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The EU Conflict Minerals Regulation – Frequently Asked Questions and Take-Aways for Downstream Companies (or Why Should I Care About Yet Another New Supply Chain Regulation?)

In late May, the European Union published the final text of its recently adopted conflict minerals regulation (the “Regulation”), which was more than seven years in the making. On almost a daily basis, we are asked by clients what, if anything, they should be doing under the Regulation. In this Alert, we provide a deep dive on the Regulation – in an easy-to-follow Q&A format – and take-aways for downstream companies.

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For additional information on the Regulation, see our earlier Alerts [here](#) and [here](#). Please also visit the [Ropes & Gray Supply Chain Compliance and Corporate Social Responsibility Resource Center](#) for EU source documents relating to the Regulation.

Unpacking the Regulation – Frequently Asked Questions

In a Nutshell, What Does the Regulation Require?

The Regulation generally will require importers of tin, tantalum, tungsten and gold (“3TG”) into the European Union to establish management systems to support due diligence, conduct due diligence and make certain disclosures concerning the 3TG that they import into the European Union. We expand on these concepts and discuss other aspects of the Regulation in the FAQs below.

Who Is Subject to the Regulation?

The Regulation applies to importers into the European Union of 3TG in mineral or metal form. These can be importers who provide ores or unrefined minerals to EU smelters and refiners or importers who import specified 3TG metals processed outside of the European Union.

How is 3TG defined?

The Regulation includes an Annex that contains a detailed description, including Combined Nomenclature codes, of the specific 3TG ores, concentrates and metals that come within its scope. Tin, tantalum, niobium, tungsten and gold ores and concentrates and gold unwrought or in semi-manufactured forms or in a powder with a gold concentration lower than 99.5% that has not passed the refining stage are listed as “minerals.” Specified metals containing or consisting of tin, tantalum, tungsten or gold, including among others various enumerated oxides, hydroxides, chlorides, carbides, bars, powders, rods and wires, are listed as “metals.” In certain respects, the compliance obligations for minerals and metals are different, as discussed below.

Does the Regulation Cover Other Minerals or Metals?

No. The Regulation is limited to 3TG, as listed on Annex I to the Regulation. Various constituencies in the European Parliament advocated for a broader regulation applicable to additional minerals, metals and commodities. However, this was rejected.

Is There a De Minimis Exception?

Small volume importers of 3TG will be exempt under the Regulation. The Regulation is intended to cover not less than 95% of the annual volume of EU imports of each of the listed 3TGs. Annex I to the Regulation contains volume thresholds for some of the listed minerals and metals. For the remaining minerals and metals, the EU Commission (the “Commission”) must establish the required volume thresholds by April 1, 2020 if feasible, and in any event not later than July 1, 2020. The thresholds will be established using customs information for the prior two years.

The Commission is empowered to amend the thresholds every three years after the effective date of the Regulation.

Given the high value of gold in small quantities, the Commission has indicated that it intends to in particular monitor the effectiveness of the Regulation as it relates to gold imports.

Is Any 3TG Excluded from the Regulation, Other Than Under the De Minimis Exception?

Yes. There are three other exceptions, for recycled metals, mineral by-products and pre-existing stocks.

Recycled metals. These consist of reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing, including excess, obsolete, defective and scrap metal materials that contain refined or processed metals that are appropriate for recycling in the production of 3TG. Minerals partially processed, unprocessed or a by-product from another ore are not considered to be recycled metals. As noted later in this Alert, although recycled metals are not in scope, they trigger disclosure requirements.

By-products. A by-product is a mineral or metal falling within the scope of the Regulation that has been obtained from the processing of a mineral or metal falling outside the scope of the Regulation, and that would not have been obtained without the processing of the primary mineral or metal falling outside the scope of the Regulation. The importer is required to maintain information supported by documentation indicating the point at which the by-product was first separated from its primary mineral or metal falling outside the scope of the Regulation.

Pre-existing stocks. The Regulation does not apply to existing stocks of 3TG created in their current form on a verifiable date prior to February 1, 2013. A date is verifiable if it can be verified by the inspection of physical date stamps on products or from inventory lists.

