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Mandatory Human Rights Due Diligence to Be Brought to a Public Vote in Switzerland

After several years of back and forth, Swiss legislators and civil society have failed to reach a compromise on mandatory human rights due diligence legislation. As discussed in this Alert, the question now appears to be not whether Switzerland will require human rights due diligence by companies, but rather the scope of the requirement and the liability of companies for human rights impacts. In this Alert, we discuss the Responsible Business Initiative that will be brought to a popular vote in Switzerland as early as later this year, as well as the counter-proposal adopted by the Parliament. A large number of U.S.-based businesses may be impacted, no matter which variant is adopted, either by virtue of their Swiss operations or because they are in the supply chains of Swiss companies.

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The Responsible Business Initiative

In 2015, 77 Swiss civil society organizations launched the Responsible Business Initiative. The RBI is a popular initiative under the Swiss public referendum system of direct democracy. A popular initiative allows Swiss citizens to request, through a national vote, an amendment to the Swiss federal constitution. If a popular initiative obtains more than 100,000 signatures in eighteen months, the initiative is then submitted to the Federal Council (executive branch) and the Parliament, who can accept or reject the initiative or draft a counter-proposal. The RBI exceeded the signature threshold and was submitted to the Swiss government during October 2016.

The RBI would amend the Swiss federal constitution to add a new Article 101a, “Responsibility of business.” Under the RBI, Switzerland would be required to take measures to strengthen respect for human rights and the environment by businesses. Key provisions of the RBI include the following:

- It would apply to companies that have their registered office, central administration or a principal place of business in Switzerland.
- Subject companies would be required to respect abroad internationally recognized human rights and international environmental standards. To determine which human rights companies must respect abroad, the RBI relies primarily on the UN Guiding Principles on Business and Human Rights. International environmental standards refers to norms that have been concluded outside legislative processes at the national level, such as international public law, those developed by international organizations and non-governmental standards.
- Subject companies also would be required to ensure that internationally recognized human rights and international environmental standards are respected by companies under their control. This would generally include subsidiaries, but also would extend to other companies where there is de facto control. Accordingly, whether a subject company controls another company would be determined by the particular facts and circumstances.
- Subject companies would be required to carry out appropriate due diligence. In particular, they would be required to (1) identify impacts, (2) take appropriate measures to prevent violations and cease existing violations and (3) account for the actions taken. The foregoing duties would apply to controlled companies and business relationships. The scope of due diligence would be risk-based. The RBI provides that, in regulating mandatory due diligence, the needs of small and medium-sized enterprises that present limited risks are to be taken into account.
- A subject company would be liable for damages abroad for violations of internationally recognized human rights or international environmental standards caused by companies under its control, unless the subject company can prove

that it took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.

The Parliamentary Process

As noted above, before a popular initiative can head to a national vote, both houses of the Swiss Parliament have the opportunity to make counter-proposals. If a counter-proposal passes both the Council of States and the National Council, and if the counter-proposal has the support of the popular initiative's sponsors, the sponsors can withdraw the initiative and the Parliament's counter-proposal becomes law. If the initiative's sponsors do not support the counter-proposal passed by Parliament, they are not required to withdraw the initiative and it is put to a national vote.

In November 2017, the Legal Affairs Committee of the Council of States made its initial counter-proposal to the RBI, which was rejected by the Legal Affairs Committee of the National Council the following month. The National Council's Legal Affairs Committee made its own counter-proposal to the RBI in April 2018, which is discussed below.

The National Council Bill

The National Council's bill scaled back the RBI, including by (1) limiting due diligence to companies that exceed a specific size threshold (described below) or that operate in high-risk sectors, (2) providing for narrower applicability to controlled entities, and (3) placing additional limitations on liability. Under the National Council bill, due diligence only would be required by Swiss companies that, alone or together with one or more domestic or foreign companies controlled by them, exceed two of the following thresholds in two consecutive financial years: (1) a balance sheet total of SFr40 million; (2) turnover of SFr80 million; or (3) 500 full-time positions on average annually.

The National Council adopted its bill in June 2018. The RBI committee indicated they would withdraw the RBI if the National Council's bill were adopted by Parliament. In March 2019, the Council of States rejected the National Council's bill. In June 2019, the National Council voted to maintain its bill. In September 2019, the Legal Affairs Committee of the Council of States requested that the Council of States adopt the National Council bill, with some amendments. However, the Council of States declined to do so.

The Council of States Bill

In the summer of 2019, a Swiss Federal Councillor promoted a different, narrower counter-proposal. This counter-proposal was adopted by the Council of States in December 2019.

The Council of States' bill would apply to Swiss public companies that, alone or together with one or more domestic or foreign companies controlled by them, have 500 full-time positions on average annually and exceed one of the following thresholds in two consecutive financial years: (1) a balance sheet total of SFr20 million; or (2) turnover of SFr40 million. Mandatory due diligence would be limited to conflict minerals and child labor. Subject companies would be required to publicly report on their due diligence, but would not under the legislation have liability for human rights violations.

The Council of States' approach also is supported by the executive branch. The Council of States' counter-proposal is more closely aligned with the Swiss government's 2020-23 National Action Plan under the UN Guiding Principles, which was published in January 2020.

Agreement by Parliament

In March 2020, the National Council and Council of States again voted to maintain support for their respective bills. Further deliberations between the Council of States and the National Council were delayed until June due to the postponement of the Swiss Parliament's session as a result of the COVID-19 pandemic.

A parliamentary committee was convened in early June to try to resolve differences between the two bills. The parliamentary committee recommended the adoption of the Council of States' bill, which ultimately was adopted by the Parliament on June 9, 2020.

The Public Referendum Moves Forward

Swiss civil society organizations have been critical of the Council of States' bill and previously indicated they would not support it. It therefore came as no surprise after the adoption of that bill by the Parliament that the RBI would not be withdrawn.

The national vote on the RBI may occur as early as this fall. For an initiative to pass and become law, a majority of both the electorate and the cantons must vote to adopt the initiative. According to one recent opinion poll, popular support of the RBI stands at 78%, an increase of 11 percentage points from February 2019.

If the RBI passes, the federal constitution will be amended to include the RBI. If the RBI fails in the popular vote, the counter-proposal passed by Parliament (i.e., the Council of States' bill) then will become law. As earlier noted, a large number of U.S.-based businesses may be impacted, no matter which variant is adopted, either by virtue of their Swiss operations or because they are in the supply chains of Swiss companies.

Other Recent Developments in Mandatory Human Rights Due Diligence

As we have written about in other Alerts, corporate human rights due diligence legislation is awaiting adoption, has been proposed, has been called for by civil society stakeholders and/or is at the discussion stage in several other jurisdictions, including Belgium, Canada, Denmark, Finland, Germany, the Netherlands, Norway, the United Kingdom, the United States and at the European Union level. Recent developments in the Netherlands, Norway, the United Kingdom and at the EU level are discussed in our earlier Alerts [here](#), [here](#), [here](#) and [here](#), respectively.

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