

April 9, 2013

## Is Conflict Minerals Regulation Going International?

### *New Developments in Canada and the EU*

In late March, Canada and the EU both took steps toward the further regulation of the use of conflict minerals. As discussed below, these initiatives are in their early stages and it is far from certain that Canadian or EU conflict minerals legislation will be enacted or what any such legislation would require. However, as U.S. public companies continue to gear up for Conflict Minerals Rule compliance in 2013 and beyond, they should keep a watchful eye on developments in Ottawa and Brussels, as these could eventually have significant impact on their Conflict Minerals Rule compliance programs.

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### Canadian Conflict Minerals Act Proposed

On March 26, a bill was introduced in the House of Commons proposing a Canadian Conflict Minerals Act. The proposed Act would require Canadian companies (more on what that means below) to exercise due diligence with respect to conflict minerals sourced from the Great Lakes Region of Africa.

Under the proposed Act, a regulated company would be required to “exercise due diligence in respect of any extraction, processing, purchasing, trading in or use of designated minerals that it carries out in the course of its activities, or that it contracts to have carried out.”

A company that engages in conduct covered by the proposed Act would be required, within 60 days after the end of its fiscal year, to submit to the Minister of Foreign Affairs and publish on its website:

- A report that specifies the measures taken by the company to exercise due diligence in respect of the source and supply chain of the designated minerals;
- An independent third-party audit of the report;
- A description of any use by the company of the designated mineral and of any products containing the designated mineral that were manufactured, or contracted to be manufactured, by the company;
- A description of any commercial and financial transactions that have occurred in relation to the designated mineral to which the company was a party;
- If applicable, a description of the facilities used by the company to process the designated mineral;
- The country of origin of the designated mineral; and
- A detailed description of the efforts made to determine the mine or location of origin of the designated mineral and the results of those efforts.

*Take-Aways from the Bill.* The bill is the second run at conflict minerals legislation in Canada over the last few years and its adoption is by no means certain. In addition, if Canadian conflict minerals legislation has a similar path to

adoption and implementation as the U.S. Conflict Minerals Rule, the bill will undergo significant modification. With the help and input of our Canadian law firm friends, we will continue to monitor the progress of the bill.

The bill has been colloquially referred to as the “Canadian Conflict Minerals Rule,” suggesting that it is substantially similar to its U.S. counterpart. However, there are a number of significant differences between the proposed Act and the U.S. Conflict Minerals Rule, including the following:

- The proposed Act only would apply to companies incorporated in Canada and their subsidiaries. It would not apply to companies up the chain. However, it would apply to Canadian subsidiaries of foreign companies, including the Canadian subsidiaries of U.S. companies. And, unlike the U.S. Conflict Minerals Rule, the application of the proposed Act would not be limited to public companies. Therefore, a U.S. company that already is subject to the U.S. Conflict Minerals Rule could find its Canadian subsidiaries subject to additional conflict minerals due diligence and disclosure requirements. Furthermore, a privately held U.S. company that is not subject to the U.S. Conflict Minerals Rule could have diligence and disclosure requirements with respect to its Canadian subsidiaries under the Act.
- The countries covered by the proposed Act are slightly different than those covered by the U.S. Conflict Minerals Rule. Unlike its U.S. counterpart, the proposed Act includes Kenya and Sudan. However, it does not include the Republic of the Congo or South Sudan.
- The definition of “designated mineral” under the Act is broader than the definition of “conflict mineral” under the U.S. Conflict Minerals Rule. It includes any of the derivatives of cassiterite, wolframite and coltan, not just the 3Ts. However, in contrast to the U.S. Conflict Minerals Rule, the definition is location-specific, so the proposed Act would not apply to or require any disclosure with respect to minerals that originate outside of the covered countries.
- The activities covered by the proposed Act are significantly broader than those covered by the U.S. Conflict Minerals Rule. The proposed Act applies to extraction, processing, purchasing, trading in or use, not just manufacturing or contracting to manufacture. The proposed Act also does not include a concept of “necessary to the functionality or production” of a product.
- The proposed Act requires that due diligence be carried out in accordance with a supply chain policy that conforms to the requirements of the OECD due diligence framework. Unlike the U.S. Conflict Minerals Rule, it does not provide for due diligence to be conducted in accordance with another nationally or internationally recognized due diligence framework if one were to be developed.
- Unlike under the U.S. Conflict Minerals Rule, there is no differentiation between scrap, recycled and newly mined minerals.
- The disclosure requirements are similar to those under the U.S. Conflict Minerals Rule, except that disclosure also would be required with respect to any commercial and financial transactions that have occurred in relation to the designated mineral to which the reporting company was a party.
- Unlike under the U.S. Conflict Minerals Rule, there is no phase-in of the audit requirement or “conflict undeterminable” designation.
- Disclosures under the proposed Act would be required to be made on a fiscal year basis and within 60 days after fiscal year end. In contrast, the U.S. Conflict Minerals Rule keys disclosure off of the calendar year and gives companies until May 31 to file their Form SD. Therefore, under the proposed Act, companies would have significantly less time to complete their audits than under the U.S. Conflict Minerals Rule.

## EU Public Consultation on Conflict Minerals

On March 27, the European Commission launched a public consultation regarding a potential EU initiative for responsible sourcing of minerals from conflict-affected and high-risk areas. According to the public announcement, the Commission wants to deepen its understanding of issues such as the sourcing and security of supply of minerals, supply chain transparency and good governance.

The Commission will use the results of the public consultation to help it decide whether – and how, in a reasonable and effective manner – to complement and/or continue ongoing due diligence initiatives and support for good governance in mineral mining, especially in developing countries affected by conflict. The consultation is open until June 26, 2013.

The Commission's Directorate-General for Trade has posted an online questionnaire for participating in the consultation. The questionnaire contains more than 50 substantive check-box and free-form response questions. Topics covered by the questionnaire relate to (1) responsible sourcing rationales and existing responsible sourcing frameworks; (2) the need for and scope of a possible EU initiative; (3) continuation of activity, security of supply and other international actors; (4) the nature of any EU initiative; (5) lessons learned from the EU timber regulation, which was an analogous initiative; (6) positive incentives for companies; and (7) economic, competitive, environmental and social impact. Some of the key questions included in the questionnaire include the following:

- Are existing initiatives sufficient and, if not, how can they be improved?
- What practical lessons can the EU draw from existing initiatives, including the OECD framework and the U.S. Conflict Minerals Rule?
- Should the EU issue a rule at all, and, if so, what countries, minerals, industries, products, supply chain participants and size companies should it cover?
- Should an initiative be voluntary or binding?
- Should an initiative provide positive incentives to businesses?
- Can existing frameworks, such as the OECD framework or the ICGLR certification initiative, be used to facilitate EU incentives?

The questionnaire can be accessed [here](#).

## For Further Information

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