What Countries or Regions Is the Regulation Concerned With?

The Regulation is concerned with 3TG sourced from conflict-affected and high-risk areas worldwide. The Regulation does not call out specific countries or regions by name. Instead, it contains a general principles-based definition of what it means to be a conflict-affected and high-risk area. These include (1) areas in a state of armed conflict; (2) fragile post-conflict areas; (3) areas with weak or non-existent governance and security, such as failed states; and (4) areas with widespread and systematic violations of international law, including human rights abuses.

How Do I Determine if an Area Is Conflict-Affected and High-Risk?

The Commission is preparing non-binding guidelines to help companies identify conflict-affected and high-risk areas. These guidelines are expected to be released by the end of 2017. They follow on a draft handbook that was published by the Commission in 2015.

The Commission also will select experts through a tender process to draw up an indicative, non-exhaustive list of conflict-affected and high-risk areas. The list also will include additional information to assist companies with their due diligence. The list is scheduled for release in 2019. The Commission intends to update the list on a regular basis.

If I Am a Manufacturer, Importer, Distributor or Retailer of Components or Finished Products, Am I Subject to the Regulation?

The Regulation does not impose compliance obligations on manufacturers of components or finished products, unless they are importing minerals or metals covered by the Regulation. Importers, distributors and retailers of

components or finished products also do not have compliance obligations under the Regulation. However, as discussed later in this Alert, all of the foregoing are encouraged to responsibly source 3TG, establish related compliance programs and make voluntary disclosures.

What Are Importers Required to Do?

Importers of minerals and metals are required to put in place management systems to support their due diligence, conduct supply chain due diligence, manage identified risks and provide specified information to their immediate customers and the public, as further described below. These requirements conform to the OECD Guidance framework (as defined below), with which the Regulation is intended to align.

What is the OECD Guidance Framework?

The Organisation for Economic Co-operation and Development (“OECD”) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (the “OECD Guidance”) provides detailed recommendations to help companies respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices. The OECD Guidance consists of base guidance and two supplements, one for tin, tantalum and tungsten and one for gold. It is organized into a five-step due diligence framework:

- establish strong company management systems;
- identify and assess risks in the supply chain;
- design and implement a strategy to respond to identified risks;
- carry out independent third-party audits of supply chain due diligence at identified points in the supply chain; and
- report on supply chain due diligence.

The OECD Guidance is for use by any company potentially sourcing minerals or metals from conflict-affected and high-risk areas. The OECD Guidance provides recommendations tailored to different points in the supply chain.

What Management Systems Are Importers Required to Adopt?

Importers are required to put in place the following management systems, which are consistent with Step 1 of the OECD Guidance:

- adopt a supply chain policy for 3TG minerals and metals potentially originating from conflict-affected and high-risk areas, and clearly communicate to suppliers and the public up-to-date information on the supply chain policy;
- incorporate in the supply chain policy standards against which supply chain due diligence is to be conducted consistent with the standards set out in the OECD Guidance;
- structure internal management systems to support supply chain due diligence by assigning responsibility to senior management to oversee the supply chain due diligence process, and maintain records of those systems for a minimum of five years;
- strengthen engagement with suppliers by incorporating the supply chain policy into contracts and agreements with suppliers consistent with the OECD Guidance; and
- establish a grievance mechanism as an early-warning risk-awareness system, or provide a mechanism through a multi-stakeholder arrangement or by facilitating recourse to an external expert or body, such as an ombudsman.

What Information Must Be Obtained from Suppliers?

Consistent with Step 2 of the OECD Guidance, the importer must operate a chain of custody or supply chain traceability system. The information to be obtained differs for importers of minerals and metals, recognizing that they are at different points in the supply chain. The purpose of the due diligence is to determine whether the 3TG that

is being imported into the European Union has been mined and processed responsibly to ensure that it is not funding armed groups or security forces in conflict areas.

