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CONFLICT MINERALS COMPLIANCE AND REPORTING

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HOT TOPIC

CONFLICT MINERALS COMPLIANCE AND REPORTING

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Mike Loch is the president of Responsible Trade, LLC. He recently served as Director, Sustainability for Motorola Solutions. Mr Loch's experience in conflict minerals includes serving on the Governance Committee of the PPA, co-chairing the CFSI, preparing Motorola's SEC Filing, participating in the development of the OECD Due Diligence Guidance and serving as the industry representative on their Multi-stakeholder Steering Group. Mr Loch has been to the DRC and Rwanda, to visit mines, traders, NGOs and governmental representatives to gain a perspective of the issues/challenges. He led the development of the Solutions for Hope project to source conflict-free tantalum from the DRC.

RC: How would you describe the current conflict minerals compliance and reporting landscape? What are the main issues and challenges you have observed?

Sullivan: Continued uncertainty is a good way to describe the current conflict minerals compliance and reporting landscape. With the 18 August 2015 US Court of Appeals for the District of Columbia Circuit (Appellate Court) reaffirming its previous ruling that parts of both the SEC's Final Rule and Section 1502 of the Dodd-Frank Act violate the First Amendment, market participants remain uncertain around how the issue will be resolved and when the SEC will respond or provide further guidance. There are three main challenges for registrants in particular. First, given the SEC's partial stay and the 'temporary suspension' of the broad applicability of the independent private sector audit (IPSA) requirement, when will the IPSA be required? The second challenge is how to balance the SEC's partial stay with the expiration of the temporary transition period provided for in the Final Rule to determine the adequacy of disclosure for the 2015 calendar year reporting. The third challenge is how to drive continued conflict minerals compliance programme performance improvement with supply chain partners in light of regulatory uncertainty.

Heim: Variability in the SEC submittals at this time is, in our opinion, a function of two main factors – firstly, limited information from the SEC on interpretations and guidance to clarify the disclosure requirements, and secondly, supply chain data availability and quality. The SEC has provided limited clarifications on the disclosures, issuing only two sets of FAQs for a total of 21 points of guidance. To a large extent, issuers have been left to their own reporting approach, resulting in inconsistencies between the submittals. The recent Assent Compliance study on all 1200-plus CY2014 filings – 1060 of which filed a Conflict Minerals Report (CMR) – conducted by Christopher Bayer, PhD provides excellent information on reporting trends and gaps. What was most surprising is that only 41 percent of CY2014 CMR filers listed the smelters/refiners, and only 32 percent disclosed the countries of origin. These two elements represented the lowest compliance rates of all components of the disclosure mandate. Reporting is improving and will continue to do so as the availability and quality of data improves.

Moloney: With the D.C. Circuit's August 2015 decision reaffirming its earlier ruling that a portion of the SEC's conflict minerals rule violates First Amendment protections on free speech, and two years of conflict minerals filings and related data available for reference and comparison, the conflict minerals compliance and reporting landscape is

starting to take shape. Some companies have very robust compliance and reporting programmes, while others have a more basic grasp of the rules and what needs to be disclosed. The primary issues facing most companies are the lack of transparency in, and control over their supply chains, which is why the majority of Form SD filers in the last two years have reported as 'DRC conflict undeterminable' or communicated essentially the same status without the formal label. Companies are required to provide information on their supply chains, but this information necessarily originates from their suppliers, who may not be squarely within the scope of the law or the jurisdiction of the US.

