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European Commission Proposes EU Conflict Minerals Legislation — Takeaways for U.S. Registrants and Other Companies

Earlier today, the European Commission released its long-expected [draft Regulation](#) on responsible conflict minerals sourcing. The Regulation proposes a voluntary self-certification scheme supported by due diligence for importers of 3TG into the European Union.

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The welcome news for downstream companies — especially those that are grappling with the U.S. Conflict Minerals Rule as public companies or as their direct or indirect suppliers — is that the proposed Regulation is much less onerous than originally anticipated and is likely to impose little if any additional compliance burdens on them.

An Overview of the Proposed Regulation

The proposed Regulation:

- Is limited to tantalum, tin, tungsten and gold.
Unlike the U.S. Conflict Minerals Rule, which contains a generic definition, the draft Regulation contains a more detailed product description of the specific ores, concentrates and metals that would come within the scope of the Regulation. That annex is attached to this Alert.
- Is focused on importers of 3TG, rather than manufacturers or sellers of finished goods.
The EC estimates that there are more than 400 market participants at this critical juncture in the minerals supply chain, consisting of approximately 300 traders, approximately 20 smelters and refiners and more than 100 component manufacturers.
- Establishes a “responsible importer” certification for importers of conflict minerals that exercise supply chain due diligence.
Importers would self-certify compliance under the Regulation.
- Applies to minerals sourced from conflict-affected and high-risk areas worldwide.
This approach is consistent with the OECD’s due diligence guidance. In contrast, the focus of the U.S. Conflict Minerals Rule is on the DRC region. The draft Regulation is not geographically specific. It does not contain a list of specific countries nor does the EC intend to provide a list. The draft Regulation instead defines “conflict-affected and high-risk areas” as areas in a state of armed conflict, fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses.

- Utilizes the OECD framework for due diligence, including for the establishment of management systems and risk management.
- Would require disclosure by the responsible importer.
The responsible importer would be required to make available to its immediate downstream purchasers the information gained and maintained pursuant to its supply chain due diligence (with due regard to business confidentiality and competitive concerns). It also would be required to publicly report annually, including on the internet, on its supply chain due diligence policies and practices for responsible sourcing.
- Would require independent third-party audit of the responsible importer's compliance procedures.
The audit objectives are stated with additional specificity in the draft Regulation.
- Contemplates that the self-certification system would be monitored and enforced by the individual EU member states.
Each member state would be required by the Regulation to designate a competent authority to receive information from responsible importers and to perform checks for compliance with the OECD framework and the Regulation. These authorities would have the power to issue notices of remedial action and non-recognition of an importer's certification, as well as to adopt related rules.
- Is voluntary, without a subsequent mandatory phase-in.
- Provides for the EC to publish and timely update a list of smelters and refiners in the supply chains of responsible importers, including those smelters and refiners that source from conflict-affected and high-risk areas.
The EC has indicated that it intends to publish this list in cooperation with the OECD.
- Requires approval of the European Parliament and the Council.
The Regulation is expected to be voted on later in 2014 at the earliest.

Complementary EC Initiatives for Downstream Companies

The proposed Regulation is part of the EU's wider approach to responsible sourcing from conflict-affected and high-risk areas. Of particular importance to some downstream companies, the EC also indicated today that it will require in its public procurement contracts for finished goods that contain 3TG that vendors comply with the OECD's due diligence guidance. The EC also contemplates visible recognition for the efforts of EU companies who source responsibly from conflict-affected countries or areas. For example, the EC has called upon EU member states to develop complementary national initiatives relating to consumer information and labeling. Both of these initiatives are separate from the Regulation.

The EC and the High Representative also released today a [joint communication paper](#) that presents their proposed overall foreign policy approach on how to address the linkage between conflict and the trade of minerals extracted in affected areas.

The Path to Today's Proposal

Today's proposed Regulation is the latest in a growing number of legislative initiatives relating to responsible conflict minerals sourcing. Section 1502 of the Dodd-Frank Act became law in 2010, the SEC adopted its Conflict Minerals Rule pursuant to Section 1502 in August 2012 and the first compliance period under that Rule began on Jan. 1, 2013. A Canadian Conflict Minerals Act was proposed during March 2013, although passage of this private member bill is remote at the present time. Several U.S. states and municipalities also have adopted or proposed their own, more limited conflict minerals legislation. In addition, numerous non-legislative initiatives relating to the responsible sourcing of conflict minerals have been undertaken by NGO, government, industry and other stakeholders.

The EU has been moving toward conflict minerals regulation for several years now. In 2010, after the adoption of Section 1502, the European Parliament passed a resolution for the EU to implement legislation. During mid-2013, the EC conducted a three-month [public consultation](#) on a possible EU initiative on responsible sourcing of minerals originating from conflict-affected and high-risk areas. The EC received approximately 300 submissions in connection with the public consultation, including ours.

Following the completion of the public consultation, the EC prepared an [impact assessment](#), which also was made available today, to assess the advantages and disadvantages of possible policy options. The EC was originally expected to propose a regulation before the end of 2013. However, its release was delayed by, among other things, the completion of the impact assessment.

