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## Consultation on the ordinance on reporting on climate issues

**Dear Federal Councillor Maurer**  
**Dear Ladies and Gentlemen**

SwissHoldings is a cross-sector business association and currently represents 61 Swiss corporations in the industrial and service sectors. Our members are major issuers on the capital market; they account for around 66 percent of total Swiss stock market capitalization (as of March 31, 2022).

We were invited to comment on the above-mentioned ordinance as part of the consultation process that opened on March 30, 2022. We would like to thank you for this opportunity and are pleased to accept it.

### Summary of the position and concerns of the association

- Meaningful information from all stakeholders is an important prerequisite for functioning markets. In **this sense, SwissHoldings supports the aim of the regulation to strengthen transparency on climate-related opportunities and risks.**
- For the association, it is central that sustainability data **continue to be defined in a comprehensible context with the business strategy and financial reporting. The transfer of international recommendations such as TCFD into Swiss legislation should also be principle-based** - whereby the criteria of relevance, feasibility and cost/benefit ratio should always apply to transparency requirements.
- The regulation is intended to **define clear minimum reporting requirements for companies. This objective is missed. It should be examined whether Switzerland could not closely follow the climate reporting legislation recently passed in the UK with regard to the definition of these requirements.** This legislation sets a clear framework for company reporting, but without limiting its scope too much.
- Another argument in favor of closely following the regulatory approach of the UK is that **it leaves room for future developments. The field is currently undergoing dynamic international development.** It should be possible to embed the developments in a modular way in this regulatory solution.
- In addition, the ordinance is intended to provide the **missing details on the section "Transparency on non-financial matters" (Art. 964bis of the Swiss Code of Obligations), which go beyond the reporting on CO2 matters.**

### A. Introductory remarks



The effects of climate change are also increasingly influencing the financial center and the valuation of financial instruments. At the same time, the shift to a green economy is opening up new growth and financing opportunities for companies. Various frameworks such as the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) support companies with regard to their strategies for adapting the business model to the new realities. At the beginning of January 2021, the Federal Council announced that it would make the TCFD recommendations binding for large Swiss companies from all sectors of the economy. This is because companies are increasingly expected to report consistently on the risks and opportunities of climate change on their corporate activities.

Increased transparency in the disclosure of non-financial information thus benefits not only stakeholders as a whole, but also the companies themselves. The majority of SwissHoldings views this initiative for greater standardization and improved transparency in sustainability issues positively. For the same reason, the association has always supported the indirect counter-proposal to the Corporate Responsibility Initiative (CRI), which also provides for new disclosure requirements in the area of sustainability. A more uniform framework for mapping sustainability performance helps create clarity and trust in the market and among the broader stakeholder base. In addition, such a framework protects companies from excessive stakeholder demands.

In principle, our members support the TCFD recommendations and are working on their implementation. The consideration and assessment of climate risks require an approach that is forward-looking and incorporates a long-term time horizon. TCFD can be seen as representative of a new generation of reporting frameworks for sustainability issues. The requirements of the standard no longer only concern the publication of individual indicators per se, but now reach deep into the actual organizational processes of a company: the core objective of TCFD is to ensure that the disclosed data are clearly related to governance, strategy and risk management issues. This requires the establishment of new elaborate management processes. From the association's point of view, it is therefore essential that companies can proceed step by step when implementing the TCFD recommendations so that they are not overwhelmed.

It is also important to bear in mind that regulatory developments on sustainable finance and ESG reporting at the international level are currently proceeding in large steps and on a tight schedule. The European Union is currently leading this development, both in terms of the depth and breadth of regulatory initiatives. Many SwissHoldings members are likely to be directly affected by these new regulations adopted at the EU level. However, private international standard-setting organizations such as the International Sustainability Standards Board (ISSB) or the Global Reporting Initiative (GRI) are also currently making great efforts to further develop the relevant standards and regulations. Regulators and private organizations have recently stepped up their efforts to consolidate the requirements of the reporting guidelines. Nevertheless, it is difficult to predict at this stage whether a comprehensive consolidation will be successful.

This represents a major challenge for our members in terms of positioning themselves on their own climate reporting. Within the framework of its legislative process, Switzerland should not further exacerbate these already considerable coordination problems for Swiss companies. From the association's point of view, the overarching goal of the consultation draft should be an internationally compatible regulation whose requirements can be embedded in future international regulatory approaches in a modular fashion.



