitoring Program ("[2023 Report](#)").

FINRA is a government-authorized not-for-profit organization that oversees U.S. broker-dealers. While FINRA has referenced ESG previously, including in statements by its Chair (but, notably, not in FINRA's 2022 Report on FINRA's Examination and Risk Monitoring Program), the 2023 Report is the first time FINRA has cautioned its members on communications relating to ESG.

Under its "communication with Public" guidance, FINRA focuses on firms offering products that promote ESG factors and provides a list of questions regarding communications, asking "Do your communications:

- contain claims that are unsupported by or inconsistent with information contained in the product's offering documents;
- lack risk disclosure or language necessary to balance any promotional claims regarding ESG; or
- use rankings, ratings or awards that lack a sound basis or are unwarranted or misleading based on the criteria used or factors considered?"

FINRA then provides recommendations for those promoting ESG funds including implementing and maintaining reasonably designed procedures for communications promoting ESG factors, including:

- reviewing communications to ensure that ESG-related claims are consistent with and supported by applicable offering documents;
- balancing statements promoting ESG factors by prominently describing the risks associated with ESG funds, including that: (i) ESG-related strategies may not result in favorable investment performance; (ii) there is no guarantee that the fund's ESG-related strategy will be successful; and (iii) the fund may forego favorable market opportunities in order to adhere to ESG-related strategies or mandates.

Firms that offer ESG-branded or marketed funds should take heed of FINRA's guidance and recommendations and review their communications around those funds. Further given the heightened scrutiny that those marketing ESG funds are

C L I F F O R D
C H A N C E

facing from both politicians and investors, this is not a topic that will decrease in attention. Our team can support in the review of marketing and communication materials to ensure best practices in this developing space.

CONTACTS



Vadim Avdeychik
Partner

T +1 212 878 3055
E vadim.avdeychik
@cliffordchance.com



Steven Gatti
Partner

T +1 202 912 5095
E steven.gatti
@cliffordchance.com



Steve Nickelsburg
Partner

T +1 202 912 5108
E steve.nickelsburg
@cliffordchance.com



Michelle Williams
Partner

T +1 202 912 5011
E michelle.williams
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington, DC 20006-1001, USA

© Clifford Chance 2023

Clifford Chance US LLP

Abu Dhabi • Amsterdam • Barcelona • Beijing •
Brussels • Bucharest • Casablanca • Delhi •
Dubai • Düsseldorf • Frankfurt • Hong Kong •
Istanbul • London • Luxembourg • Madrid •
Milan • Munich • Newcastle • New York • Paris
• Perth • Prague • Rome • São Paulo •
Shanghai • Singapore • Sydney • Tokyo •
Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement
with Abuhimed Alsheikh Alhagbani Law Firm
in Riyadh.

Clifford Chance has a best friends relationship
with Redcliffe Partners in Ukraine.