

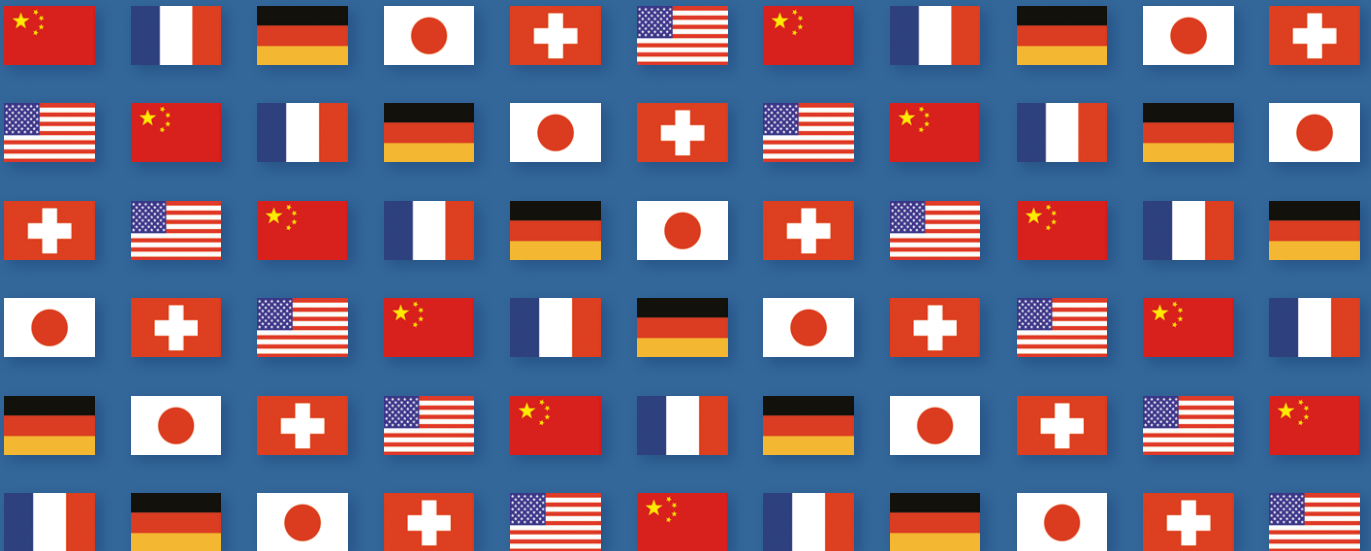


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# RISK & COMPLIANCE MANAGEMENT 2023

Contributing editor  
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# The turn of an era: new Swiss non-financial reporting duties

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Swiss public interest and FINMA regulated companies must publish the first non-financial reports in 2024. The Swiss statute is demanding, and companies need to allocate a high degree of management attention and resources to meet the deadline. Absent compliance with the new rules, all board members, who must approve and sign the reports, are exposed to the risk of criminal sanctions for contravention of federal law.

In line with the global trend towards corporate non-financial sustainability reporting and supply chain due diligence, Switzerland enacted a new statute on non-financial reporting and due diligence obligations on 1 January 2022 (article 964a et seq of the Swiss Code of Obligations (CO)). About 250 Swiss and foreign companies will have to report on environmental, including CO2 targets, social, labour, human rights and anti-corruption matters as of 2024, the first year to be reported on being 2023. Reporting is mandatory for companies that meet the following three criteria (according to article 964a paragraph 1 CO):

Reporting on non-financial matters in accordance with article 964a paragraph 1 CO affects companies with the following cumulative characteristics:



#### Public Interest Companies

Public interest companies (as defined in the Audit Supervisory Act) are public companies and companies subject to the Financial Market Supervisory Authority's oversight. Under article 727 CO, public companies are listed companies and companies with outstanding bonds.



#### ≥500 FTE

Companies with an annual average of at least 500 full-time employees in two consecutive financial years on a consolidated basis (ie, including all controlled companies).



#### Thresholds

At least one of the following values exceeded in two consecutive financial years: (1) balance sheet total of 20 million Swiss francs or (2) turnover of 40 million Swiss francs.

**These companies, including on a consolidated basis all controlled subsidiaries worldwide, must report as of 2024 on environmental, social, labour, human rights and anti-corruption matters.**

The above thresholds and the new reporting obligations encompass all controlled group companies worldwide (article 964b paragraph 4 CO).