## **B. Detailed comments on the draft regulation (incl. accompanying report)**

We are pleased to comment on the specifics of the draft regulation and accompanying report as follows:

### **Article 1 "*Subject matter (Art. 964a-964c CO)*"**

In August 2021, the Federal Council defined the benchmarks for mandatory reporting on the TCFD recommendations, which serve as the basis for the current draft ordinance. However, the counter-proposal to the Corporate Responsibility Initiative (CCI) also introduces provisions in the CO for disclosure on non-financial matters, including environmental matters (in particular on CO<sub>2</sub>). In order to avoid duplications, it is to be welcomed that the implementation of the TCFD recommendations is aimed at within the framework of an enforcement ordinance.

The choice of the executive order for the legal anchoring of climate reporting in Switzerland implies that the criteria regarding the scope of the counter-proposal UVI for mandatory climate reporting in Switzerland are also applied: Public companies, such as banks and insurance companies, both with 500 or more employees and a balance sheet total of at least CHF 20 million and sales revenue of at least CHF 40 million would be required to disclose according to TCFD recommendations. In view of the high expenses implied by the implementation of the TCFD recommendations at company level, we consider it proportionate that SMEs are generally exempt from the reporting obligation.

In Art. 1 para. 2. it is specified that climate concerns include the effects of the climate on companies as well as the effects of the activities of companies on the climate. This principle corresponds to the so-called "double materiality". However, the TCFD recommendations do not recognize double materiality, but build on the so-called (single) financial materiality. This also applies to the recently published ISSB drafts on climate-related issues. If companies seek to implement the reporting obligation under Article 964a of the Swiss Code of Obligations on climate-related matters based on TCFD, they are confronted with an unclear starting position. There is a lack of information on how the financial information required at the ordinance level must be disclosed for climate-related issues that do not have a significant impact on the company (outside-in perspective).



**Article 2 "Fulfillment of the obligation to report on climate issues (Art. 964b para. 1 CO)".**

In Art. 2 para. 1, with reference to the possibility mentioned in Art. 964b para. 3 CO of basing reporting on "national, European or international codes", the presumption is established that reporting on climate issues is fulfilled if it is based on the TCFD recommendations in accordance with Art. 3 (cf. in particular also Art. 964b para. 2 items 1-5 CO). It is logical that the draft regulation specifies that this presumption does not exclude that reporting on climate issues can also be based on other guidelines or standards.

Art. 2 para. 2 also states that it must be proven that the obligation to report on environmental matters in accordance with Article 964b para. 1 CO is fulfilled in other ways in the area of climate matters, in the event that reporting on climate matters has not been carried out in accordance with Art. 3. This wording implies that each company must individually assess whether a set of rules meets the requirements of Article 964b paragraph 1 CO. In our opinion, it should be possible to objectify this assessment so that either in the ordinance or in the accompanying materials it is bindingly defined which other international reporting standards meet the requirements. If it is assumed that the two standards "*IFRS/ISSB S2 Climate-related Disclosures*" and "*ESRS E1 Climate Change*" will become established internationally, the aim should be to ensure that the reporting requirements on climate issues under the draft ordinance are also met when these two standards are applied.

The legal anchoring of climate reporting in Switzerland should be principle-based. Against this background, the association welcomes the ordinance's clear commitment to the "*comply or explain*" principle. This proven regulatory approach allows the companies concerned to implement the rules according to their respective size, structure, complexity, business activities and risks. This is especially true in the early stages of implementing a standard, when companies need leeway to adapt their processes to the new requirements. In addition, this approach ensures that industry- and sector-specific starting points and constellations can be taken into account appropriately.

However, it is crucial that the "*comply or explain*" approach is defined in an internationally coordinated manner. The first pillar of the indirect counterproposal UVI was drafted based on the resolutions of the Federal Council of August 14, 2019 and the RK-S of October 28, 2019, analogous to the European Union (EU) Directive 2014/95/EU of October 22, 2014 (CSR Directive). Accordingly, it is correct that the draft regulation formulates the "*comply or explain*" principle in accordance with the EU Directive, which states under Article 29a(1): "If the company does not follow a policy in relation to one or more of these matters, the non-financial statement shall contain a clear and reasoned explanation as to why this is the case."