Sinha: Conflict minerals compliance can be an exhaustive effort if not planned and scoped well. Over the past 12 months or so, in order to demonstrate compliance with Dodd-Frank section 1502, organisations have conducted due diligence across the suppliers in scope for conflict minerals. However, there have been challenges in the level of due diligence – how much is enough and who decides how much is enough? What is the appetite of senior management, auditors and NGOs? Challenges to the scoping and execution of the conflict minerals programme have included the inaccessibility to accurately identify the supplier base, the intense effort required across an organisation to scope conflict minerals programme, and an inefficient coordination and communication strategy, or the lack of resources including time, technology and people needed to support the end-to-end effort. Added to this, a lack of clarity around the rule itself, challenges brought against the ruling, and the SEC's lack of enforcement have created an even thicker shroud of doubt on its validity and value. As it stands today, many companies are still grappling with the SEC requirements on conflict minerals, however unwavering in their focus on simplifying compliance efforts and making the process more simple, sustainable and repeatable.

> **"Continued uncertainty is a good way to describe the current conflict minerals compliance and reporting landscape."**
>
> *Kristen Sullivan, Deloitte & Touche LLP*

Loch: Both the SEC rules and OECD Guidance allow for considerable flexibility in how a company can comply with the requirements. This flexibility has caused confusion among companies, as no

one company wants to deviate from the norm. Unfortunately, given the infancy of reporting, no norm exists. Compounding this is the lack of guidance from the SEC and reliable information from suppliers. There is also the clash of internal organisations when companies have legal, finance, procurement, communications and sustainability involved in determining what information to include. The outcome is typically very conservative providing only what is believed to be required. What is reported is influenced by the company's risk tolerance as a company's ability to make certain assertions will vary as 100 percent certainty is not mandated by the rule, but may be needed internally due to the conservative nature of a company's SEC filings.

RC: What impact has the influence exerted by NGOs had on the conflict minerals compliance and reporting landscape?

Sinha: Ethics, supplier governance and responsible sourcing are increasingly areas of focus for NGOs as well as socially responsible citizens. This increased focus and attention has led companies to build better compliance and reporting programmes, driving them to be more responsible corporate citizens. Some trends in this are a deeper focus on due diligence, communication, and deeper visibility into smelter and refiner disclosure. Companies are listening to feedback from auditors, NGOs, customers and industry groups in the development of their compliance programmes.

Moloney: NGOs have exerted varying degrees of influence on the compliance and reporting landscape, depending upon the industry at issue, and inside each industry, varying degrees of influence on each particular company. Certain companies are more focused on the opinions of third parties such as NGOs and have opted to conduct their compliance and reporting with such opinions in mind. Others are more focused on simply satisfying the minimum SEC requirements and less on providing additional details often called for by NGOs. In many respects, NGOs have acted as the intermediary between the disclosures and the public,

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> *Sonal Sinha, MetricStream*

and we frequently advise our clients to consider their disclosures through the lens of any relevant NGOs that may read and comment on their reports.

Loch: This can be broken into two timeframes: regulatory development and regulatory reporting. As for development, NGO influence was significant as they were instrumental in the rule being developed and were able to keep much of what they desired in the final regulations. As for reporting, the influence has been minimal. There was limited communications by NGOs on what should be reported. What early guidance did exist conflicted with what most companies felt was required, and thus NGO expectations were not met. There have been efforts by NGOs to provide guidance through reports on how they evaluated the first year's findings, but in some cases this information came out too late to have a measurable impact to the 2015 reports. The anticipation is that NGO efforts will lead to some convergence over the next few years between what a company reports and what NGOs want reported, but total agreement is not foreseen.

Heim: A small number of NGOs brought this issue to the public's attention and were instrumental in creating Section 1502 to begin with. They deserve recognition for those efforts. No one wants to be associated with, or support, human rights atrocities in the Great Lakes Region – or anywhere else for that matter. But success has caused some to become more antagonistic against the very group that can be of most benefit. For example, in April 2015, Global Witness and Amnesty International jointly published a paper brazenly claiming that 80 percent of SEC filers for reporting year 2013 did not comply with the conflict minerals disclosure requirements. There were numerous flaws and errors with this claim and their 'study', the most egregious being that Global Witness and Amnesty International defined 'compliance' as including disclosure elements that the groups desire, but are not actually mandated by the SEC rules. Their erroneous conclusions were based on only 100 SEC submittals. A study of all 2013 filings that we conducted in conjunction with Georgetown University School of Law found a far higher compliance rate looking at the mandated disclosure criteria, as did the Assent study for CY2014. Another NGO group, Responsible Sourcing Network (RSN), chose a different path that may have a more positive impact on the filings. RSN developed and published indicators that they acknowledge go beyond the disclosure mandate, but feel offer more depth and context to the report, specifically for an investor audience. Their report, titled 'Mining the Disclosures: An Investor Guide to Conflict Minerals Reporting', presented RSN's disclosure aspirations as a set of specific metrics and content. Assent's study analysed and scored issuer uptake and implementation of the RSN indicators for the CY2014 filings.

