

International Trade Alert

Financial Reform Bill to Impose Supply Chain Security and SEC Reporting Requirements for Products That Incorporate Congolese “Conflict Minerals”

July 21, 2010

On July 21, 2010, President Barack Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Financial Reform Act”). Among the many provisions of this vast legislation is one requiring corporations to report to the U.S. Securities and Exchange Commission (SEC) whether their manufactured goods contain “conflict minerals” mined in the Democratic Republic of Congo (DRC) or in adjoining countries and, if so, to provide a description of the supply chain security measures that such corporations have taken regarding the source and chain of custody of these minerals. This provision, intended to discourage the use of certain minerals benefiting armed groups in this region, will increase SEC and supply chain security compliance costs for a wide array of manufacturing firms, including many that import foreign-made products into the United States. This provision may also impose compliance burdens on some firms, including some U.S. importers, that are not currently subject to any SEC reporting requirements.

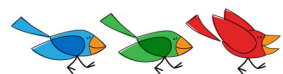
Reporting Obligation

The applicable provision of the Financial Reform Act is Section 1502, which sets forth an amendment to Section 13 of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78m. Under new sub-section (p) to Section 13 of the Exchange Act, titled “Disclosures Relating to Conflict Minerals Originating in the Democratic Republic of Congo,” covered persons must report annually to the SEC whether “necessary” conflict minerals incorporated into manufactured goods originated in the DRC or in an adjoining country. Under sub-section (p)(2)(B) of the amendment to the Exchange Act, “necessary” is defined as “necessary to the functionality or production of a product manufactured by such person.”

Section 1502 directs the SEC to promulgate regulations requiring covered persons to provide to the SEC certain information annually. Each such annual report must contain—

- a declaration whether any “necessary” conflict minerals originated in the DRC or in an adjoining country (sub-section (1)(A))
- if so, a report detailing the measures taken to exercise due diligence with respect to the source and chain of custody of such minerals (sub-section (1)(A)(i)) and describing any products that not “DRC conflict free” (sub-section (1)(A)(ii))
- a certified private sector audit concerning the above-referenced report (sub-section (1)(B)).

Section 1502(e)(4)(A) defines “conflict minerals” as encompassing columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives. Notably, sub-section (e)(4)(B) also empowers the U.S. secretary of state to designate other minerals or their derivatives as “conflict minerals.”



www.twitter.com/akin_gump

Who Must Report

Section 1502 of the Financial Reform Act sets forth a broad, but vague, reporting requirement. Sub-section (p)(1)(A) of the amendment to Section 13 of the Exchange Act provides that “any person described in paragraph (2)” is subject to the conflict minerals reporting requirements. Paragraph (2), in turn, provides that a person is so described if the person is “required to file reports...pursuant to paragraph (1)(A)” of the same sub-section. The definition of covered persons is, thus, circular and is not—unlike the version of the bill passed by the Senate—clearly linked to any other provisions of the Exchange Act that might clarify the scope of applicability. Accordingly, Section 1502 seems likely to generate confusion among firms potentially subject to the conflict minerals reporting requirements, including some U.S. importers, and it appears that only the SEC rulemaking process will clarify the scope of a covered “person.”

SEC Rulemaking and Congressional Reporting

Section 1502 instructs the SEC to promulgate implementing regulations within 270 days after the day of enactment into law of the Financial Reform Act. Among the SEC’s many challenges in doing so will be to clarify the applicability of Section 1502’s reporting requirements and how, if at all, these requirements relate to existing SEC disclosure obligations. The SEC will also have to devise a process for addressing those persons that are required to report, but cannot ascertain the origin of the minerals contained in their products. Yet another implementation challenge for the SEC will be to clarify the meaning of what is “necessary to the functionality or production of a product manufactured by” a person—a key concept in triggering reporting obligations.

Section 1502 also imposes congressional reporting obligations on a number of executive branch agencies. Under subsection (c)(1)(a), the U.S. secretary of state must, within 180 days of enactment into law, supply to relevant congressional committees a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals and commercial products.

Further, under subsection (d), the comptroller general of the United States must, within one year of enactment of the Financial Reform Act, submit a report to the relevant congressional committees addressing the rate of sexual- and gender-based violence in war-torn areas of the DRC and adjoining countries. The comptroller general of the United States is also directed by subsection (d) to submit to Congress annual reports, beginning two years from the date of enactment, assessing the effectiveness of Section 1502.

CONTACT INFORMATION

If you have any questions concerning this alert, please contact —

Lars-Erik A. Hjelm
lhjelm@akingump.com
202.887.4175
Washington, D.C.

Nicholas I. Porritt
nporritt@akingump.com
202.887.4019
Washington, D.C.

Bernd G. Janzen
bjanzen@akingump.com
202.887.4309
Washington, D.C.