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Revisiting Conflict Minerals Compliance – Developments, Trends and Action Items for the Current Reporting Year and Beyond

The seventh year of filings under the U.S. Conflict Minerals Rule will be due in slightly under three months. At most companies, conflict minerals reporting and compliance have been more or less static for the last few years. It is time for many companies to take a fresh look at their conflict minerals disclosure and compliance program. In some cases, disclosures have become outdated and compliance programs have not kept pace with market developments. In addition, over the last few years, the global regulatory landscape has continued to evolve, both with respect to conflict minerals specifically and human rights more broadly, with more changes on the way. Furthermore, investor expectations concerning supply chains – as part of ESG integration by mainstream investors – continue to increase. In this Article, we discuss these and other developments and trends, as well as action items for companies to consider.

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EU Conflict Minerals Compliance Is Drawing Near, and Will Affect U.S. Compliance Practices

The EU Conflict Minerals Regulation takes effect on January 1, 2021. The EU Regulation generally will require importers of tin, tantalum, tungsten and gold (“3TG” or “conflict minerals”) into the European Union to establish management systems to support due diligence, conduct due diligence and make disclosures concerning the 3TG that they import into the European Union. For a more detailed discussion of the EU Regulation, see our earlier Alerts [here](#), [here](#) and [here](#).

Although often lumped together with the U.S. Conflict Minerals Rule, the EU Regulation is very different than its U.S. counterpart:

- The EU Regulation applies to importers into the European Union of 3TG ores, concentrates and metals, in that form. These can be importers who supply ores or unrefined minerals to EU smelters and refiners or importers who import specified 3TG metals processed outside of the European Union in the form of bars, rods, sheets, powders, etc. The EU Regulation does not impose compliance obligations on manufacturers of components or finished products, unless they are directly importing into the EU covered minerals or metals contained in the components or products. Importers, distributors and retailers of components or finished products also do not have compliance obligations under the EU Regulation. In contrast, the U.S. Rule applies further downstream to public companies that manufacture or contract to manufacture products that contain 3TG.
- The EU 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. In certain respects, the compliance obligations for minerals and metals are different. The U.S. Rule contains a more general definition of “conflict minerals.”
- Small volume importers of 3TG will be exempt under the EU Regulation. There is no de minimis exemption under the U.S. Rule.
- The EU Regulation is concerned with 3TG sourced from conflict-affected and high-risk areas (“CAHRAs”) anywhere in the world. The EU 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 CAHRA. CAHRAs are discussed in more detail later in this Article. In contrast, the U.S. Rule divides the world into the Democratic Republic of the Congo region and everywhere else.

- Under the EU Regulation, 3TG importers have specified disclosure obligations to customers, the public and regulators. 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. In addition, importers must, on an annual basis, publicly report on their supply chain due diligence policies and practices for responsible sourcing. Importers also must make available to EU member state competent authorities the report of any third-party audit that they commission or evidence of conformity with a supply chain due diligence scheme recognized by the European Union.

The EU Regulation does not require companies further downstream – such as product or component manufacturers, distributors or retailers – to make public disclosures. The European Commission is, however, establishing a transparency platform to provide a single location for downstream companies to voluntarily report on their conflict minerals due diligence practices. In addition to creating greater transparency, the platform is intended to create peer pressure for downstream companies to report and engage in due diligence.

Pursuant to a separate EU requirement, not all conflict minerals reporting by downstream EU companies is voluntary. Some downstream EU companies already separately are required to make disclosures concerning conflict minerals under the EU Non-financial Reporting Directive. However, based on a recent analysis by the Alliance for Corporate Transparency of the sustainability reports made pursuant to the Directive by 1,000 companies, only a small percentage currently provide conflict minerals-related disclosures, primarily centered around policies rather than outcomes. For further information on the Non-financial Reporting Directive as it relates to conflict minerals, see our earlier Alert [here](#).

We expect that the EC's voluntary conflict minerals reporting platform will result in more EU companies publishing conflict minerals-related information and more detailed information being published than companies currently are providing under the Non-financial Reporting Directive. A significant number of voluntary reporters also will be enhancing their management systems and due diligence to align with the EU Regulation.