Sullivan: NGOs have certainly made their mark in driving this movement toward increased transparency and accountability throughout a company's supply chain. Many registrants, however, anticipated a more aggressive NGO 'name and shame' approach to enforcing accountability to transparency and rigor in conflict minerals disclosures. For the most part, to date, registrants have not experienced significant reputational impacts based on NGO evaluation of Form SD and CMR filings. The leading NGOs in this area have developed detailed analyses of the early filings highlighting leading practices among companies across all industries. These NGOs have chosen a collaborative, and what many believe to be a more constructive, approach to engaging with registrants to impress the importance of a rigorous supply chain due diligence process, in order to minimise the risk of contributing to conflict, and the role that transparency plays in driving awareness and behaviour change around hidden or outsourced risk. As conflict minerals compliance programmes continue to evolve and progress, NGOs play a critical role in convening market participants, promoting infrastructure development, tools and leading practices to enable more efficient and effective conflict minerals due diligence practices, and driving accountability.

RC: What advice would you give companies as they begin drafting their calendar year 2015 Form SD and conflict minerals reports in anticipation of a future independent private sector audit (IPSA)?

Loch: Hopefully companies have used the first two years to establish programmes that will support the audit requirements. They will need to identify the type of audit they want, attestation or performance, and by whom. Engaging with their selected audit firm early will help to assure alignment on scope, expectations and cost. When they draft their reports, companies should separate their RCOI activities from their due diligence to minimise the scope of the audit and thus cost. They should also assure that they have the proper documentation and records. Beginning the process as soon as appropriate will allow time to address identified gaps. At this point, unless the SEC issues additional clarification, an IPSA will not be required unless a company makes a 'DRC Conflict Free' product determination. With that said, companies should plan to conduct an IPSA and initiate that effort regardless of their current product determination.

Sullivan: We advise companies to focus on a few key areas when they begin drafting their 2015 calendar year filing. Some NGOs have encouraged registrants to disclose information about their conflict minerals compliance programme by OECD step to provide a more robust and comprehensive

description of the due diligence measures they have taken to promote greater accountability. While this approach can help an IPSA practitioner understand how a registrant's activities align with each OECD step, it is critical for the registrant to deliberately indicate the programme element aligned with each OECD step as either Reasonable Country of Origin Inquiry (RCOI) or due diligence. The due diligence elements of the registrant's conflict minerals compliance programme can then be organised and disclosed in a manner that easily identifies them as subject to the future IPSA. Separately describing RCOI and due diligence measures in the CMR can add clarity to the description of the registrant's conflict minerals compliance programme, while minimising potential duplication in the process description. In addition, separate descriptions can help the IPSA practitioner efficiently identify the content of the CMR that will be subject to the IPSA. We have observed that registrants that identified RCOI separately from due diligence measures also included RCOI activities in their description of due diligence measures. In addition to being repetitive, this overlap resulted in the improper inclusion of RCOI activities within the scope of the IPSA. The SEC staff has emphasised that only due diligence design and due diligence measures performed should be included within the IPSA's scope. In the SEC's FAQs on conflict minerals, SEC FAQ 18 clarifies that aspects of the OECD Framework may include procedures for obtaining information about a conflict mineral's country of origin and consequently may be part of the registrant's RCOI process. We have observed that many registrants continue to struggle with clearly defining the conflict minerals activities that represented RCOI, as opposed to due diligence measures. One of the biggest challenges is that conflict minerals compliance and due diligence programmes are often executed through a continuous set of activities, which make it difficult for registrants to draw a bright line in assigning discrete activities to RCOI and due diligence measures, respectively. As we move into the third year of compliance with the final rule, registrants are likely to become more confident about clearly defining activities as RCOI versus due diligence with the emergence of an evidence base of examples and reinforcement of the SEC staff's related guidance. A unique aspect of the IPSA is that in forming an opinion in accordance with the second IPSA objective described in the final rule, the IPSA practitioner will use the description of the due diligence measures performed, as disclosed in the CMR, as the criteria for evaluating the due diligence measures the registrant actually undertook.