Takeaways for U.S. Registrants and Other Companies

The U.S. Conflict Minerals Rule Will Continue to Drive Compliance Programs

As indicated above, the Regulation would apply only to those companies that import 3TG into the EU as provided for in the annex to the Regulation. It does not apply to importers or sellers of finished goods or manufactured components. It also is not directed at companies that manufacture or assemble products in the EU. Therefore, U.S. and other businesses that engage in these activities would not come within the scope of the Regulation. Accordingly, at least for the time being, the requirements of the U.S. Conflict Minerals Rule will continue to drive the compliance procedures and programs of most downstream companies, whether they are public or private, large or small or located in the United States or abroad.

However, as part of the global conflict minerals compliance program, companies will want to consider adapting their systems to capture and store the sourcing information provided by responsible importers.

In addition, to the extent that responsible importers in the supply chain are sourcing from non-DRC region conflict-affected and high-risk areas, this information should be taken into account in evaluating supply chain risk, policies and procedures and messaging around responsible minerals sourcing.

EU and U.S. Legislation May Apply Differently to Mining and Metals Companies

A small number of companies that are public in the United States may find that they come within the scope of the proposed Regulation, even though their business activities are not in scope for purposes of the U.S. Conflict Minerals Rule. Companies that are engaged in mining and other activities customarily associated with mining are not required to comply with the U.S. Conflict Minerals Rule, because that rule only applies to manufacturing activities and the U.S. SEC is of the view that mining is not equivalent to manufacturing.

The Proposed Regulation Should Over Time Facilitate U.S. Conflict Minerals Rule Compliance

Commercial purchasers of conflict minerals in the EU market are likely to place pressure on their importers to become responsible importers. In addition, although there are relatively few smelters and refiners located in the EU, and many of them already are certified as conflict free, not all of them are. It is expected that the Regulation will increase pressure on the remaining processors to undergo third party certification. The foregoing pressures should over time increase the amount of traceable conflict free 3TG content used by European component manufacturers and contract manufacturers, which will facilitate compliance with the U.S. Conflict Minerals Rule.

In addition, the list of smelters and refiners that will be published by the EC, and the information furnished by responsible importers, should assist companies with their reasonable country of origin and due diligence inquiries under the U.S. Conflict Minerals Rule.

Expect Global Pressure for Responsible Sourcing to Continue to Increase

Although not all companies face the same level of external pressure around responsible minerals sourcing, this continues to be an issue of focus for many NGOs, socially responsible investors, public and union pension funds, CSR research and ranking firms, consumer groups and consumers and trade customers, among others. These constituencies are not limiting their engagement on this issue to calls for legislation and are employing other tactics as well to drive responsible minerals sourcing. In addition, over the last few years, there has been increased focus on responsible sourcing of other commodities, such as cocoa, cotton and timber, as well as on corporate social responsibility issues generally, and these pressures are expected to further increase for many companies. Companies should continue to keep these considerations in mind as they develop and implement responsible minerals sourcing policies and procedures and communicate with external stakeholders.

We May Not Have Heard the Last Word on EU Conflict Minerals Regulation

Many constituencies are unhappy with the narrow scope and voluntary nature of the proposed Regulation, including constituencies within the European Parliament. For example, in its Feb. 19 Report, the Committee on Development advocated for a significantly stronger regulation. Expect this to be a subject of continuing discussion and debate before a final regulation is approved.

Companies That Seek to Sell Goods to the EC May Need Enhanced Compliance Procedures

As noted above, the EC has indicated that it will require vendors to agree in its public procurement contracts for finished goods that contain 3TG that they will comply with the OECD's due diligence guidance. Given the global focus of the OECD framework, companies that wish to sell products to the EC may require a globally-focused compliance program, rather than a program that is focused solely on sourcing risks arising out of the DRC region, in order to satisfy EC procurement contract requirements. As companies continue to build out their due diligence framework, they should take this into consideration.

For Further Information

If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney.

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ANNEX I

List of minerals and metals within the scope of the Regulation classified under the Combined Nomenclature

| CN code | Product description |
|------------|--|
| 2609 00 00 | Tin ores and concentrates |
| 2611 00 00 | Tungsten ores and concentrates |
| 2615 90 00 | Tantalum ores and concentrates |
| 2616 90 00 | Gold ores and concentrates |
| 2825 90 40 | Tungsten oxides and hydroxides |
| 2849 90 30 | Tungsten carbides |
| 2849 90 50 | Tantalum carbides |
| 7108 | Gold, unwrought or in semi-manufactured forms, or in powder form |
| 8001 | Tin, unwrought |
| 8003 00 00 | Tin bars, rods, profiles and wires |
| 8007 00 | Tin, other articles |
| 8101 10 00 | Tungsten, powder |
| 8101 94 00 | Tungsten, unwrought, including bars and rods obtained simply by sintering |
| 8101 96 00 | Tungsten wire |
| 8101 99 | Tungsten bars and rods, other than those obtained simply by sintering, profiles, plates, sheets, strip and foil, and other |
| 8103 20 00 | Tantalum, unwrought including bars and rods, obtained simply by sintering; powders |
| 8103 90 | Tantalum bars and rods, other than those obtained simply by sintering, profiles, wire, plates, sheets, strip and foil, and other |

Source: *European Commission Draft Regulation*

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