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Corporate Social Responsibility Disclosure and Compliance: An Overview of Selected Legislation, Guidance and Voluntary Initiatives

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Corporate social responsibility disclosure and compliance is an increasing area of focus for many in-house legal departments. This Article provides an overview for in-house counsel of selected legislation, guidance and voluntary initiatives driving CSR disclosure and compliance in the United States and abroad.

CONFLICT MINERALS (TIN, TANTALUM, TUNGSTEN AND GOLD)

Adopted Legislation

U.S. Conflict Minerals Rule (2012): If tin, tantalum, tungsten or gold is necessary to the functionality or production of a product manufactured or contracted to be manufactured by a U.S. public company registrant, it must conduct a “reasonable country of origin inquiry” to determine whether the necessary 3TG minerals in the product originated in the Democratic Republic of the Congo or an adjoining country. If the minerals originated outside of the DRC region or are from recycled or scrap sources, Securities and Exchange Commission Form SD requires the registrant to disclose its determination and describe its reasonable country of origin inquiry and the related results. Form SD is an annual filing requirement. If the registrant knows or has reason to believe that necessary 3TG minerals are from the DRC region, it must conduct enhanced due diligence and file a separate Conflict Minerals Report exhibit to its Form SD, detailing the measures taken to exercise due diligence on the source and chain of custody of the minerals and information concerning the processing facilities, the country of origin and the efforts to determine the mine or location of origin. The Rule also contains mandatory independent private sector audit and “labeling” requirements, which have been stayed pursuant to SEC guidance issued in 2014.

EU Conflict Minerals Regulation (2017): The regulation requires EU importers of tin, tantalum, tungsten or gold in mineral or metal form to conduct due diligence and make certain disclosures to their immediate purchasers and publicly concerning the 3TG that they import into the European Union. The regulation also creates a voluntary reporting mechanism for downstream companies to encourage them to responsibly source 3TG. The regulation takes effect on January 1, 2021.

Guidance and Voluntary Initiatives

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas (Third Edition, 2016): Due diligence under both the U.S. Conflict Minerals Rule and the EU regulation must be conducted using the OECD Guidance framework. The OECD Guidance advocates a five-step due diligence framework:

- (1) establish strong company management systems;
- (2) identify and assess risks in the supply chain;

- (3) design and implement a strategy to respond to identified risks;
- (4) carry out independent third-party audit of supply chain due diligence at identified points in the supply chain; and
- (5) report on supply chain due diligence.

In addition to base guidance, the OECD Guidance includes supplements for tin, tantalum and tungsten and for gold.

China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters Conflict Minerals Guidance (2015): The CCCMC's voluntary guidance applies to Chinese companies at any point in the supply chain. The guidance is aligned with the OECD Guidance five-step framework and is intended to help Chinese companies to address inquiries under the U.S. and EU legislation.

RESOURCE EXTRACTION

Adopted Legislation

EU Accounting and Transparency Directives (2013): The Directives require listed and large non-listed extractive and logging companies to each year publicly report, at a project level, payments of more than €100,000 that they make to governments. Extractive companies include those involved in the exploration, prospecting, discovery, development and extraction of minerals, oil, natural gas deposits or other materials. Logging activities include clear cutting, selective logging and thinning on land containing primary forest areas as well as the disturbance of primary forests by mining, mineral, water, oil or gas extraction activities. Listed entities include those with securities traded on an exchange in an EU member state. Large undertakings subject to the Directives include EU entities that exceed two of the following criteria:

- (1) balance sheet total assets of €20 million;
- (2) net turnover of €40 million; and
- (3) an average number of 250 employees for the year.

Canadian Extractive Sector Transparency Measures Act (2014): The ESTMA requires extractive entities engaged in the commercial development of oil, gas or minerals to publicly disclose, on an annual basis, specific payments made to governments in Canada and abroad, to the extent totaling at least C\$100,000. The ESTMA applies to:

- (1) entities listed on a Canadian stock exchange; or
- (2) if not listed on a Canadian stock exchange:
 - (a) that have a place of business in Canada, do business in Canada or have assets in Canada; and
 - (b) meet two of the following thresholds in one of their two most recent financial years:
 - (i) C\$20 million in assets;
 - (ii) C\$40 million in revenue; and
 - (iii) an average of 250 employees.

