

Responsible Sourcing: Due Diligence and Disclosure in Global Supply Chains

Pharmaceutical EHS Counsel Roundtable

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US Conflict Minerals Update

Congress

- Financial CHOICE Act 2017 passed House (June 2017), includes Section 1502 **repeal**, D.O.A. in Senate
- House passed appropriations bill (Sept. 2017) to **defund** the “implementation, administration and enforcement” of Section 1502

Treasury Dept.

- Treasury Dept. Report (Oct. 2017) recommends **removal of “non-material disclosure requirements”** including Section 1502 conflict minerals provision

SEC

- New SEC Chairman Clayton has voiced **support** for reduction of disclosure obligations generally, and of recent Treasury Report
- Has **not responded** to letter from Democratic senators asking Clayton to “clarify immediately” that SEC will enforce conflict minerals rule

Only “Enforcement” to Date: NGO Monitoring and Ranking

- Development International, Responsible Sourcing Network, etc. publish annual benchmarking reports
 - Metrics vary, but include scoring on “compliance,” implementation of OECD guidance, and performance on beyond compliance transparency criteria
- Benchmarking reports for 2017 disclosures are emerging
- Meanwhile, other NGOs, activists, and reporters are building pressure for due diligence on other minerals from other countries/regions
 - ◆ Mica from India (used in paints, and as insulator in electronics)
 - ◆ Graphite from China (used in batteries)
 - ◆ Cobalt from the DRC (used in lithium batteries)

EU Conflict Minerals Update

- **EU Conflict Minerals Regulation**

- Upstream importer due diligence, certification and reporting starting in 2021
- Commission to launch transparency database in 2018 to encourage conflict minerals disclosures by downstream entities
- Non-binding guidance on conflict minerals disclosures for companies subject to [EU Directive on Non-Financial Reporting](#)
- Procurement and product labeling initiatives for finished goods (anticipated)
- Other indirect impacts for downstream companies – guidance on conflict affected areas worldwide

Modern Slavery Laws: A Dizzying Pace

“Cheat sheet” for what is on the books now and what is (likely) coming soon

Existing
<ul style="list-style-type: none">• California Transparency in Supply Chains Act (TISCA)• US FAR Anti-Trafficking requirements• US Tariff Act (Consumptive Demand Repeal)• UK Modern Slavery Act (MSA)• EU Directive on Non-Financial Reporting (NFRD) (new guidance issued)• French Vigilance Law (guidance on “vigilance plans” may be coming)

Emerging
<ul style="list-style-type: none">• Dutch Due Diligence Law on Child Labor (pending Dutch Senate approval, effective in 2020)• Australia considering own Modern Slavery Act (consultation paper issued Aug. 2017)• UK Modern Slavery Act proposed amendments (government procurement consequences for lack of transparency), strengthened guidance• Germany? Under consideration

Are you in? Variations on a theme

CA TISCA

- Retailers and manufacturers doing business in California, with global receipts in excess of \$100 million

UK MSA

- Commercial organizations supplying goods/services & carrying on business in the UK, with annual turnover of £36 million

French Vigilance Law

- Companies headquartered in France with 5,000 employees in France or 10,000 globally

Netherlands Child Labor Law

- *Enterprises (whether based in the Netherlands or outside of the Netherlands) that sell or supply goods and services to Dutch end users*

Australia MSA

- *Entities headquartered in Australia or entities that have any part of their operations in Australia, with \$100 million in annual revenue*

What is required? Who can enforce?

CA TISCA

- Disclose efforts to address human trafficking in supply chain (5 topics)
- Injunctive relief, *creative litigation*

UK MSA

- Modern slavery statement (6 suggested topics); board approval & signature
- Injunctive relief and fines if do not comply with injunction

French Vigilance Law

- Plan (5 mandatory elements) to prevent serious impacts
- Injunctive relief, potential liability if harm to individual

Netherlands Child Labor Law

- *Declaration on child labor due diligence, plan of action if child labor occurs*
- *Fines if do not declare, complaint mechanism*

Australia MSA

- *Modern slavery statement (4 topics); board approval & signature*
- *Penalties / injunctive relief not included in current proposal*

Tariff Act and Forced Labor

Consumptive Demand Repeal

- Tariff Act prohibits import of goods made with forced labor
- Exception if goods not produced in quantities sufficient to meet US “consumptive demand”
- Exception repealed March 2016
- Any person can submit petition to CBP that goods made with forced labor are being imported

Risks

- Illustrates tension between transparency and legal risk
- Potential business disruption: Withhold Release Order ↔ Seizure of Goods
- Trump Administration enforcement priority
- But so far, used primarily for commodities (not finished goods)

Mitigation Strategies

- Supply chain responsibility monitoring, auditing, and corrective actions
- Draft disclosures with this in mind
- Become CBP “Importer Self Assessment” member

Practice Tips

- Assess early on: does my company have a direct obligation?
 - Scoping: Detailed assessment, or benchmarking and monitoring?
- If so, how will you meet the requirements?
 - Staffing: What should be done by lawyers and what should be done by compliance professionals?
 - Due diligence: Do you really need to create a new independent program or can you leverage existing programs, policies and teams?
 - Disclosure: Develop one base disclosure / overall structure / policies + results and use to customize for each required disclosure or customer communication?
 - Protective lawyering: How to ensure consistency in what your company says? Awareness of red flag language? How to spot red flags for adjacent areas of the law?
- Even if your company is not directly in scope, are there ways you may still be impacted through engagement with suppliers and customers?
- **What are yours?**

Thank you!



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