Minerals. The chain of custody or supply chain traceability system must provide, supported by documentation, the following information:

- a description of the mineral, including its trade name and type;
- the name and address of the supplier to the importer;
- the country of origin of the minerals;
- the quantities and dates of extraction, if available, expressed in volume or weight; and
- if minerals originate from conflict-affected and high-risk areas, or other supply chain risks as listed in the OECD Guidance have been ascertained by the importer, additional information in accordance with the specific recommendations for upstream economic operators set out in the OECD Guidance, such as the mine of mineral origin, locations where minerals are consolidated, traded and processed and taxes, fees and royalties paid.

Metals. The chain of custody or supply chain traceability system must provide, supported by documentation, the following information:

- a description of the metal, including its trade name and type;
- the name and address of the supplier to the importer;
- the name and address of the smelters and refiners in the supply chain of the importer;
- if available, records of the third-party audit reports of the smelters and refiners, or evidence of conformity with a recognized supply chain due diligence scheme; and
- if third-party audit reports are not available:
 - the countries of origin of the minerals in the supply chain of the smelters and refiners; and
 - if the metals are based on minerals originating from conflict-affected and high-risk areas, or other supply chain risks listed in the OECD Guidance have been ascertained by the importer, additional information in accordance with the specific recommendations for downstream economic operators set out in the OECD Guidance.

Importers are required to maintain documentation demonstrating compliance with their due diligence obligations.

What Are Importers Required to Do to Mitigate Sourcing Risk?

Importers of minerals and metals are required to use the information that they obtain through their due diligence to mitigate risk.

Importers of Minerals. An importer of minerals is required to identify and assess the risks of adverse impacts in its mineral supply chain using the information that it obtains through its due diligence against the standards of its supply chain policy and the due diligence recommendations set out in the OECD Guidance. Using this information, it is required to implement a strategy to respond to the identified risks that is designed to prevent or mitigate adverse impacts by:

- reporting findings of the supply chain risk assessment to designated senior management;
- adopting risk management measures consistent with the OECD Guidance, taking into account its ability to influence and, where necessary, take steps to exert pressure on suppliers who can most effectively prevent or mitigate the identified risk; these risk management measures may include continuing trade while simultaneously implementing measurable risk mitigation efforts, suspending trade temporarily while pursuing ongoing measurable risk mitigation efforts or disengaging with a supplier after failed attempts at risk mitigation;

- implementing the risk management plan, monitoring and tracking the performance of risk mitigation efforts, reporting back to designated senior management and considering suspending or discontinuing engagement with a supplier after failed attempts at mitigation; and
- undertaking additional fact and risk assessments for risks requiring mitigation, or after a change of circumstances.

If an importer of minerals pursues risk mitigation efforts while continuing trade or temporarily suspending trade, it is required to consult with suppliers and the stakeholders concerned, including local and central government authorities, international or civil society organizations and affected third parties, and agree on a strategy for measurable risk mitigation in its risk management plan.

An importer of minerals is required to design conflict and high-risk sensitive strategies for mitigation in its risk management plan in accordance with the measures and indicators in Annex III to the OECD Guidance and measure progressive improvement.

Importers of Metals. An importer of metals is required to identify and assess in accordance with the OECD Guidance the risks in its supply chain based on available third-party audits of smelters and refiners and by assessing the smelters' and refiners' due diligence practices. The findings of the risk assessment must be reported to designated senior management, and the importer must implement a response strategy designed to prevent or mitigate adverse impacts consistent with the OECD Guidance.

If there is not a third-party audit report from a smelter or refiner, the importer must identify and assess the risks in its supply chain as part of its own risk management system. In those cases, the importer must carry out audits of its supply chain due diligence through an independent third-party.

When Must An Importer Obtain a Third-Party Audit?

Importers of minerals or metals generally are required to obtain independent third-party audits pertaining to their supply chain due diligence to assess conformity with the Regulation. The audit must:

- include in its scope all of the importer's activities, processes and systems used to implement supply chain due diligence regarding minerals or metals, including its management system, risk management and disclosure of information in accordance with the Regulation;
- have as its objective the determination of conformity of the importer's supply chain due diligence practices with the Regulation; and
- make recommendations to the importer on how to improve its supply chain due diligence practices.