Only a small number of U.S.-based companies that file under the U.S. Rule will also be subject to the EU Regulation. Nevertheless, the conflict minerals compliance programs of a large number of U.S.-based (and foreign) companies will be impacted by the EU Regulation, as discussed in this Article.

Conflict Minerals Compliance Will Broaden to Include Other Conflict-Affected and High-Risk Areas Outside of the DRC Region

The global focus of the EU Regulation will soon start to draw more attention to other CAHRAs beyond the Democratic Republic of the Congo region. We expect that leading downstream companies, in the European Union, the United States and elsewhere, will over time refine and expand their supply chain policies, inquiries and other procedures to take these other CAHRAs into account, both to mitigate supply chain risk and as part of their commitment to responsible sourcing and human rights. This will in turn require or at least put pressure on other tiers of the supply chain and peer companies to follow suit.

In addition, as conflict minerals compliance programs become more global in approach, conflict minerals disclosure will become less tied to the U.S. Rule. However, for companies subject to the U.S. Rule, we expect any additional disclosures not required by the U.S. Rule to be made primarily on websites and in sustainability or CSR reports rather than in their Form SD and/or Conflict Minerals Report.

European Commission Guidelines

During August 2018, the European Commission published non-binding guidelines for the identification of CAHRAs and other supply chain risks. Over time, these guidelines will affect due diligence practices and the areas that are

characterized as CAHRAs by NGOs and other stakeholders. This will in turn affect conflict minerals compliance programs.

The EC guidelines discuss four principal topics:

General Due Diligence Concepts and Steps

Consistent with both the UN Guiding Principles on Business and Human Rights and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (“OECD Guidance”), the EC guidelines indicate that applicable companies should conduct risk-based due diligence to ensure that they do not intentionally or unintentionally contribute to or become associated with significant adverse impacts associated with their activities or sourcing decisions, including armed conflict and serious human rights abuses. Risks are defined in relation to the potentially adverse impacts of a company’s operations, which result from its own activities or which may be directly linked to operations, products or services by its business relationships with third parties, including suppliers and other entities in the supply chain. Adverse impacts may include external impacts such as harm to people or internal impacts such as reputational damage or legal liability for the company, or both external and internal impacts. The EC guidelines indicate that a good faith effort should be made to identify and assess location, supplier or circumstantial-related risks and put in place due diligence measures adapted to the specific requirements of such risks.

CAHRAs Defined

The EU Regulation defines CAHRAs as areas in a state of armed conflict or 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. CAHRAs are not limited to nation-states and also can be sub-national. Elements of this definition are further discussed in the guidelines:

- *State of armed conflict:* presence of armed conflict, widespread violence or other risks of harm to people, but excluding internal disturbances and tensions such as riots and isolated and sporadic acts of violence.
- *Fragile post-conflict areas:* areas where active hostilities have ceased that have a weak capacity to carry out basic governance functions and lack the ability to develop mutually constructive societal relationships due to the prior conflict.
- *Failed states:* involves an implosion of power and authority structures, a collapse of law and order and the absence of institutions capable of representing the state.

Information for Identifying CAHRAs

The EC guidelines include a non-exhaustive list of 23 open source resources to help identify CAHRAs. The resources are grouped into three areas:

- *Conflict:* for the assessment of whether an area is in a “state of armed conflict” or is a “fragile post-conflict area.”
- *Governance:* for the assessment of the extent to which an area witnesses weak or non-existent governance and security.
- *Human rights:* for the assessment of whether an area is affected by widespread and systematic violations of international law, including human rights abuses.

In addition to the guidelines, the European Commission has indicated that it will call upon external expertise to provide an indicative, non-exhaustive and regularly updated list of CAHRAs.

Red Flags for Enhanced Due Diligence

This portion of the EC guidelines is intended to assist companies to obtain the relevant information on red flag situations and tailor their due diligence appropriately. The guidelines describe more than 20 red flag indicators and examples relating to (1) mineral origin and transit, (2) suppliers and (3) circumstances where anomalies or unusual circumstances identified give rise to a reasonable suspicion that the 3TG may contribute to conflict or serious abuses associated with their extraction, transport or trade.