Heim: Most importantly, clearly separate RCOI activities from due diligence measures. This has significant bearing on the IPSA effort and cost. The SEC's FAQs plainly states that RCOI processes, along with associated procedures under a nationally or internationally recognised due diligence framework

are not within the IPSA scope. Therefore, issuers have an opportunity to reduce audit costs simply by clearly differentiating RCOI and due diligence. However, the line between the two may not be apparent so we offer the following thought: RCOI centres on dealing with suppliers – screening, sending questionnaires, reviewing responses and hounding them for corrections. Due diligence are the activities that are based on the final information obtained from suppliers – checking smelter/refiner lists, obtaining country of origin information and making internal decisions about what to do with that information in terms of supplier relationships. Also, when reviewing the CMR content for IPSA implications, be mindful of auditor independence issues when using third party audit firms. An IPSA auditor should not advise on the IPSA content or structure, as they would be auditing their own work. We also caution against using the same firm to provide IPSA preparation and the formal IPSA. Audit readiness activities can serve to provide company management with advice on the subject matter of the IPSA and again, create a potential impairment.

Moloney: In terms of good corporate governance, companies should consider structuring the disclosure in their conflict minerals reports with a future IPSA in mind, even though the SEC has placed a moratorium on such a requirement for most filers. In this regard, they should consider separating sections that will not be audited from those sections that may need to be audited. For example, the IPSA does not include review of a company's description of its reasonable country of origin inquiry (RCOI), so some companies have begun to structure their reports so there is one section discussing the RCOI and another section discussing due diligence measures. Companies should also consider engaging an accounting firm to begin pre-audit planning on their calendar year 2015 filings. Discussing the disclosure with an accounting firm well in advance of the next filing deadline will help avoid last-minute surprises and allow

companies to make any needed changes to their diligence processes while they are still conducting their due diligence for the current year. Even if an IPSA is not required for calendar year 2015 filings, starting the process of preparing filings with an IPSA in mind will make the process easier if one is later required.

Sinha: Before you look to draft your form SD and conflict minerals report, it's important to remember to align your approach to your corporate strategy on conflict minerals. For example, is conflict minerals essential to your core corporate branding or sustainability initiative? Organisations have latitude in how they can create the reports to a large extent. Balancing your corporate brand strategy to the conflict minerals programme is a must as companies look to put detail on the measures they have taken to exercise a compliance programme. A minimalistic approach is always recommended as you think about the audit as auditors are limited to validate the disclosures in your annual report.

RC: With the absence of a clear threshold for what 'good' looks like, in your view what does 'non-compliance' look like? And what should registrants be keeping in mind in terms of consequences of non-compliance?

Moloney: Non-compliance with the rule can take several forms. Some companies simply do not file a Form SD and conflict minerals report when they probably should. The SEC originally estimated that approximately 6000 companies would need to file at least a Form SD, yet

only approximately 1300 companies filed in 2014, and less than 1300 filed in 2015, supporting the notion that some companies may not be fulfilling their Form SD filing obligations. Some companies may misinterpret a requirement and fail to disclose required information. In other cases, a company has information that it is required to disclose, such as a list of known smelters used to process conflict minerals in a company's products, but it chooses not to report such information for any variety of reasons, ranging from ignorance to a concerted desire to disclose less about its operations. Companies that do not comply with the conflict minerals rule in good faith are subject to liability under Section 18 of the Securities Exchange Act of 1934. In addition to any legal implications stemming from non-compliance, companies may encounter pressure from a variety of third parties, including NGOs, human rights organisations, their shareholders and other market participants, including customers and competitors.