However, importers of metals are exempt from the audit requirement if they make available substantive evidence, including third-party audit reports, demonstrating that all of the smelters and refiners in their supply chain comply with the Regulation. This requirement will be deemed to be fulfilled if the importer of metals demonstrates that it is sourcing exclusively from smelters and refiners listed by the Commission as global responsible smelters and refiners. This exemption is intended to encourage importers to source 3TG exclusively from compliant smelters and refiners.

How Will Importers Know if They Are Purchasing Responsibly Sourced 3TG?

The Commission is required to publish on the Internet a list of global responsible smelters and refiners. The list will take into account smelters and refiners covered by supply chain due diligence schemes recognized by the Commission.

The Commission is required to use its best endeavors to identify those smelters and refiners included on the list that source at least partially from conflict-affected and high-risk areas, in particular by utilizing information provided by recognized due diligence schemes.

Are There Currently Any Recognized Due Diligence Schemes?

At present, there are not any recognized due diligence schemes. The recognition process is discussed in the next FAQ.

How Does a Due Diligence Scheme Get Recognized?

Supply chain due diligence schemes may request recognition by the Commission. Supplemental legislation setting out the methodology and criteria for assessing due diligence schemes is expected to be completed in 2018. The Commission is required to establish and keep up to date a register of recognized supply chain due diligence schemes. That register is required to be made publicly available on the Internet.

Existing industry due diligence schemes based on the OECD Guidance methodology and criteria, such as the Conflict-Free Smelter Program, the London Bullion Market Association Responsible Gold Guidance and the Responsible Jewellery Council Chain-of-Custody Standard, are expected to be recognized. These existing due diligence schemes currently are used by companies in connection with their due diligence under the U.S. Conflict Minerals Rule.

The foregoing due diligence schemes and others are undergoing an assessment of their alignment with the OECD Guidance. We hosted a webinar on the alignment assessment process as part of our Advanced Supply Chain Compliance & CSR Webinar Series. That webinar is available [here](#).

Do Importers Have Disclosure Obligations under the Regulation?

Importers have specified disclosure obligations to customers, the public and regulators, as described below.

Customers. Importers must make available to their immediate downstream purchasers all information gained and maintained pursuant to their supply chain due diligence, with due regard for business confidentiality and other competitive concerns.

Publicly. Importers must, on an annual basis, publicly report as widely as possible, including on the Internet, on their supply chain due diligence policies and practices for responsible sourcing. The report must contain the steps taken by the importer to implement its management system and risk management obligations. In addition, the report must contain a summary of any third-party audit that is commissioned, including the name of the auditor, with due regard for business confidentiality and other competitive concerns.

If an importer of metals can reasonably conclude that the metals are derived only from recycled or scrap sources, it must, with due regard for business confidentiality and other competitive concerns, publicly disclose its conclusion and describe in reasonable detail the supply chain due diligence measures it exercised in reaching that conclusion.

Regulators. Importers must make available to EU member state competent authorities the reports of any third-party audit that they commission or evidence of conformity with a supply chain due diligence scheme recognized by the Commission.

Does the Regulation Require Companies Further Downstream to Make Public Disclosures?

The Regulation does not require companies that are downstream from an importer – such as a product or component manufacturer, distributor or retailer – to make public disclosures.

However, the Commission intends to launch a transparency database in 2018 to provide a single location for these companies to voluntarily report on their due diligence practices. In addition to creating greater transparency, the database is intended to create peer pressure to report and engage in due diligence.

Separate from the Regulation, EU entities that are subject to the Non-Financial Reporting Directive may need to report on their 3TG due diligence. According to the voluntary guidelines on non-financial reporting published by the Commission this summer, where relevant and proportionate, companies are expected to disclose information on due

diligence to ensure responsible supply chains for 3TG from conflict-affected and high-risk areas. According to the guidance, disclosures should be consistent with the OECD Guidance, including (1) relevant information on the performance of policies, practices and results on due diligence and (2) the steps taken to implement the OECD Guidance framework, taking into account the company's position in the supply chain. Companies also are expected to disclose key performance indicators relating to (1) the nature and number of risks identified, (2) the measures taken to prevent and mitigate these risks and (3) how the company has strengthened its due diligence efforts over time.

