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U.S. RoHS and Conflict Minerals Legislation Introduced in Congress

Beveridge & Diamond, P.C., May 22, 2009

Legislation has recently been introduced in both the U.S. House and Senate aimed at restricting the use of certain materials in the manufacture of electrical and electronics products. H.R. 2420 proposes to amend the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2601 et seq., to prohibit the manufacture after July 1, 2010 of certain "electroindustry products" that exceed the maximum concentration values that are currently in place in the European Union for certain heavy metals and brominated flame retardants. S. 891 proposes to amend the Securities Exchange Act, 15 U.S.C. § 78a et seq., to require covered entities - including electronics manufacturers - to make annual disclosures to the United States Securities and Exchange Commission ("SEC") of certain activities related to the "conflict minerals" columbite-tantalite, cassiterite, and wolframite, which are used to produce metals commonly found in electronics and other products.

H.R. 2420: The Environmental Design of Electrical Equipment Act

On May 14, 2009, Rep. Michael Burgess (R-TX) introduced H.R. 2420, which proposes to amend TSCA to prohibit the manufacture after July 1, 2010 of "electroindustry products" that contain lead, mercury, hexavalent chromium, polybrominated biphenyls ("PBBs"), and polybrominated diphenyl ethers ("PBDEs") above 0.1% and cadmium above 0.01%, at the homogeneous level. Such restrictions are currently in place for a broader range of electrical and electronic equipment under the European Union's Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, 2002/95/EC ("RoHS Directive").

The current text of H.R. 2420 limits its scope to any "electroindustry product," defined as "any product or equipment that is directly used to facilitate the transmission, distribution, or control of electricity, or that uses electrical power for arc welding, lighting, signaling protection and communication, or medical imaging, or electrical motors and generators." The bill would exempt several electroindustry products and product categories, including products or equipment designed for use with a voltage rating of 300 volts or above, medical diagnostic imaging and therapy equipment and devices, electrical wire and cable products and accessories, and high intensity discharge lamps.

The bill would also exempt from the prohibition several applications of

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lead, mercury, cadmium and hexavalent chromium that are currently listed as exemptions to the RoHS Directive. The Administrator of the U.S. Environmental Protection Agency ("EPA") may promulgate by rule additional exemptions, but the bill does not provide a procedure by which additional exemptions could be sought or any limitations on EPA's decision-making authority with regard to exemptions.

The bill would require the Administrator of the EPA within one year of the effective date of the Act, to "promulgate guidelines establishing test procedures for determining the concentration of lead, mercury, hexavalent chromium, cadmium, PBBs and/or PBDEs contained in an electroindustry product." In addition, the bill would broadly preempt state mandates that contain inconsistent or more stringent requirements.

H.R. 2420 has been referred to the House and Energy Climate Committee and will likely be sent to the Energy and Environment Subcommittee.

S. 891: The Congo Conflicts Minerals Act of 2009

On April 23, 2009, Senators Brownback (R-KS), Durbin (D-IL), and Feingold (D-WI) introduced S. 891, the "Congo Conflict Minerals Act of 2009" ("S. 891"). The bill would amend Section 13 of the Securities Exchange Act to require the SEC to promulgate regulations requiring the annual disclosure of certain "activities related to columbite-tantalite, cassiterite, and wolframite industries." Metals derived from these minerals are used to manufacture a wide range of electronic products, including mobile phones, digital cameras, MP3 players, and laptop computers.

Columbite-tantalite is mined for the elements niobium and, most significantly, tantalum. Electronics manufacturers rely heavily on tantalum powder, which they use to make tantalum capacitors for electronic circuits used in equipment such as GPS systems, laptops, cellular phones, DVD players, and video cameras. The development of higher charge tantalum powders has enabled the creation of smaller tantalum capacitors and, therefore, smaller electronics. The reduction in the size of cell phones, in particular, has been attributed to advances in tantalum.

Cassiterite is the primary source of tin, which manufacturers use to make tin solder. Tin solder has been used by many manufacturers as a "greener" alternative to lead solder. Wolframite is a source of tungsten, which manufacturers use in integrated circuits as an interconnect device and in wiring. Tungsten or its compounds are also used in light bulbs, cathode

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ray tubes, electric lamps, and LCD screens.

While these minerals are extracted from mines throughout the world, Congress is primarily interested in mines in the Democratic Republic of Congo ("DRC"). According to United Nations and nongovernmental organization ("NGO") reports, armed militia groups control certain mines in the DRC through force and violence and use profits from mineral extraction to finance their illegal activities.

S. 891 would require covered entities to report to the SEC: (1) the country of origin of the relevant minerals; and (2) if the country of origin is the DRC or an adjoining country, the mine of origin. The reporting requirements would apply to entities already required to submit annual reports to the SEC that are: (1) engaged in the exploration, importation, exportation, extraction, or sale of the relevant minerals; or (2) use such minerals or their derivatives in the manufacture of products for sale.

These reporting requirements would potentially impose significant burdens on manufacturers with respect to managing their supply chains. If passed, the legislation would require manufacturers to determine whether any of the metals used in their products were derived from columbite-tantalite, cassiterite, and wolframite, and if so, the country of origin of these minerals, and potentially the specific mine where they were extracted. This determination is made particularly difficult because once extracted, the minerals are fungible and thus not easily differentiated from minerals mined elsewhere.

Significant civil penalties would be imposed for filing false reports or failing to report as required. Criminal penalties would also be available, but only in egregious circumstances.

The bill would require other measures that would not directly affect manufacturers but would raise public awareness of "conflict minerals" in the DRC. For example, the bill would require the State Department, in coordination with the United Nations and international NGOs, to produce and release to the public a map of mineral-rich zones and armed groups in the eastern region of the DRC. In addition, the State Department's annual human rights report on the DRC would include a description of human rights abuses associated with minerals trade and extraction in the DRC.

The bill would also require the State Department, in conjunction with the United Nations, to provide guidance to commercial entities seeking to

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exercise due diligence on their suppliers to ensure that raw materials used in their products do not finance armed conflict, result in labor or human rights violations, or damage the environment.
S.891 has been referred to the Senate Committee on Banking, Housing, and Urban Affairs.

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Key documents are available below.

- H.R. 2420
- S. 891