U.S. Resource Extraction Issuer Disclosure Rule (2016): During June 2016, the SEC adopted a resource extraction issuer disclosure rule, as required by the Dodd-Frank Act. The rule required U.S. public companies to annually report on payments made to foreign governments and the U.S. federal government relating to the commercial development of oil, natural gas and minerals. Shortly after President Trump took office, the rule was disapproved pursuant to the Congressional Review Act, which allows a rule to be disapproved by Congress within a specified number of days after it receives the rule from the promulgating federal agency. Accordingly, the rule is no longer in force. However, the statutory Dodd-Frank Act requirement to adopt a resource extraction issuer disclosure rule is still on the books, and the SEC has indicated that it is working on a new proposed rule.

Guidance and Voluntary Initiatives

Extractive Industries Transparency Initiative: The EITI is a voluntary initiative with the objective of improving transparency and accountability in countries rich in oil, gas and mineral resources. Once a host country endorses the initiative, the EITI process is mandatory for all extractive industry operators (including those that are state-owned) operating within that country. Among other things, the EITI Standard contemplates public reporting of resource extraction-related payments.

MODERN SLAVERY, CHILD LABOR AND OTHER WORKFORCE-RELATED ISSUES

Adopted Legislation

California Transparency in Supply Chains Act (2010): Requires retail sellers and manufacturers doing business in California that have annual worldwide gross receipts exceeding \$100 million to disclose on their websites information regarding their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. Disclosure topics include:

- (1) verification of product supply chains;
- (2) supplier audits;
- (3) supplier certifications;
- (4) internal accountability; and
- (5) training.

U.S. Federal Acquisition Regulation Anti-human Trafficking Provisions (2015): Prohibits specified human trafficking conduct by contractors and subcontractors in connection with U.S. federal contracts. Also requires a compliance plan to be adopted and certifications to be provided if the contract or subcontract involves supplies acquired or services to be performed outside of the United States with an estimated value greater than \$500,000, excluding commercially available off-the-shelf items.

U.K. Modern Slavery Act (2015): Requires commercial organisations that supply goods or services, are doing business in the United Kingdom and have an annual turnover of at least £36 million to annually prepare a slavery and human trafficking statement indicating the steps taken to ensure that modern slavery is not occurring in the supply chain or business. Suggested disclosure topics include:

- (1) organizational structure, business model and supply chain relationships;
- (2) applicable policies;

- (3) due diligence and auditing process;
- (4) human trafficking risks and steps taken to assess and mitigate risk;
- (5) compliance effectiveness and key performance indicators; and
- (6) training.

U.S. Trade Facilitation and Trade Enforcement Act (2016): Repealed the “consumptive demand exception” to the U.S. Tariff Act. This exception allowed goods made using forced labor to be imported into the United States under certain circumstances.

U.S. Countering America’s Adversaries Through Sanctions Act (2017): The CAATSA established 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. As a result, under the Tariff Act, the goods will be denied U.S. entry (in addition to other potentially available enforcement measures), absent clear and convincing evidence that they were not produced using forced labor.

New South Wales Modern Slavery Act (2018): An entity must prepare an annual modern slavery statement under the NSW Act if:

- (1) it has employees in NSW;
- (2) supplies goods and services for profit or gain; and
- (3) has total turnover for the applicable fiscal year of at least A\$50 million, or such other amount as may be prescribed by regulation.

Modern slavery statements will be required to contain information pertaining to the steps taken by the subject entity during the applicable fiscal year to ensure that its goods and services are not a product of supply chains in which modern slavery is taking place. Following commencement of the NSW Act, which has not yet been set, annual statements will be required to be made public and will be due as provided for in subsequent regulations. In contemplation of the proposed Australian federal Modern Slavery Act, which is discussed below, the transparency provisions of the NSW Act will not apply to entities with obligations under a law of Australia or another Australian state or a territory that is prescribed as a corresponding law.