New State Procurement Requirements Will Affect Some Companies

After a multi-year hiatus, in 2019, legislation was introduced at the U.S. state level pertaining to the procurement of products containing 3TG. Previously, legislation was adopted in California (2011), Maryland (2012) and Massachusetts (2017).

Oregon

During September 2019, legislation took effect in Oregon relating to State procurement of products containing 3TG. The law becomes operative on January 1, 2021.

Under the law, solicitation documents for public contracts will require prospective contractors to state in their bid or proposal (1) whether and to what extent the materials the contractor intends to use in performing the contract are 3TG and (2) that the contractor's disclosures, policies, practices and procedures with respect to procuring 3TG comply with the OECD Guidance.

A prospective contractor may meet the foregoing requirements by linking or referring in a bid or proposal to a description of its 3TG disclosures, policies, practices and procedures on its website or in another publicly available official publication, such as its Form SD and/or Conflict Minerals Report.

The Oregon law indicates that, notwithstanding State law that requires a contracting agency to award a public contract to the lowest responsible bidder or the prospective contractor that submits the best proposal or quotation, if the procurement requires or will use 3TG, the State contracting agency will give a preference to prospective contractors that meet the requirements of the Oregon conflict minerals procurement law.

Minnesota

In 2019, a bill was introduced in Minnesota that would prohibit government agencies from procuring supplies or services from companies that fail to disclose, to the extent required by U.S. federal law, information relating to conflict minerals originating in the DRC region. The Minnesota bill has not yet been adopted.

3TG Compliance Programs Should Take into Account Other Current Compliance Requirements, and Additional Compliance Requirements Are Likely

3TG sourcing also may raise compliance considerations under other legislation, beyond the U.S. Rule and the EU Regulation.

OFAC Sanctions and Enforcement Actions

Numerous media reports in 2019 indicated that Venezuela has been selling significant gold reserves via Ugandan intermediaries to generate hard currency. During March 2019, the U.S. Department of the Treasury's Office of Foreign Assets Control imposed sanctions against CVG Compania General de Minería de Venezuela CA, or Minerven, the Venezuelan state-run gold processor, and its President. U.S. sanctions involving Venezuela were further strengthened in August 2019, as discussed in our earlier Alert [here](#).

There also continue to be allegations of gold from sources affiliated with sanctioned entities in Russia and Zimbabwe making its way into global supply chains.

In addition, in a rare enforcement action relating to supply chains, in January 2019, OFAC announced that e.l.f. Cosmetics, Inc. had agreed to pay \$996,080 to settle its potential civil liability for 156 apparent violations of the North Korea Sanctions Regulations. According to the announcement, e.l.f. imported products from China that, unbeknownst to e.l.f., contained materials sourced by its Chinese suppliers from North Korea. OFAC noted as an aggravating factor that e.l.f.'s OFAC compliance program was either non-existent or inadequate throughout the time period in which the apparent violations occurred, and that it appeared not to have exercised sufficient supply chain due diligence while sourcing products from a region that poses a high risk to the effectiveness of the NKSR. Although not involving 3TG supply chains, the same legal principles could apply to sanctioned sources of 3TG in the supply chain. The e.l.f. enforcement action is discussed in additional detail in our earlier Alert [here](#).

Section 307 of the Tariff Act

Section 307 of the Tariff Act prohibits the importation into the United States of goods, wares, articles and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor, forced labor or indentured labor under penal sanctions. For decades, this prohibition was largely negated by what was known as the "consumptive demand exception." That exception was repealed in early 2016 as part of the U.S. Trade Facilitation and Trade Enforcement Act.

Since the repeal of the consumptive demand exception, U.S. Customs and Border Protection has issued 13 withhold release orders denying importation of goods into the United States. This compares to 32 WROs in the approximately 60 prior years. These 13 WROs cover a wide range of products and geographies. The most recent set of five WROs, from October 2019, included gold from artisanal small mines in the eastern DRC.

