

# Update

## Newsflash November 2020

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### Counter-Proposal to Responsible Business Initiative: Overview of New Duties for Companies

On November 29, 2020, the "Responsible Business Initiative" has been rejected by a majority of the Swiss cantons. As a result, the indirect counter-proposal adopted by the Swiss parliament will most likely enter into force. The counter-proposal imposes extensive non-financial reporting duties on large publicly traded companies and regulated financial institutions notably in relation to environmental, social and employment-related matters, respect for human rights as well as anti-corruption. It also lays down additional due diligence duties with regard to conflict minerals, and child labor.

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Even though a majority of the Swiss people voted in favor of the "Responsible Business Initiative" (the "**Initiative**"), it failed to win a majority of the Swiss cantons and was thus rejected. The Initiative aimed to strengthen the respect of human rights and environmental standards by imposing extensive due diligence duties on Swiss businesses and introducing a new vicarious liability regime for prejudice caused by controlled entities.

Now that the Initiative has been rejected, the indirect counter-proposal, adopted by the Swiss Parliament as an alternative to the Initiative (the "**Counter-Proposal**"), is close to entering into force.

#### The Counter-Proposal

The Counter-Proposal takes the form of a new law, which would amend and add new provisions to the Swiss Code of Obligations and the Criminal Code. In essence, the Counter-Proposal imposes on Swiss businesses:

- › **Non-financial reporting duties** on certain human rights, environmental, social and employment-related matters, largely following the Directive 2014/95/EU of the European Union on Disclosure of Non-Financial and Diversity Information; and
- › **Due Diligence and Transparency Duties** (with a corresponding reporting duty) with respect to **conflict minerals** and the prevention of **child labor**.

The Counter-Proposal will not immediately enter into force: It is subject to a voluntary popular referendum. If opponents collect 50,000 signatures within the applicable 100-day deadline, there will be a popular vote on the Counter-Proposal. Otherwise, the Swiss Federal Council will determine its entry into force.

For companies who would fall under the scope of the new duties, it may be advisable to prepare the implementation of an adequate internal corporate social responsibility program and risk management system, as well as to start applying

the new due diligence requirements prior to their entry into force.

### Scope

The duty to issue an **annual report on non-financial matters** introduced by the Counter-Proposal applies to **large Swiss "public interest companies"**, which means:

- › publicly traded companies (*i.e.*, having securities listed on a stock exchange, bonds outstanding, or contributing at least 20 per cent of the consolidated assets or turnover of such a company); or
- › regulated entities supervised by the Swiss Financial Market Supervisory Authority FINMA (*e.g.*, banks, insurance companies or securities firms).

These companies would fall within the scope of the Counter-Proposal if, over the course of two consecutive business years (and including controlled entities worldwide), they:

- › had at least 500 full-time employees (measured as an annual average); and
- › exceeded at least one of the following threshold values: a balance sheet sum of CHF 20 million or a turnover of CHF 40 million.

However, large Swiss public interest companies may be exempted if their parent company has already issued the required non-financial report (or an equivalent report required under foreign law).

By contrast, the due diligence and reporting obligations introduced in relation to **conflict minerals**, as well as **child labor** would apply to **all businesses** with their registered office, headquarters, or principal place of business in Switzerland that either:

- › circulate or process "conflict minerals" in Switzerland (*i.e.*, minerals or metals containing tin, tantalum, tungsten, or gold from conflict or high-risk areas); or
- › offer goods or services in relation to which there is reasonable suspicion of child labor.

While the personal scope for the non-financial reporting duties is clearly set in the law, the scope of application of the new due diligence duties in relation to conflict minerals and child labor is less clear. First, the notions of "conflict and high-risk areas" and "reasonable suspicion"

leave room for interpretation. Second, the Swiss Federal Council may still provide for exemptions, for instance for businesses not exceeding certain annual import volumes of relevant minerals and metals or, with respect to child labor, for small and medium-sized enterprises (SMEs) and businesses presenting low risks in this regard. Businesses already complying with similar internationally recognized rules, in particular the OECD Guidelines for Multinational Enterprises, may also be exempted from the diligence and reporting duties.

### Non-Financial Reporting Duties

In addition to the traditional financial reporting obligations, under the Counter-Proposal, the superior executive or management bodies of large Swiss public interest companies would have to prepare a **report on non-financial matters**. This report would have to be submitted to the general meeting of shareholders for approval and then remain publicly available for 10 years.

The required **content** of the report includes information about environmental matters (in particular CO2 targets), social and employment-related matters, respect for human rights, and anti-corruption (the "**Non-Financial Matters**"). The report must extend to controlled entities worldwide. Amongst other items, the report must describe due diligence practices and processes applied in relation to these Non-Financial Matters, the measures taken in this context and the main risks associated with them.

Regarding the level of detail, the idea is that the information provided should be sufficient to understand the development of the company's business, its performance and positioning as well as the impact of its activities on the Non-Financial Matters.

Businesses would be free to follow other **national, European, or international standards** for reporting (such as the OECD Guiding Principles). In this case, the standards applied should be mentioned in the report and should be complied with in their entirety. This appears to be an attractive option for businesses that are already reporting according to a recognized standard. That said, the reporting would in any event ultimately still need to comply with all applicable Swiss legal requirements. As the case may be, following this approach may require drawing up

a supplementary report to address aspects where Swiss rules would go beyond the standards applied.

### **Due Diligence Duties with Respect to Conflict Minerals and Child Labor**

The Counter-Proposal provides for specific **supply chain-related due diligence duties** in relation to conflict minerals, as well as child labor, which come in addition to the obligations related to Non-Financial Matters. Swiss businesses falling under the scope of these new rules would be required to implement a **management system** and issue **supply chain policies** addressing these issues and to introduce a supply chain tracing system. Further, a supply chain risk management plan to adequately identify supply chain risks and to manage and mitigate them would be required. Compliance with the due diligence obligations relating to conflict minerals would, in particular, be subject to an **independent audit**.

In addition, a specific **reporting obligation** would apply. This would involve the publication of an annual report on the company's compliance with conflict minerals and child labor due diligence duties (in a national language or in English), which would remain publicly available for 10 years.

The Counter-Proposal was drafted with international treaties in mind, such as the International Labor Standards on Child Labor of the Interna-

tional Labor Organization (ILO), OECD Guidelines, as well the EU 'Conflict Minerals' Regulations (EU) 2017/821. It is also inspired by the Dutch Child Labor Due Diligence Act.

### **No Civil Liability, but Criminal Sanctions**

In contrast to the Initiative, the Counter-Proposal does not introduce new specific civil liability provisions for subsidiaries and economically controlled businesses. Nevertheless, businesses are well advised to implement the provisions of the Counter-Proposal carefully and promptly in order to avoid reputational and legal risks.

It should also be borne in mind that new duties of care may lay ground for potential **liability claims**. A failure to implement the prescribed due diligence obligations may, under certain circumstances, expose a company or its corporate bodies to civil law claims, as the case may be even for breaches materializing in the supply chain.

Finally, the Counter-Proposal includes **criminal sanctions** for non-compliance with the applicable annual reporting duties or for making false statements, which may be punishable by a fine of up to CHF 100,000 in case of an intentional breach and of up to CHF 50,000 in case of negligence.

**Please do not hesitate to contact us in case of any questions.**

**Legal Note:** The information contained in this UPDATE Newsflash is of general nature and does not constitute legal advice. In case of particular queries, please contact us for specific advice.

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