Sinha: To me, non-compliance is not filing the annual report. In order to be compliant, one must have a robust compliance programme including visibility over your supplier ecosystem. Supply chains are now global, so it's vital that organisations have reasonable visibility and transparency across the global supplier ecosystem to start the process. Organisations want to know who their suppliers are, where they are located and how they are operating, especially as consumers become more vocal about what is important to them. The focus now is on establishing risk-aware, compliant, sustainable and ethical organisations and supply chains. The most damaging consequence of an incident of supplier non-compliance is the impact on the parent organisation, its reputation and its sales and profitability.

> **"Plainly speaking, noncompliance involves excluding any reporting element that is legally mandated."**
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> *Lawrence M. Heim, Elm Sustainability Partners LLC*

Sullivan: Compliance with respect to conflict minerals can be viewed through many lenses – the SEC filing obligation, stakeholder expectations, company policy and culture. Striking the balance of achieving compliance with each objective and audience is key – recognising that the spirit of the Final Rule is to promote continuous conflict minerals

supplier due diligence process improvement through compliance activities. Consequences for non-compliance will vary by company, industry, geographic footprint and supply chain complement as each dictates the influence of the three audiences noted. We encourage registrants to proactively engage with relevant stakeholders on this topic and establish a mechanism to regularly evaluate and begin to anticipate changes to compliance expectations. To date, non-compliance with respect to any of these three audiences has not been defined and consistently applied. As the practice of conflict minerals compliance evolves, the market will define greater clarity around non-compliance, which will likely drive greater consistency and standardisation in disclosures.

Loch: There is a clear threshold for what good looks like; not everyone agrees, but it tends to be what the leading companies, including Intel, Motorola Solutions and BlackBerry, have included in their filings. As for non-compliance, this includes requirements that are blatantly missing, information provided that does not pass the straight face test, and contradictory statements in the filing. As this is only a reporting requirement and the SEC does not have the bandwidth nor the funding for enforcement, the consequences will most likely be a public naming and shaming of companies by third parties. Thus the big brand and consumer facing companies have the biggest risk. The SEC may pursue filers where there is a high probability of fraud. Given the confusion of what is compliance, companies need to keep in mind that not meeting stakeholder expectations will most likely lead to brand damage.

Heim: Plainly speaking, noncompliance involves excluding any reporting element that is legally mandated. Assent's report provides a great deal of insight into this, and the complete data set – when available – will be invaluable. From our own observations, two required reporting elements frequently absent are the identification of scrap or recycled sources in the Form SD – not the CMR, and listing the countries of origin - also noted in Assent's study. For the first item, we believe filers inadvertently overlook that requirement. The lack of countries of origin disclosure is a little more complicated. Many filers are unaware that there is a difference between the country where the facility is located – which is easily available – and the country from which the ore originates – not so easily found. Many times, but not always, these are different countries. Raw ore is shipped all over the world for processing and the fundamental concept of Section 1502 relates to where the ore originates, not where it was processed. Another complicating factor is that filers have divergent opinions and interpretations concerning the disclosure content creating gaps in the reports.

RC: How does the SEC's Final Rule on Conflict Minerals impact the reporting and due diligence activities of private companies in the supply chain of end issuers'? How does this rule impact government contractors, if at all?