The U.S. Department of Labor's 2018 List of Goods Produced by Child Labor or Forced Labor lists 22 countries where gold is mined using child and/or forced labor. Two countries are listed for tin and one country is listed for each of tantalum and tungsten.

The Countering America's Adversaries Through Sanctions Act

Section 321(b) of CAATSA, which was adopted in 2017, creates a presumption that goods, wares, articles and merchandise mined, produced or manufactured wholly or in part by the labor of North Korean nationals or citizens, wherever located, involve forced labor for purposes of Section 307 of the Tariff Act. These goods will be denied U.S. entry absent clear and convincing evidence that they were not produced using forced labor. For our earlier Alert on the CAATSA, see [here](#).

Mandatory Human Rights Due Diligence Legislation

Additional legislation requiring companies to conduct human rights due diligence is likely to be adopted in the next few years. The French corporate duty of vigilance law, which requires human rights due diligence, risk mitigation and related reporting by a small number of large French companies, took effect in 2017. Since that time, there have been calls across several additional jurisdictions, including at the EU level, for legislation that would make human rights due diligence mandatory for a much larger number of companies. Some of these initiatives are discussed in our earlier Alerts [here](#), [here](#) and [here](#).

The most recent legislative counter-proposal to a popular initiative relating to mandatory human rights due diligence adopted by the Swiss Council of States in December 2019 would specifically apply to conflict minerals (as well as child labor). As adopted by the Council of States, the legislation would apply to Swiss companies that, alone or together with their domestic or foreign subsidiaries, exceed two of the following thresholds in two consecutive financial years: (1) a balance sheet total of SFr40MM; (2) sales of SFr80MM; and (3) 500 full-time positions on average annually. If the current counter-proposal is adopted, the Swiss legislation will apply to a significant number of companies.

A broad-based human rights due diligence requirement should, for relevant companies, encompass conflict minerals, even if conflict minerals are not explicitly referenced in the legislation.

3TG Compliance Programs Also Should Take into Account Broader Trends in Corporate Social Responsibility and Human Rights Compliance

Regulation is just one driver of supply chain compliance programs. Selected other recent developments and drivers are highlighted below.

Corporate Purpose

Corporate purpose has been a discussion topic in BlackRock's annual letter to CEOs for each of the past three years. It has been a focus of other large institutional investors and other constituencies as well.

This past summer, the Business Roundtable published an updated Statement on the Purpose of a Corporation. The Statement was signed by approximately 200 BRT members, including many of the world's largest companies. The Statement indicates that the signatories share a commitment to all of their stakeholders, including suppliers. The signatories commit to dealing fairly and ethically with suppliers. The Statement goes on to indicate that the signatories are dedicated to serving as good partners to the other companies, large and small, that help them meet their missions. Over time, the Statement is likely to have an impact on public company sustainability disclosures and relevant policies, including relating to supply chains, at both BRT signatories and other companies. For a further discussion of the Statement, see our earlier Alert [here](#).

More recently, the World Economic Forum launched its Davos Manifesto. The Davos Manifesto is the WEF's spin on corporate purpose and also recognizes suppliers as a stakeholder to be served by companies. The Davos Manifesto explicitly calls for integrating respect for human rights into the entire supply chain as part of a shared commitment to policies and decisions that strengthen the long-term prosperity of a company.

The UN Sustainable Development Goals

Over the last few years, even before the new stakeholder-focused statements of corporate purpose from the BRT and WEF, companies began to publicly align their business practices with the UN Sustainable Development Goals. The SDGs, which were adopted in 2015, consist of 17 economic, social and environmental goals with 169 associated targets.

Three SDGs in particular are linked to responsible minerals sourcing: Goal 8, Decent Work and Economic Growth; Goal 12, Responsible Consumption and Production; and Goal 16, Peace, Justice and Strong Institutions.

Human Rights Policies

As part of proactively managing human rights risks in their supply chains, many companies have adopted human rights policies. In some cases, this was done in response to shareholder pressure. In 2019, a significant number of companies received shareholder proposals seeking to require the adoption of human rights policies. For this year's annual meeting season, the Interfaith Center on Corporate Responsibility's 2020 Proxy Resolutions and Voting Guide includes six human rights policy proposals sponsored by ICCR members. Human rights policy proposals also have been submitted by other shareholders at additional companies.