U.S. Pay Ratio Rule (2015): Covered SEC registrants are required to disclose in their proxy statements the median of the annual total compensation of all employees (other than the chief executive officer) and the ratio of the median to the chief executive officer’s annual total compensation.

U.K. Gender Pay Gap Information Regulations (2017): U.K. employers with 250 or more employees are required to annually publish gender pay gap information on their websites.

Proposed Legislation

The Netherlands: In 2017, the Dutch Parliament adopted legislation that would require companies that sell or provide goods or services to consumers based in the Netherlands to engage in due diligence to mitigate the risk of child labor in their supply chains, and to make related disclosures. The legislation is awaiting adoption by the Senate.

Hong Kong: In late 2017, a member of Hong Kong's Legislative Council sent a draft modern slavery bill to the Hong Kong Chief Executive for consideration. The draft bill includes reporting provisions similar to those contained in the U.K. Modern Slavery Act. The bill is not expected to be adopted.

Australia (Federal): A bill to adopt a Modern Slavery Act was introduced to the Australian Parliament in June 2018. The Act, as proposed in the bill, will apply to Australia-based entities and other entities that carry on business in Australia and that have at least A\$100 million in annual consolidated revenue. Subject entities will be required to report each year on their actions to address modern slavery in both their operations and their supply chains. Reporting entities will be required to submit statements to the Minister of Home Affairs for publication within six months after the applicable fiscal year-end.

Guidance and Voluntary Initiatives

International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (5th Edition, 2017): The MNE Declaration provides direct guidance to enterprises (multinational and national) on social policy and inclusive, responsible and sustainable workplace practices. It is intended to encourage the positive contribution that international companies can make to economic and social progress and the realization of decent work for all, and to minimize and resolve the difficulties to which their various operations may give rise. Topics covered include employees, training, conditions of work and life, industrial relations and general policies.

U.K. Labour Standards Assurance System (2012): LSAS was commissioned by the U.K. Department of Health and NHS Supply Chain, which procures products for the National Health Service. LSAS is the foundation of NHS Supply Chain's ethical procurement strategy. LSAS has 15 policy, procedure and practice action points. There are four audit levels under LSAS, each of which requires a specified level of compliance with the LSAS action points.

Welsh Code of Practice for Ethical Employment in Supply Chains (2017): The goal of the Code – which covers procurement, supplier selection, tendering and contract and supplier management – is to ensure that workers in Welsh public sector supply chains are employed ethically and in compliance with both the letter and the spirit of U.K., EU and international laws. The Welsh government has indicated that it expects businesses involved in Welsh public sector supply chains to adhere to the Code. Among other things, the Code contains a requirement to publish an annual modern slavery statement outlining the steps taken during the fiscal year, and plans for future actions, to ensure that slavery and human trafficking are not taking place in any portion of the organization or its supply chains.

CLIMATE CHANGE AND OTHER ENVIRONMENTAL ISSUES

Guidance and Voluntary Initiatives

U.S. Securities and Exchange Commission Guidance Regarding Disclosure Related to Climate Change (2010): The Guidance identifies four items in Regulation S-K that may require disclosures relating to climate change:

- (1) Item 1.01, Description of Business, requires a description of the registrant's business, including its principal products and services, and the principal markets it operates in. This item expressly requires disclosure of the material effects of complying with environmental laws upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.
- (2) Item 1.03, Legal Proceedings, requires a registrant to include information about certain material pending legal proceedings, including, in certain circumstances, those arising under any federal, state or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primarily for the purpose of protecting the environment.

(3) Item 5.03(c), Risk Factors, requires registrants to discuss the most significant factors that make investment in the registrant speculative or risky.

(4) Item 3.03, Management's Discussion and Analysis of Financial Condition and Results of Operations, requires registrants to identify and disclose known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on their financial condition or operating performance.

The Guidance also indicates climate change-related matters that may trigger disclosure:

(1) Legislation and regulation: pending or existing regulations or legislation related to climate change at all levels of government. For example, registrants could face costs to improve facilities and equipment to reduce emissions to comply with regulatory limits, or to purchase or profit from the sale of allowances or credits under a "cap and trade" system.

