

BULLETIN MARCH 2022

ESG Reporting and Human Rights due diligence obligations

I. INTRODUCTION

On November 29, 2020, the “Responsible Business Initiative” (RBI) was rejected. This decision paves the way for the indirect counterproposal adopted on June 19, 2020, by the Swiss Parliament (the **Counterproposal**).

The Counterproposal is largely based on existing EU regulation. It will introduce new reporting obligations on environmental, social and governance (ESG) matters as well as human rights due diligence and reporting obligations regarding conflicts minerals and child labor.

On December 3, 2021, the Federal Council closed the consultation procedure and published the Ordinance on Due Diligence Obligations and Transparency Regarding Minerals and Metals from Conflict Areas and Child Labor (the **Ordinance**). Since there are no delegation norms included in the section on ESG matters (infra II), the Ordinance covers the sections on conflict minerals and child labor only (infra III).

The Counterproposal has just entered into force on January 1, 2022. Swiss companies should thus determine their

obligations and prepare to implement or enhance their ESG reporting and compliance programs.

II. ESG REPORTING

- **New reporting obligations:** Companies falling within the scope of the new regulation will have to publish a yearly report explaining the company’s business and the impact of its activities on environmental (including emission reduction targets), social, employee, human rights and anti-corruption matters. The report will describe: (i) the business model, (ii) the main ESG risks resulting from the company's own operations and, where relevant and proportionate, its business relationships, products or services, (iii) the policies pursued to address these ESG risks, including due diligence applied, (iv) the outcome of these policies and (v) non-financial key performance indicators applied regarding the company's response to ESG risks¹. If a company does not have policies addressing certain ESG risks, the report must

¹ Please see the EU Guidelines 2017/C 215/01 on the methodology for reporting non-financial information.

include a clear explanation therefor (“comply or explain”).

- **Affected companies:** ESG reporting obligations apply to companies of “public interest” domiciled in Switzerland such as listed companies or prudentially supervised large companies that with their foreign or Swiss subsidiaries: (i) have annually at least 500 full-time employees on average and (ii) exceed either the threshold of CHF 20 million in assets or CHF 40 million turnover. Companies controlled by a company subject to non-financial reporting obligations and companies already required to produce an equivalent report under foreign law (such as the EU Directive 2014/95) will be exempted from these obligations.
- **Equivalent standard:** Companies may base their report on national, European or international reporting standards, in particular on the OECD guidelines for Multinational Enterprises, provided that their ESG report covers all requirements of the new Swiss regulation. If a company bases its report on European or international reporting standards, this must be clearly indicated in the report.
- **Formal reporting requirements:** The report may be drafted in one of the Swiss national languages or in English. It will cover all Swiss and foreign companies controlled, in whole or jointly, by the Swiss reporting company. The report must be approved and signed by the board of directors and submitted to the shareholders’ meeting for approval. The report does not need to be audited. The board of directors will then be required to ensure that the report be published electronically immediately after its approval and remain accessible to the public for ten years.

III. CONFLICT MINERAL AND CHILD LABOR DUE DILIGENCE AND COMPLIANCE REPORTING

- **New due diligence obligations:** Companies subject to the due diligence obligation will be required to have an adequate control system to address risks associated with tin, tantalum, tungsten, or gold containing minerals or metals from conflict or high-risk areas (**Conflict Minerals**) and child labor that includes a supply chain policy and a system for tracking the supply chain. The implementation of due diligence measures in the area of Conflict Minerals has to be audited by an independent expert.

The Ordinance contains specifications on the design of the supply chain policy (art. 10 and 11), on the supply chain traceability system (art. 12 and 13), on the risk management plan and measures (art. 15) as well as on the audit regarding compliance with the due diligence obligations in the minerals and metals sector by an auditor (art. 16). Furthermore, the Ordinance requires companies to establish a notification procedure that enables all interested persons to express substantiated concerns about the existence of a potential or actual adverse effect in connection with Conflict Minerals or child labor (art. 14).

- **New reporting obligations:** Companies subject to the due diligence obligations will have to issue an annual report on compliance with these measures within six months after the end of each business year. A company subject to the reporting obligations which is controlled by a legal entity domiciled abroad that establishes an equivalent consolidated report does not have to establish a separate report. In such a case, the Swiss company must indicate in the notes to the financial statements which other legal entity included it in its report and publish the report of the foreign company. Similarly, a company subject to the reporting obligations, which offers products and services from companies that establish a report is also not required to establish a separate report for those goods and services.

- **Affected companies:** New due diligence and reporting obligations in connection with Conflict Mineral and child labor apply to all companies with their registered office, central administration or main establishment in Switzerland that (i) import or process Conflict Minerals or (ii) offer products or services giving rise to a justified suspicion that they were manufactured or provided using child labor.
- **Exemptions from the due diligence and reporting obligations regarding Conflict Minerals:** The Federal Council specified in the annex 1 to the Ordinance annual import and processing quantities of minerals and metals up to which a company is exempted from the due diligence and reporting obligations. In the context of a group, import and processing quantities of all group companies must be taken into account to determine if the threshold is reached. These limits are based on the Regulation (EU) 2017/821 on conflict minerals. It is worth noting that the importation and processing of recycled metals is subject to certain exemptions (e.g., no requirement for a notification procedure, no risk management and no audit by an auditing company).