Among other things, human rights policies typically set forth labor expectations for supply chains, including with respect to child and forced labor. These policies typically extend beyond tier-1 suppliers to additional tiers of the supply chain. They often also are expressly aligned with the UN Guiding Principles on Business and Human Rights, which include expectations for avoiding and mitigating adverse human rights impacts.

Media Reports Relating to 3TG

During 2019, media reports criticized by name large, well-known companies for potentially having illegally-mined gold from Colombia in their supply chains. According to The New York Times, gold has replaced cocaine as the main source of income for organized crime in Colombia.

Other 2019 media reports linked by name large, well-known electronics companies to gold from a mine in Tanzania that was criticized for environmental issues and violence by security personnel.

We expect media interest in 3TG sourcing to continue as the EU Regulation starts to focus attention on other CAHRAs, as well as due to mainstream interest in both environmental sustainability and human rights issues in supply chains.

Conflict Minerals Are Being Taken into Account as Part of ESG Integration

Mainstream investors are taking conflict minerals compliance into account at selected companies as part of their integration of ESG factors into investment decisions and ongoing engagement. Leading ESG ratings used by investors already include indicators relating to conflict minerals disclosures and compliance program elements, which facilitates investor assessment of this issue.

Conflict minerals also is caught up in the broader call by investors for comparable, financially relevant, decision-useful sustainability information. Large institutional asset managers, including BlackRock, State Street and Vanguard, are asking companies to publish disclosures aligned with the Sustainability Accounting Standards Board standards, which were codified in late 2018. BlackRock has asked companies to do so by year-end. There are 77 industry-specific SASB standards grouped under 11 sectors. 3TG are addressed in 14 standards across seven sectors, including in the context of critical materials.

More generally, we expect investors' focus on supply chain risks to increase, among other reasons, given the fragility of many supply chains, as underscored by the current coronavirus pandemic. One of these areas of focus will be human rights in supply chains. Human rights already is indicated as an area of focus in the stewardship reports and other public communications of many leading institutional investors.

Cobalt Sourcing Is Coming Under Pressure

In early 2016, an influential report was published by Amnesty International describing human rights issues associated with DRC cobalt mining. Since that time, the focus on responsible cobalt sourcing has steadily increased, to some extent paralleling prior developments relating to 3TG.

In 2018, the Responsible Minerals Initiative piloted a Cobalt Reporting Template, modeled on its universally used Conflict Minerals Reporting Template. Revision 2.0 of the Cobalt Reporting Template was released in October 2019. An increasing number of companies are using the Cobalt Reporting Template to request information from suppliers on the source of the cobalt in their products and the suppliers' related compliance procedures. A large number of cobalt refiners are undergoing RMI Responsible Minerals Assurance Process assessments. The first cobalt refiner received a conformant designation in July 2019, and there currently are four conformant cobalt refiners and 17 active refiners. Once a critical mass of cobalt refiners is conformant, we expect there to be pressure to use only cobalt processed by conformant refiners.

In recognition of growing investor interest in this issue, during April 2018, the UN-supported Principles for Responsible Investment published a report discussing how investors can promote responsible cobalt sourcing practices. PRI is a potent force for driving change in supply chain practices. According to information published by PRI, its 2000+ signatories have more than \$80 trillion in assets under management.

In addition, in its 2019 Mining the Disclosures Report, Responsible Sourcing Network for the first time included a scored analysis of cobalt disclosures by 27 companies in the technology, automotive and jet engine sectors. RSN is a project of As You Sow, which many companies are familiar with from the shareholder proposals they have submitted. We expect cobalt sourcing to be an increasing focus of both RSN and As You Sow.

Finally, cobalt supply chains are creating litigation risk for downstream companies. During December 2019, a class-action lawsuit was filed against several leading technology companies relating to forced labor in DRC cobalt mining. The defendants are downstream companies many levels removed from cobalt mining and processing. The plaintiffs are alleging participation by the defendants in a "venture" with their supply chains that the defendants knew or should have known engaged in forced labor, in violation of the Trafficking Victims Protection Reauthorization Act.