When Does the Regulation Take Effect?

The due diligence and other obligations applicable to importers will take effect on January 1, 2021. The extended transition period is intended to allow sufficient time to establish procedures and control mechanisms, prepare guidance and recognize due diligence schemes. However, we expect that many larger downstream companies and the NGO community will push for earlier voluntary compliance by importers.

Do EU Member States Need to Adopt Implementing Legislation?

No. As a regulation (in contrast to a directive), the EU's conflict minerals legislation will be directly and uniformly applicable in all member states from its effective date, without the need for the member states to draft and adopt separate national legislation.

Who Will Be Responsible for Enforcing the Regulation?

EU member states' competent authorities will be responsible for ensuring effective and uniform implementation of the Regulation throughout the European Union. Member states are required to inform the Commission of their designated competent authority by December 9, 2017.

How Will the Regulation Be Enforced?

Member state competent authorities are responsible for carrying out ex-post checks in order to ensure that importers are complying with the Regulation. The Commission is required to prepare non-binding guidelines detailing the steps to be followed by member state competent authorities carrying out the ex-post checks. Each member state is required to establish rules applicable to infringements of the Regulation.

Will the Regulation Be Expanded to Cover Additional Points in the 3TG Supply Chain?

The Commission is periodically required to review and report on the functioning and effectiveness of the Regulation. The first review will occur in 2023. Additional reviews will occur every three years thereafter.

Reviews are required to take into account the impact of the Regulation on the ground, including on the promotion and cost of responsible sourcing of 3TG from conflict-affected and high-risk areas and the impact of the Regulation on EU economic operators. Reviews also are required to include an independent assessment of the proportion of total downstream EU economic operators with 3TG in their supply chains that have due diligence schemes in place. In addition, the review is required to assess the adequacy and implementation of these due diligence schemes as well as the need for additional mandatory measures in order to ensure sufficient leverage of the total EU market on the responsible global supply chain of minerals.

Has the EU Adopted or Is It Considering Other Measures to Encourage Responsible Sourcing of 3TG?

The Regulation is one piece of a multi-pronged strategy to encourage responsible sourcing of 3TG, which, among other things, includes the following:

Multi-stakeholder Initiatives. The European Partnership for Responsible Minerals has been launched by selected EU member states, the Commission and stakeholders from the NGO and business communities. The Partnership supports the socially responsible extraction of minerals in conflict zones and other high-risk areas. During November

2016, we hosted a webinar on the Partnership as part of our Advanced Supply Chain Compliance & CSR Webinar Series. That webinar is available [here](#).

In-region Support. The EU has allocated €20 million to support in-region projects to help reduce conflict in areas from which 3TG is sourced.

Public Procurement. The Commission has indicated that it will require in its public procurement contracts for finished goods that contain 3TG that vendors comply with the OECD Guidance.

Product Labeling. The Commission has called upon EU member states to separately develop complementary national initiatives relating to consumer information and labeling.

Is the EU Regulation Similar to the U.S. Conflict Minerals Rule?

The Regulation and the U.S. Conflict Minerals Rule both apply to 3TG and both utilize the OCED Guidance framework for due diligence. However, there are significant differences between the Regulation and the U.S. Rule. The principal differences include the following:

Subject Companies. The U.S. Rule imposes due diligence and disclosure requirements on U.S. public companies anywhere in the supply chain. The EU instead seeks to regulate further up the supply chain, focusing on 3TG importers.

Included Minerals and Metals. The U.S. Rule contains a generic definition of 3TG, as compared to the more detailed Annex included in the Regulation. Although there is significant overlap, in-scope 3TG is not the same under the Regulation and the U.S. Rule.