Heim: In a twist to the SEC's traditional mandate, which is supposed to be limited to companies with securities traded on US exchanges, private companies have been directly impacted by Section 1502 to almost the same extent as the public companies. Suppliers that provide 3TG-containing products, components, assemblies or materials to regulated companies are faced with having to respond to 3TG information requests from their customers. Responding to the 3TG information requests typically involves the same efforts and programme framework as the SEC requires of the companies they directly regulate. So we have a 'trickle down effect' and a de facto expansion of regulatory boundaries. Government contractors are affected only if they are themselves subject to SEC jurisdiction, or if they are also a supplier to a company who must report under the conflict minerals rule. There is no specific conflict minerals disclosure obligation for federal government contractors, nor are we aware of any US federal procurement mandate related to conflict minerals. However, there are a handful of municipalities in the US with local ordinances incorporating various conflict minerals issues into their procurement requirements, as have a few universities.

Loch: There is an impact to all actors in the supply chain. While they may not file with the SEC, they need to provide information to their customers. To do this they need to gather information from suppliers. Participating in industry initiatives such as the Conflict Free Sourcing Initiative (CFSI), will help minimise the impacts by taking advantage of common tools and programmes. The impact to government contractors is minimal. There are some states that require compliance to the rule to do business in that state. As this is only a reporting obligation with not much bite on enforcement, risks to government contractors are reduced. There is a Conflict Free Campus Initiative, led by the Enough Project, getting resolutions passed for conflict free products. Given the limited number of finished goods manufacturers able to make this claim, it has raised awareness of the issue, but not had direct impact on companies.

Sinha: Although the SEC's conflict minerals rule directly impacts public companies, those private companies that are tied to public companies or are suppliers to public companies are indirectly impacted. These private companies are getting requests from their 'customers' to provide a declaration of the conflict minerals they use in their supply chain. They then, in turn need

to perform the due diligence and data gathering to report to their 'customers' hence the burden of compliance is passed on in today's interwoven global supply chain.

Sullivan: Private companies continue to be uniquely impacted by the SEC's Final Rule and all indications look to increased expectations and requirements being placed on suppliers – both private and public companies – as end issuers continue to increase their expectations for transparency around conflict minerals due diligence practices in a more rigorous and disciplined manner. Private company suppliers are increasingly influenced by the commercial obligations to put in place a conflict mineral due diligence programmes with the appropriate processes and controls to enable timely, accurate and complete information reporting to end customers. There are no specific provisions at this time with respect to conflict minerals in the Federal Acquisition Regulations (FAR) which govern government contracts. As such, government contractors need to determine applicability of the SEC's Final Rule as all other companies.

Moloney: Private companies embedded within the supply chains of end issuers subject to the conflict minerals rule are likely to need to conduct due upstream diligence on the sources of conflict minerals in their own supply chains in order to better communicate this

information to the downstream end users. In addition to conducting their own due diligence, these private companies may choose to put pressure on their suppliers to source certified conflict-free minerals and even terminate certain supplier relationships, depending upon the expectations of the end issuers. It is also worth noting that private companies considering going public or may be the targets of future acquisitions by public companies should take the compliance and reporting requirements into consideration, as their acquirers may have to file conflict minerals reports addressing the operations of the recently-acquired private company. The rule does not contemplate a specific exclusion or additional reporting burden for government contractors.

RC: How do disclosure approaches differ across the various industries subject to reporting requirements? What advice can you offer to companies in certain industries that have limited ability to influence suppliers beyond direct suppliers?

Sullivan: Clearly, those industries that have been exposed to the risk of sourcing minerals from the subject region – electronics, for example – and the related risks to perpetuating ongoing conflicts funded by valuable mineral resources for some time have been at this game longer. While longer tenure of a company in developing and improving due diligence practices with respect to sourcing conflict minerals would suggest sustained higher performance than less impacted industries, the regulatory requirements introduced by Section 1502 and the SEC's Final Rule served to create a new set of defined requirements that levelled the playing field a little bit. Supply chain complexity varies not only by industry, but by company, due to business models and practices that companies employ to create competitive differentiation and advantage. As a part of our year two filings analysis, we did not observe clear and distinct disclosure approaches by industry, but rather observed that disclosure approaches varied broadly – within industries and across industries. Several industry organisations have taken steps to promote similar disclosure approaches by providing companies within the industry sample disclosure forms and the opportunity to discuss disclosure considerations among peer companies. We have observed from working with many clients that the ability to influence suppliers beyond direct Tier 1 suppliers, in terms of responsiveness to inquiries, information gathering and proactive measures to promote greater transparency further upstream has improved. Many companies have moved beyond compliance and legal measures – for example, contractual terms – to proactive steps to promote training, performance improvement and the value that can be derived by suppliers by putting due diligence and risk mitigation measures around their sourcing practices. We advise companies to continue