Recommended Near-term Action Items

Take a Fresh Look at Your Disclosure for the Upcoming Conflict Minerals Rule Filing

For the last few years, most companies have made minimal year-over-year changes to their filings under the U.S. Rule. In many cases, all that has changed are the dates on the filing and the smelter and refiner information disclosed. On a recent TheCorporateCounsel.net webcast on the U.S. Rule at which Michael Littenberg was a panelist, some of the panelists characterized filings as having been on "autopilot" for the last few years.

Many filings are due for a refresh this year. A significant number of last year's filings that we reviewed use outdated terminology. In addition, at many companies, responsibility for the filing has transitioned, in some cases several times, to personnel not as familiar with the U.S. Rule as the original internal owners and that also do not have visibility on the reasoning behind earlier disclosure decisions. As a result, disclosure that has been carried over from year to year that once made sense may merit revision. Furthermore, with the passage of time and personnel turnover in legal, compliance and operations, some filings likely no longer sync up with the compliance programs they purport to describe.

Companies also should ensure their disclosure is aligned with applicable third-party rankings and ratings. Many companies that are ranked by the Responsible Sourcing Network in its annual Mining the Disclosures survey do not

receive all the credit to which they are entitled. In addition, for companies in some industries, ESG ratings take into account conflict minerals disclosures, so those ratings should be considered as well.

Conflict Minerals Rule disclosures also should be reviewed against other human rights, supply chain and responsible sourcing-related disclosures on company websites and in sustainability or CSR reports. In our reviews, we often find that these and other CSR disclosures are not aligned across platforms. In addition, disclosures should be reviewed for consistency with human rights, supply chain and other relevant policies.

Finally, companies should assess whether their disclosure relating to conflict minerals – either in their Conflict Minerals Rule filing or elsewhere – is aligned with the applicable SASB standard.

Revisit Your Conflict Minerals Policy

Many conflict minerals policies also merit a refresh, especially policies adopted several or more years ago. Older policies suffer from many of the same defects as filings. In many cases, older conflict minerals policies are no longer aligned with compliance programs or other responsible sourcing, human rights or supply chain policies. In addition, many older policies use outdated terminology.

Companies also are beginning to align conflict minerals policies with the pending EU Regulation. In addition, some companies are starting to broaden their policies to address responsible sourcing of other minerals, such as cobalt.

Assess the Adequacy of Your Conflict Minerals Compliance Program

As discussed in this Article, the U.S. Rule is not all companies should take into account in connection with their 3TG compliance. Companies should assess whether their 3TG compliance programs are sufficiently flexible to address evolving commercial, consumer and other stakeholder expectations, in particular relating to the EU Regulation and its focus on CAHRAs globally. In addition, companies should assess whether their 3TG compliance programs appropriately take into account and are integrated with other areas of compliance, including Section 307 of the Tariff Act, CAATSA, OFAC sanctions and even state procurement requirements. Companies also should assess whether their conflict minerals compliance programs are aligned with their other programs, policies and procedures relating to responsible sourcing, human rights and other supply chain matters.

Determine Whether Your Company Is Required to Comply with the EU Regulation

The European Commission has estimated that the EU Regulation will apply directly to between 600 and 1,000 3TG importers. As discussed earlier in this Article, the vast majority of product and component manufacturers are not importers within the meaning of the EU 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 EU Regulation. If not already done, compliance personnel at companies with large EU manufacturing operations should determine whether they directly import 3TG into the European Union. The inquiry will need to be specific to the metals listed on Annex I to the EU Regulation.

About Our Practice

Ropes & Gray has a leading ESG, CSR and supply chain compliance practice. We offer clients a comprehensive approach to ESG, CSR and supply chain compliance through a global team with members in the United States, Europe and Asia. In addition, senior members of the practice have advised on ESG, CSR and supply chain compliance matters for almost 30 years, enabling us to provide a long-term perspective that few firms can match.

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

To discuss how we can assist you with your conflict minerals compliance, click [here](#).

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