The Swiss non-financial reports shall allow the readers to understand the course of business, the results of operations, the state of the company and the effects of its activities

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on the non-financial matters (article 964b paragraph 1 CO). The stand-alone reports must include the following information (article 964b paragraph 2 CO):

The report needs to contain information required for the understanding of the course of business, the results of operations, the position of the company and the effects of its activities on the non-financial matters (article 964b paragraph 1 CO).

In particular, the report must include the following (article 964b paragraph 2 CO):

1	Activity	A description of the business model.
2	Concept	A description of the standards adopted on the reporting topics / reporting matters, including the due diligence applied.
3	Effectiveness	A presentation of the measures taken to implement these standards and an evaluation of their effectiveness.
4	Risk	A description of the main risks related to the reporting matters associated with the business model and the company's management of those risks – in particular, those arising from the company's own business activities, and, if relevant and proportionate, any arising from its business relationships, products or services.
5	KPI's	Key performance indicators for the company's activities relating to the reported matters.

Companies controlled by a reporting company are exempt from reporting obligations.

Companies controlled by an entity that prepares an equivalent report under applicable foreign law are exempt from the reporting obligation (article 964a paragraph 2 CO).

The role of the board

Non-financial reports must be signed by the board of directors and made publicly available for at least 10 years (article 964c paragraph 2 CO).

Comply or explain

If a company does not follow any standard with respect to one or more non-financial matters, the reasons must be clearly explained in the report ('comply or explain' according to article 964b paragraph 5 CO). This implicitly presupposes that, as a rule, the reporting is based on a generally accepted international standard, for instance ISO 37001 (anti-bribery management systems).

The non-financial reports must be separate, stand-alone reports, namely, they must not be integrated into the financial reports. The reports can be prepared in any of the Swiss national languages or English (article 964b paragraph 6 CO).

In addition to the non-financial reporting obligations, all Swiss companies must comply with supply chain due diligence obligations on conflict materials and child labour. The due diligence obligations apply to all companies with their registered office, head office or principal place of business in Switzerland that (1) put into free circulation in Switzerland specific minerals or metals (in particular gold, tin, tantalum, tungsten) from conflict and high-risk areas (or process them in Switzerland) (article 964j paragraph 1 n 1 CO) respectively (2) offer products or services for which there is a reasonable suspicion that they have been manufactured or provided using child labour (in the context of child labour) (article 964j paragraph 1, 2 CO).

The Federal Council regulates the applicable import and processing quantities regarding conflict minerals and metals in the Ordinance on Due Diligence and Transparency Regarding Minerals and Metals from Conflict Areas and Child Labour, which relates to the thresholds set by the EU with EU Ordinance 2017/821.

Regarding child labour, any (simple) reasonable suspicion of child labour in the entire supply chain triggers the due diligence and reporting duties. Exempt from these obligations are undertakings with low-risk and Small and Medium Enterprises (SMEs) (article 964j paragraph 3 CO). Under Swiss law an SME is defined as a company (together with all the domestic and foreign companies controlled by it) that does not meet two of the following thresholds in two consecutive financial years: balance sheet total of 20 million Swiss francs, average of 250 full-time employees and sales revenue of 40 million Swiss francs. The SME exception does not apply if the use of child labour is evident, for instance if child labour is evidenced by media, NGO or governmental reports.

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The due diligence requirements according to article 964k paragraph 1 and 2 CO are:

Due Diligence Requirements:

- 1 Establishment of a management system and definition of a supply chain policy.
- 2 Identification and assessment of risks in the supply chain.
- 3 Establishment of a risk management plan with concrete measures to avoid or minimise the identified risks.
- 4 An annual report.
- 5 (For conflict minerals) An audit conducted by an external independent third party (article 964k paragraph 3 CO).

Non-compliance with the Swiss transparency and due diligence obligations (ie, non- or false reporting) is subject to criminal sanctions, specifically to fines up to 100,000 Swiss francs (article 325ter of the Swiss Criminal Code). Because non-financial reports must be approved and signed by the members of the Board of Directors, criminal complaints would be directed against the Members of the Board. Upon approval by the Board, the non-financial reports will have to be approved by the Shareholders at the annual general meeting (article 964c paragraph 1 CO).

Although the first reports are due latest by end of June 2024, companies in scope of the new rules should not underestimate the management attention and resources required to produce accurate and complete reports. For Board assurance and litigation risk mitigation purposes, companies in scope of the new transparency and diligence rules should seek independent external review regarding their reporting duties and the quality of their reports.

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