(2) International accords: treaties or international accords relating to climate change.

(3) Indirect consequences of regulation or business trends: new opportunities or risks created by legal, technological, political or scientific developments related to climate change. For example, registrants may face decreased demand for goods that produce significant greenhouse gas emissions and may face potential adverse consequences to their business operations or financial condition from the public's perception of publicly-available data about their greenhouse gas emissions.

(4) Physical impacts: significant physical effects of climate change such as severity of storms, sea levels and water availability. For example, severe weather could cause property damage and disruptions to operations for registrants with operations concentrated on coastlines. It could also cause indirect financial and operational impacts by disrupting the operations of major customers or suppliers.

The TCFD Recommendations (2017): The objective of the Financial Stability Board's Task Force on Climate-related Financial Disclosures is to encourage companies to evaluate and disclose, as part of their financial filing preparation and reporting processes, the material climate-related risks and opportunities pertinent to their business activities. This is intended to help investors and other financial market participants, such as lenders and insurance underwriters, to assess and price climate-related risks and opportunities. The TCFD's high level recommendations for all sectors center around four elements:

- (1) governance;
- (2) strategy;
- (3) risk management; and
- (4) metrics and targets.

The TCFD recommendations also include supplemental guidance for the financial sector (banks, insurance companies, asset owners and asset managers) and non-financial groups (energy, transportation, materials and buildings and agriculture, food and forest products), including suggested metrics.

CDP (f/k/a the Carbon Disclosure Project): CDP focuses on climate, water and forests. Among other things, it solicits information from companies on behalf of investors, via annual questionnaires. Companies also can join to gather information on their supply chains. Questionnaires request qualitative and quantitative information regarding, among

other things, strategy, targets, performance, methodology, resource usage and emissions data. Questionnaire responses can be public or private.

BROAD-BASED HUMAN RIGHTS/CORPORATE SOCIAL RESPONSIBILITY

Adopted Legislation

EU Non-financial Reporting Directive (2014; subsequently implemented into national legislation in the EU member states): The EU Non-financial Reporting Directive requires subject EU companies to disclose in their management reports material information relating to environmental matters, social and employee matters, respect for human rights, anti-corruption and bribery matters and diversity. Disclosure topics include:

- (1) business model;
- (2) relevant policies, including due diligence processes implemented;
- (3) outcomes of policies;
- (4) principal risks, where relevant and proportionate, including business relationships, products or services which are likely to cause adverse impacts and how the risks are managed; and
- (5) non-financial key performance indicators.

French Duty of Vigilance Law (2017): Addresses serious violations of human rights and fundamental freedoms, as outlined in the UN Guiding Principles on Business and Human Rights (which is discussed below), the health and safety of people and the environment. Requires large French companies to establish vigilance plans to allow for the identification and prevention of severe violations of human rights in their businesses and at certain subcontractors and suppliers. The vigilance plan and a report on its implementation must be made public and included in the subject company's annual report.

Proposed Legislation

Swiss Human Rights Due Diligence Legislation: The Responsible Business Initiative, a coalition of Swiss civil society organizations, had proposed amending the Swiss constitution to create a binding framework to protect human rights. During June 2018, the Swiss National Council approved a compromise bill that would, by legislation rather than constitutional amendment, require Swiss companies above a specified size threshold and/or that are high-risk to assess and mitigate severe adverse human rights and environmental impacts arising out of their activities, remedy violations and report on the remedial measures taken. The bill also would create civil liability for Swiss parent entities arising out of human rights harm caused by entities under their control. The RBI has indicated that it is prepared to support the bill and withdraw its constitutional amendment initiative. The Swiss Council of States (the upper chamber of Parliament) has not yet voted on the bill.

Guidance and Voluntary Initiatives

UN Guiding Principles on Business and Human Rights (2011): The Guiding Principles implement the United Nation's "Protect, Respect and Remedy" framework. They cover all internationally recognized human rights abuses. The Guiding Principles contain recommendations regarding policies, due diligence and remediation of adverse human rights impacts linked to business activity.