**Article 3 "Reporting on climate-related issues based on the recommendations of the Task Force on Climate-related Financial Disclosures" (Art. 964b para. 1 and 2 CO)**

The preparation of certain report contents of the TCFD recommendations is complex and requires a great deal of empirical knowledge. This applies, for example, to the quantification of short-, medium- and long-term scenarios. Also challenging is the calculation of indirect emissions from the generation of purchased electricity, steam, heating and cooling, which arise over the entire value chain of a company (so-called "Scope 3" category). These difficulties are also pointed out in the ongoing consultations on other standards such as SEC, ISSB and EFRAG. In the view of the association, provision should therefore be made for companies to proceed step by step when implementing the TCFD recommendations. The initial focus should be on transparent disclosure



regarding the strategic anchoring of climate issues at company level and the corresponding responsibilities.

The TCFD recommendations, with their modular structure and the four clearly identified topics "1. governance", "2. strategy", "3. risk management", and "4. *metrics and targets*", rely on a balanced approach between qualitative and quantitative indicators. The reason for this is that performance targets in the area of sustainability can only be measured numerically to a certain extent. While it is relatively easy to quantify and compare a company's emissions ("CO2 equivalents"), it is much more difficult to assess whether a company's business model is resilient over time and space in the interplay of complex developments in nature, technology and government regulation. Consequently, the sheer quantity of reported data alone is not a decisive indicator of the quality and materiality of a report. Investment and business decisions based on a purely quantitative view of data thus also run the risk of leading to misallocations.

In our view, the decree in Art. 3 does not do justice to this differentiated approach of TCFD. The focus of the decree is too much on quantitative performance indicators. In particular, Art. 3 (3), (4) and (5) lay down far-reaching requirements for the "*metrics and targets*" to be reported by companies. It is true that these provisions are underpinned by the concept of "as far as possible and appropriate" and attempts are made to put them into perspective. But this only relieves the companies superficially. In fact, companies are indirectly put under pressure to implement very comprehensive reporting. In TCFD, no "*metrics and targets*" are mandatory. The implementation in Switzerland should not (even indirectly) go beyond the principle-based TCFD recommendations. No Swiss Finish is to be created. For companies with little climate relevance, the high implementation costs of a far-reaching implementation of the "*Metrics and Targets*" can hardly be justified - whereas for other companies, such comprehensive reporting should remain a distinguishing feature.

It is imperative to revise the ordinance in this area. It should be examined whether Switzerland could closely follow the climate reporting legislation adopted in the UK<sup>1</sup>. The UK is the first G20 country to require its large companies to disclose their climate-related risks and opportunities in accordance with TCFD. The regulation in this regard is convincing due to its clear framework defining the minimum reporting content (especially in *section 414CB (e)2A (a)-(h)*). This creates legal certainty for companies. At the same time, despite the specification of clear benchmarks, the UK approach does not restrict the companies' room for maneuver too much and thus leaves room for developments. In particular, this approach forms a good basis for dynamically integrating the expected future international regulatory developments. Last but not least, the Federal Council has clearly communicated that the present climate reporting project is to be implemented as part of the sustainable financial center strategy. Against this background, the UK regulation is also the best reference value for the Swiss regulatory approach.

**Article 4 "*Publication (Art. 964c para. 2 item 1 CO)*".**

Art.4 para.2 provides that the report shall also be published on the company's website in a machine-readable, internationally distributed electronic format. There are currently various efforts to define standardized procedures for the creation of such electronic report formats. At present, however, no standard has yet become established. In addition, the demand for such electronically

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<sup>1</sup> [https://www.legislation.gov.uk/uksi/2022/31/pdfs/ukxi\\_20220031\\_en.pdf](https://www.legislation.gov.uk/uksi/2022/31/pdfs/ukxi_20220031_en.pdf)



readable formats has not yet been significantly established in the market either. For these reasons, we suggest that a transition period of three to five years be provided for this obligation, provided that appropriate international standards have been established by then.

#### **Article 5 "Entry into force"**

According to the draft ordinance, the ordinance is to enter into force on January 1, 2023. In view of the necessary preparatory and implementation work, this is not feasible. However, we consider implementation to be realistic for the 2024 reporting year.