The definition of “conflict and high-risk area” is now enshrined in art. 2(1)(e) of the Ordinance. However, despite the precise definition, it is not easy to determine which countries are currently classified as conflict and high-risk areas. The non-binding list of "Conflict-Affected and High-Risk Areas" (available at www.cahraslist.net) may serve as a starting point for the classification.

- **Exemptions from the due diligence and reporting obligations regarding child labor:** The Federal Council specifies in the Ordinance conditions under which companies are not required to verify whether there is a reasonable suspicion of child labor. The Ordinance provides the three following steps:

- 1) If a company, together with controlled companies, falls below two of the following thresholds in the two consecutive financial years: (i) total assets of CHF 20 million, (ii) revenues of CHF 40 million and (iii) 250 FTEs on annual average, it does not have to perform any further examination.
- 2) If a company reaches or exceeds these thresholds, it must assess annually whether the countries from which the company sources products or services present low, medium or high child labor risks. If the country of origin presents low risks, the company does not have to perform any further examination. Pursuant to the statutory provisions, the risk assessment applies in principle to all countries in the supply chain. However, the explanatory report to the Ordinance, provides that the risk assessments may be limited to the country of production according to the indication of origin (« made in »). For purposes of the risk analysis, the companies may consult the UNICEF Children’s Rights in the Workplace Index.
- 3) If pursuant to the evaluation the existence of a medium or high risks regarding child labor is retained, the Swiss company must confirm for each specific product or service at hand whether there is a reasonable suspicion of child labor. A suspicion of child labor is deemed to be reasonable if there are motives to assume that a product has been manufactured or a service has been provided with the use of child labor. To determine if such ground exists, the Swiss company must take into consideration one or more concrete indications or evidences while taking into consideration that not every activity performed by a person under the age of 18 automatically constitutes child labor. The age, the type of work, and the working conditions must be taken into considerations to determine whether a certain activity constitutes child labor. ILO Convention No.

138 provides that each member ratifying the Convention must specify a minimum age for admission to employment. Pursuant to the ILO Convention No. 138, light work for schoolchildren and work in the context of vocational training is allowed provided that certain conditions are satisfied.

Finally, art. 8 of the Ordinance contains a counter-exception to the aforementioned exceptions: If a company offers products or services that were “patently” produced or provided using child labor, the company is subject to the due diligence and reporting obligations regardless of the result of the above-mentioned three assessment steps. According to the explanatory report to the Ordinance, “evidently produced or provided using child labor” refers to “blatant cases” that “stand out” and of which the company has “certain knowledge”.

- **Equivalent standard:** Annex 2 of the Ordinance provides a list of international regulations that are considered to be equivalent standards, both with regard to Conflict Minerals and child labor.
- **Formal reporting requirements:** The report may be drafted in one of the Swiss national languages or in English. Companies required to prepare consolidated financial statements must establish a consolidated report. The report must be approved by the board of directors, but unlike the report on ESG matters it does not have to be submitted to the shareholder’s meeting for approval. The report does not need to be audited. The board of directors will then be required to ensure that the report be published electronically immediately after its approval and remains accessible to the public for ten years.

IV. LIABILITY FOR VIOLATIONS OF THE NEW REPORTING OBLIGATIONS

- **Criminal sanctions:** The Counterproposal introduces a new criminal provision for the violation of reporting obligations in the Swiss

Criminal Code. Anyone who makes false statements in the report on ESG matters or on the mandatory human rights due diligence or fails to publish a report or who does not comply with the conservation obligations can be fined up to CHF 100,000. The fine for negligent behavior is up to CHF 50,000.

- **Liability regime:** The Counterproposal does not introduce a new liability regime for multinational companies having their seat in Switzerland. Existing liability provisions, in particular the liability of board members and management according to article 754 of the Swiss Code of Obligations, will therefore apply if the conditions are satisfied.

V. ENTRY INTO FORCE

- The new statutory provisions entered into force on January 1, 2022. Pursuant to the applicable transitional provision, new reporting obligations will, however, only have to be observed for the first time with respect to the 2023 financial year. Hence, the first reports based on the new statutory provisions must therefore be issued in 2024/2025 with respect to the financial year beginning in 2023.

VI. GOVERNMENT PAYMENTS REPORTING FOR COMMODITY EXTRACTING COMPANIES

- For the sake of completeness, please note that new reporting obligations entered into force on January 1, 2021 for companies (i) that are subject to an ordinary audit and (ii) directly or indirectly through controlled entities extract minerals, oil, natural gas or woods from primary forests. The affected companies must publish a report on cash and in-kind payments to government authorities of an aggregate amount of at least CHF 100,000. Companies trading in these commodities are, for now, not subject to the new reporting obligations. However, the Federal Council has the power to declare the reporting obligation applicable also to these companies. As is the case for the due

diligence compliance report related to Conflict Minerals and child labor, the report must be approved by the board of directors and made accessible to the public for at least 10 years.

VII. CONCLUSION

- Given the environmental and social challenges facing our society, there is now a strong focus on ESG matters. Studies show that most of the major Swiss companies already report on social and environmental concerns voluntarily or compulsorily (e.g. companies subject to EU Directive 2014/95). For these players, the Counterproposal should introduce no major changes from their current practice. They must however ensure that their report covers all requirements of the new Swiss regulation. By contrast, the pressure for greater transparency will increase for small and medium-sized companies.



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