OECD Guidelines for Multinational Enterprises (Fifth Edition, 2011): The OECD Guidelines for Multinational Enterprises are non-binding principles and standards for responsible business conduct in a global context. The Guidelines are the only multilaterally-agreed and comprehensive code of responsible business conduct that governments have committed to promote. The topics covered in the OECD Guidelines include:

- (1) general policies;
- (2) disclosure;
- (3) human rights;
- (4) employment and industrial relations;
- (5) environment;
- (6) combating bribery, bribe solicitation and extortion;
- (7) consumer interests;
- (8) science and technology;
- (9) competition; and
- (10) taxation.

OECD Due Diligence Guidance for Responsible Business Conduct (2018): The objective of the Guidance is to provide practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises, to help enterprises avoid and address adverse impacts related to workers, human rights, the environment, bribery, consumers and corporate governance that may be associated with their operations, supply chains and other business relationships.

Hong Kong Stock Exchange Environmental, Social and Governance Reporting Guide (2015): The Guide consists of both mandatory “comply or explain” provisions and recommended disclosures relating to environmental and social matters. For each of the subject areas, the Guide contains general disclosures and key performance indicators for issuers to report on in order to demonstrate how they have performed.

UN Sustainable Development Goals (2015): The Sustainable Development Goals include 17 economic, social and environmental goals with 169 associated targets. The SDGs are intended to be universal goals that meet urgent environmental, political and economic challenges facing the world.

The GRI Standards (2016): The GRI Standards provide a voluntary framework for reporting on economic, environmental and social impacts to a wide variety of global stakeholders, ranging from civil society to investors. They can be used for comprehensive sustainability reporting or more narrowly for issue-specific disclosures. The Standards take a modular approach, consisting of three universal standards – Foundation (101), General Disclosures (102) and Management Approach (103) – and 33 topic-specific standards organized into Economic (200), Environmental (300) and Social (400) topics.

Nasdaq ESG Reporting Guide (Nordic & Baltic Markets) (2017): The Guide presents Nasdaq’s view regarding the long-term value of measuring, managing and reporting environmental, social and corporate governance data. It is intended as a support tool for listed companies in the relevant markets. The Guide focuses on both broad economic principles and

specific performance measurements, 33 of which are discussed in the Guide. The Guide relies heavily upon other prevalent sustainability reporting frameworks – chiefly GRI – as well as emerging ESG disclosure regulations, such as the EU Non-financial Reporting Directive.

London Stock Exchange Group ESG Reporting Guidance (2018): The LSE Group has published recommendations for ESG reporting for listed issuers. The guidance builds on the TCFD recommendations and the SDGs.

The SASB Standards (2018): The Sustainability Accounting Standards Board seeks to improve the effectiveness of public company reports filed with the SEC with standardized sustainability disclosure. Its standards, which are complementary with the TCFD recommendations, are more granular and go beyond climate-related factors. The SASB framework covers approximately 30 different sustainability activities organized under five pillars:

- (1) environment;
- (2) human capital;
- (3) social capital;
- (4) business model and innovation; and
- (5) leadership and governance.

The SASB has developed standards for 77 industries that identify material sustainability factors that are likely to impact financial performance. The standards provide guidance on metrics and targets.

UN Global Compact: Founded by the United Nations, the UNGC is involved with a variety of sustainability issues. Participating companies are required to express a commitment to:

- (1) the UNGC and its ten principles, which address human rights, labor, the environment and corruption;
- (2) take action in support of UN goals; and
- (3) the annual Communication on Progress submission.

The COP describes members' practical actions taken or planned to implement the ten UNGC principles.

About Our Supply Chain Compliance and Corporate Social Responsibility Practice

Ropes & Gray has a leading Supply Chain Compliance and Corporate Social Responsibility (business and human rights) practice. With team members in the United States, Europe and Asia, we are able to take a holistic, global approach to supply chain compliance and CSR. Senior members of the practice have advised on these matters for almost 30 years, enabling us to provide a long-term perspective that few firms can match. For further information on the practice, contact Michael Littenberg at 212-596-9160 or michael.littenberg@ropesgray.com.

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