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Mandatory Human Rights Due Diligence Initiative Brought to a Public Vote in Switzerland – *Initiative Fails, Parliament Indirect Counterproposal Moves Forward*

On November 29, a public referendum was held to amend the Swiss constitution that would have required mandatory human rights and environmental due diligence by businesses and introduced liability for extraterritorial human rights and environmental violations. The initiative failed. However, the story does not end there. The Swiss government will be tasked with implementing the narrower indirect counterproposal previously agreed upon by the Parliament, unless a popular vote is requested and the indirect counterproposal is rejected.

In this Alert, Ropes & Gray and Swiss law firm Bär & Karrer discuss the Parliament's indirect counterproposal and its implementation. Although the indirect counterproposal is narrower in scope than the proposed constitutional amendment, it is nevertheless likely to affect many U.S.-based businesses, either directly by virtue of their Swiss operations or indirectly because they are in the supply chains of Swiss companies.

A Bit of Context – The Proposed Constitutional Amendment

The Responsible Business Initiative

In 2015, 77 Swiss civil society organizations launched the Responsible Business Initiative. The RBI was 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 the requisite number of signatures, the initiative is then submitted to the Federal Council (executive branch) and the Parliament, which can accept or reject the initiative or draft a counterproposal. The RBI exceeded the signature threshold and was submitted to the Swiss government during October 2016.

The RBI would have amended the Swiss federal constitution to add a new Article 101a, "Responsibility of business." The constitutional amendment would have required enterprises with their registered office, central administration or a principal place of business in Switzerland to respect abroad internationally recognized human rights and international environmental standards. This duty would have extended to subsidiaries and other controlled enterprises.

The constitutional amendment would have required subject enterprises to carry out risk-based human rights and environmental due diligence. In particular, they would have been required to (1) identify impacts, (2) take appropriate measures to prevent violations and cease existing violations and (3) account for the actions taken. A subject enterprise would have been liable for damages abroad for violations of internationally recognized human rights or international environmental standards caused by its controlled enterprises, unless the subject enterprise could 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 Outcome of the Referendum

For a constitutional amendment to pass, it must receive both a majority of the total votes cast and majority support in over half the Swiss cantons. The constitutional amendment was supported by 50.7% of voters, but less than half the

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cantons. Analogous to the blue state/red state divide in the United States, the amendment did not receive majority support in many of the more conservative rural cantons.

The Federal Council did not support the proposed constitutional amendment, expressing concern with the effect it would have had on the competitiveness of Swiss companies. The business community's views were mixed. For example, in the lead-up to the vote, a large global Swiss-based bank took out a full page ad in an influential newspaper criticizing the initiative. However, many Swiss companies – including some large global names – had previously expressed their support.

Next Steps – The Parliament's Indirect Counterproposal Moves Forward (Maybe)

As noted above, before a popular initiative can head to a national vote, both houses of the Swiss Parliament have the opportunity to make counterproposals. After almost two years of back-and-forth, on June 9, 2020, the Parliament agreed upon the indirect counterproposal advocated by the Council of States (the upper house). It is referred to as an indirect counterproposal, rather than a direct counterproposal, because it takes the form of a statute (rather than an amendment to the constitution) and, therefore, the public referendum did not expressly allow voters to choose between the RBI and the counterproposal.

There are two separate pieces to the indirect counterproposal: mandatory human rights due diligence and non-financial reporting. Each of these components of the indirect counterproposal is discussed below. Mandatory human rights due diligence is of principal relevance to U.S.-based multinationals.

If a counterproposal passes both the Council of States and the National Council (the lower house), and if the counterproposal has the support of the popular initiative's sponsors, the sponsors can withdraw the initiative and the Parliament's counterproposal becomes law. In this case, the initiative's sponsors did not support the indirect counterproposal passed by Parliament, so the initiative was put to a national vote. However, if the initiative is put to a vote and fails – as was the case here – there are two possible subsequent paths: the Parliament's indirect counterproposal can either become law or it can be submitted to a popular vote. A popular vote may be requested within 100 days after the official publication of the indirect counterproposal if a petition to hold a popular vote receives 50,000 signatures or 8 cantons request a popular vote. If a popular vote is held and the indirect counterproposal is voted down, it will not become law. If the indirect counterproposal is not voted down, or a popular vote is not requested, the indirect counterproposal will become law.

Mandatory Human Rights Due Diligence

This portion of the indirect counterproposal is significantly narrower than the proposed constitutional amendment.

Subject enterprises. Enterprises with their registered office, central administration or principal place of business in Switzerland, if certain thresholds are met for doing business relating to conflict minerals or offering products or services that induce a justified suspicion of an involvement of child labor. These thresholds are not specified in the indirect counterproposal and will need to be set by the Federal Council.