#### **C. Missing concretization of the section "Transparency on non-financial matters" (Art. 964bis CO), which goes beyond the reporting on CO2 matters.**

In its deliberations on the indirect counter-proposal, Parliament has already adopted explicit implementing provisions on the topic-specific due diligence requirements covered by the Ordinance on Due Diligence and Transparency in the Areas of Minerals and Metals from Conflict Areas and Child Labor (VSoTr), which will enter into force at the end of 2021. The implementing provisions for the section "Transparency on non-financial matters" (Art. 964bis CO), which go beyond reporting on CO2 matters, are still missing.

Systematically, it makes sense to clarify the still open questions on transparency in the present ordinance concerning TCFD. As a result, the counter-proposal would be concretized via two ordinances, whereby one ordinance would refer to the first pillar of the counter-proposal - transparency on non-financial matters - and the second would deal with the second pillar of the proposal - the explicit topic-specific due diligence obligations in the area of conflict minerals and child labor.

Specifically, from SwissHoldings' perspective, clarifications in the area of transparency regarding non-financial matters are urgently needed in the areas described below:

Whereas in Directive 2014/95/EU the audit measures are formulated as "process-based", Art. 964<sup>ter</sup> para. 2 item 3 CO additionally provides for an assessment of the effectiveness of the measures taken. However, internationally common reporting guidelines such as GRI, which are referenced in the parliamentary reports as a basis for reporting, do not provide for any indicators for the "effectiveness assessment". It must therefore be clarified that the required proof of effectiveness can be provided in the sense of a qualitative overall assessment and that an "individual case review" of the measures pursued can be dispensed with.

If the report is based on national, European or international regulations, the regulations applied must be stated in accordance with Art. 964<sup>ter</sup> para. 3 CO. When applying such rules, it must also be ensured that all the requirements of this article are met. This wording implies that each company must individually assess whether a set of rules meets the legal requirements. In our opinion, it should be possible to objectify this assessment so that it is bindingly defined that, for example, a report prepared in accordance with GRI meets the requirements. In addition, it should be clearly stated that a company is exempt from the reporting obligations pursuant to Art. 964<sup>ter</sup> para. 1-2 CO if it complies with the sets of rules pursuant to Art. 964<sup>ter</sup> para. 3 CO.



According to Art. 964quater para. 1 CO, the report on non-financial matters requires the approval and signature of the highest management or administrative body and the approval of the body responsible for approving the annual financial statements. Here, it is central to clarify that the voting on the reports follows the model of the compensation report. I.e. the shareholders can confirm or reject the reports, respectively the relevant part of the report, but this without actually binding effect; the general meeting cannot demand a behavior from the board of directors based on the reports. It is one of the inalienable duties of the Board of Directors to determine the strategy of the company, including the sustainability strategy and risk management. This competence cannot be delegated away to the General Meeting. Furthermore, this also makes sense for reasons of practicability with regard to voting modalities and legal certainty.

Furthermore, a company should be able to choose whether the report on non-financial matters is published as a stand-alone report or integrated into the annual report - either in the management report or in a separate chapter.

According to the indirect counterproposal, Art. 325ter of the Criminal Code is to be amended to the effect that anyone who intentionally makes false statements in the reports pursuant to Articles 964bis, 964ter and 964septies of the Swiss Code of Obligations or fails to report; or who fails to comply with the legal obligation to retain and document the reports pursuant to Articles 964quater and 964septies of the Swiss Code of Obligations, shall be punished by a fine. Anyone who acts negligently is punished with a fine of up to 50,000 Swiss francs. Regarding the "negligent act", a practicable solution must be found in order to ensure legal certainty. Any false statement must be subjectively culpable and objectively false in qualitative and/or quantitative terms to such an extent that it exerts a significant influence on the overall assessment of the current situation of the company with regard to the reported element.

In this context, it should also be mentioned that the Penal Code (Art. 8 STPO in conjunction with Art. 52 StGB) offers the possibility of refraining from the fundamental compulsion of the prosecuting authorities to prosecute if both the guilt and the consequence of the offense are minor ("opportunity principle"). This principle is used not least in tax law. It should be examined whether it could not also be applied in this area if the company makes a "state of the art" effort to report the correct figures and information.



Thank you for your consideration and consideration of our concerns. Please do not hesitate to contact us if you have any questions.

Kind regards

**SwissHoldings**  
Office

A handwritten signature in black ink, appearing to read "Dr. RumoDenise".

Dr. Gabriel RumoDenise  
DirectorMember

A handwritten signature in black ink, appearing to read "Laufer".

Laufer  
of the Executive Board