Geographic Scope. The U.S. Rule is focused on the Democratic Republic of the Congo (“DRC”) region. The Regulation applies to minerals and metals sourced from conflict-affected and high-risk areas worldwide.

For additional information on the U.S. Rule, see the [Ropes & Gray Supply Chain Compliance and Corporate Social Responsibility website](#).

Selected Take-Aways for Downstream Companies

The U.S. Conflict Minerals Rule Will Continue to Be the Primary Driver of Compliance Programs, for Now

Assuming that the U.S. Rule is not repealed or modified, it will for the time being continue to drive the compliance procedures and programs at most downstream companies, whether they are public or private, large or small or located in the United States, the European Union or elsewhere. As noted earlier, the Regulation does not take effect until 2021. In addition, because it only imposes obligations on 3TG importers, it will not require downstream companies to implement compliance programs to the same extent as under the U.S. Rule. However, as more EU downstream companies begin to publicly report on their 3TG compliance programs, either voluntarily through the transparency database or pursuant to the Non-Financial Reporting Directive, we expect to see the Regulation have an impact on downstream compliance practices. Although beyond the scope of this Alert, we also expect the French human rights-focused Duty of Vigilance Law, which was adopted earlier this year, to have some impact on downstream 3TG compliance programs.

For additional information on some of the recent developments affecting the U.S. Rule, see our Alerts and White Papers [here](#).

Some Manufacturers Will Need to Broaden Their Compliance Programs

The Commission estimates that the Regulation will apply directly to between 600 and 1,000 importers. The vast majority of product and component manufacturers are not importers within the meaning of the Regulation. However, some larger companies that manufacture in the European Union also are importers of 3TG metals and will therefore be required to comply with the Regulation. As an initial matter, if they have not already done so, compliance

personnel at companies with large EU manufacturing operations should determine whether they directly import 3TG metals into the European Union. The inquiry will need to be specific to the metals listed on Annex I.

The Regulation Will Draw More Attention to 3TG Sourcing from Other Regions

The global focus of the Regulation will over time draw more attention to other 3TG-producing areas of the world, beyond the DRC, that may be conflict-affected and high-risk. To the extent other areas are widely recognized as conflict-affected and high-risk, we expect that leading downstream companies will expand and refine their supply chain inquiries, policies and other procedures to take these areas into account, both to mitigate supply chain risk and as part of their commitment to responsible sourcing. This will in turn put pressure on other portions of the supply chain to follow suit. We also expect that many larger downstream companies, not just those based in the European Union, will over time expand their supply chain disclosures to specifically address 3TG sourcing from these other areas.

As noted earlier, the Commission is preparing non-binding guidelines to help companies identify conflict-affected and high-risk areas, and it will select experts via a tender process to draw up an indicative, non-exhaustive list of these areas. There are likely to be good faith differences of opinion as to whether a particular area is conflict-affected and high-risk and how to demarcate the area. For these reasons, it is important for larger companies and industry associations to be part of this dialogue with governments, NGOs and other members of civil society.

Expect Pressure on Responsible Sourcing of 3TG and Related Disclosures to Continue to Increase

The NGO community has been critical of the limited applicability of the Regulation. Downstream companies should expect that NGOs will continue to advocate for due diligence and disclosure by the downstream, including through one-on-one engagement, benchmarking studies and “name and shame” and social media campaigns. NGOs also may lobby for national legislation that addresses perceived gaps in the Regulation, similar in approach to that which has been adopted or proposed relating to anti-human trafficking, especially in EU member states that were supportive of mandatory 3TG due diligence for the entire supply chain.

Although additional EU legislation is not imminent and the Regulation was many years in the making, at the press conference announcing the political agreement on the Regulation, the Chair of the EU Parliament’s Committee on International Trade foreshadowed what may perhaps be ahead. He indicated that the Regulation “opens the door for a new momentum in trade policy,” and that the Parliament will look at other sectors and value chains to improve living conditions for workers and the environment in the entire value chain of products.

About Our Supply Chain Compliance and Corporate Social Responsibility Practice

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

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