For purposes of the indirect counterproposal, conflict minerals are tin, tantalum, tungsten and gold from conflict-affected or high-risk areas that are transported into Switzerland or processed in Switzerland. Note that this definition differs in part from the definition under the U.S. Conflict Minerals Rule and the EU Conflict Minerals Regulation. The indirect counterproposal does not contain a definition of child labor.

Due diligence requirement. Subject enterprises will be required to conduct due diligence in respect of conflict minerals and child labor. Consistent with the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence

Guidance for Responsible Business Conduct, due diligence is an expansive concept that refers to the entire process for managing adverse human rights impacts and extends to subsidiaries and business partners.

Subject enterprises will be required to put in place an adequate management system to address conflict minerals and child labor risks that includes a supply chain policy and a system for tracking the supply chain. Subject enterprises also will be required to determine and evaluate the risk of adverse impacts in the supply chain, prepare a risk management plan and take appropriate measures to mitigate risks.

Compliance with the conflict minerals due diligence requirements of the indirect counterproposal will be required to be verified by an independent external expert.

The indirect counterproposal leaves many details to be worked out. For example, it does not go into detail on the due diligence requirement or describe the third-party verification requirement. The Federal Council is required to adopt a more detailed implementing decree that follows internationally recognized standards, including OECD guidelines.

Reporting. Subject enterprises will be required to annually report on their due diligence.

The report will be required to be approved by the highest management body (e.g., the board of directors) of the subject enterprise. In addition, the subject enterprise will be required to maintain records of its due diligence.

Subject enterprises will be exempt from reporting if they offer products and services of other enterprises that are subject to reporting obligations. In practice, this exemption is not likely to benefit many, if any, U.S.-based multinationals.

Non-financial Reporting

The non-financial reporting requirement is analogous to the European Union's Non-financial Reporting Directive. Except in limited cases, this requirement will not apply to U.S.-based multinationals or their subsidiaries.

Subject enterprises. Swiss enterprises (1) whose shares are publicly traded in Switzerland; (2) that have issued bonds; (3) that contribute at least 20% to the assets or revenues of an enterprise coming under (1) or (2) above; or (4) that are prudentially supervised large financial institutions, in particular certain banks and insurance companies.

However, the foregoing enterprises will have reporting obligations only if they, alone or together with one or more domestic or foreign enterprises 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. In addition, an enterprise will not have a reporting obligation if it is controlled by another subject enterprise or required to produce an equivalent report under the laws of another jurisdiction.

Reporting. Subject enterprises annually will be required to report on material ESG matters, such as emissions reduction goals, social matters, human rights compliance and compliance with anti-corruption laws. Among other things, the report will be required to describe any due diligence measures taken and their effectiveness.

The report will be required to be approved by the highest management body of the subject enterprise (e.g., its board of directors) and by its shareholders. In addition, the subject enterprise will be required to maintain records relating to the ESG matters underlying its reporting.

Liability for Violations

A frequent criticism of most corporate human rights legislation is the lack of meaningful remedies to deter violations. The indirect counterproposal attempts to address this concern.

Violations of the reporting and record-keeping obligations applicable to both mandatory human rights due diligence and non-financial reporting will carry a fine of up to SFr.100,000, except that, in the case of negligence only (i.e., no willful misconduct), the maximum fine will be SFr.50,000.

In contrast to the proposed constitutional amendment, under the indirect counterproposal, enterprises will not have liability for human rights violations or violations of international environmental standards.

Next Steps

With the rejection of the RBI, as a next step, the Parliament's indirect counterproposal will be submitted to a popular vote or implemented. Unless a popular vote results in the rejection of the indirect counterproposal, the Federal Council will need to adopt a more detailed implementing decree giving effect to the indirect counterproposal. The Federal Council is not required to act within a specific time frame.

The legislation will apply starting with the financial year that begins one year after it enters into force. The Federal Council will determine when the legislation enters into force.

Meanwhile, in Other Developments ...

As we have written about in other alerts, articles and white papers, 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, Sweden, the United Kingdom and the United States, and at the European Union level. These would join requirements already in place in, among other jurisdictions, Australia, France, the United Kingdom and the United States. These initiatives are beyond the scope of this Alert, but need to be kept in mind as companies continue to implement and enhance their global human rights compliance programs.

About Our Practice

Ropes & Gray has a leading ESG, CSR and business and human rights compliance practice. We offer clients a comprehensive approach in these subject areas through a global team with members in the United States, Europe and Asia. In addition, senior members of the practice have advised on these matters for more than 30 years, enabling us to provide a long-term perspective that few firms can match.

For further information on the practice, click [here](#).

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