to build on these additional value added measures, balance cost benefit as well as risk tolerance.

Moloney: While filers in all industries are subject to the same reporting requirements, approaches tend to vary across industries. Companies in some industries, such as the technology and automotive sectors, for example, have embraced conflict-free sourcing as a way to distinguish themselves from their competitors, resulting in more detailed filings. Other industries, however, appear to have determined that the rule has limited applicability to their business. For example, few if any companies in the hospitality, homebuilding, land development, entertainment and gaming industries have made such filings. But regardless of industry, most companies are and will generally continue to be limited in the disclosures that they can make, especially where they do not deal directly with smelters or refiners of conflict minerals. This is particularly true where suppliers have limited influence beyond their direct suppliers. In those cases we generally recommend that companies establish clear expectations with their suppliers regarding the sourcing of conflict-free minerals, including through the creation of a public, stated policy on conflict minerals. Companies should also establish procedures for incentivising suppliers to source from certified conflict-free smelters and refiners, which may include reducing the amount of business with such suppliers and in some cases ceasing to do business with certain suppliers altogether.

Heim: Since the US law and regulation originally targeted the tech and electronics industries, it is probably no surprise that they tend to be leading the way. Beyond that, we are not sure there are other meaningful industry trends. Assent's report contains a breakdown of filers by SIC that is interesting. In our view, the reporting approach is company-specific, based on each company's own evaluation of stakeholders, pressures and overall situation. Many companies, regardless of industry, have little influence over suppliers – even direct suppliers. In this situation, pressure to obtain conflict minerals information should be maintained. It is possible

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James J. Moloney, Gibson, Dunn & Crutcher LLP

at times to enlist others to increase the pressure – other customers of the supplier and even your own customers – especially where this is a big brand. At some point, you may have to seriously question your relationship with that supplier if they demonstrate long-term non-responsiveness.

Loch: The electronics industry is viewed as the most progressive due to its early involvement and development of the CFSI. It also tends to be more engaging with the NGO community in helping to manage expectations. The automotive industry has also been working together to be more consistent with their tools and approaches. Of the six audited reports for 2014 reporting year, five out of the six were from the electronics industry and the other was jewellery. When there is limited ability to influence, the best advice is utilise the industry tools that exist. The tools are not industry specific and were actually developed to be used across industries. Common tools and expectations help to minimise impacts on a supply base. Tools that are able to be shared across industries will minimise cost and efforts for those suppliers closer to the processors as they more than like will serve multiple industries.

Sinha: Organisations must conduct reasonable data gathering activities and due diligence to ensure their suppliers are in compliance with local regulations as well as aligned with the parent company's own policies and business objectives. A risk-based approach is recommended for those companies that have limited ability to influence data gathering beyond direct suppliers. Simple due diligence based on company knowledge of the product can be very helpful in identifying potential red flags in responses.

RC: Compared to the Dodd-Frank Section 1502 and the SEC's Final Rule on Conflict Minerals, how do you see requirements around conflict minerals compliance and reporting evolving worldwide? Are there opportunities for synergy in regulation around the world?

Loch: As the EU begins to finalise its regulation, there are concerns that have been raised by industry. As drafted, the EU expanded the scope of the 3TG to be global in nature, posing challenges to the current CFSI approach, which was developed to address Dodd-Frank compliance. The CFSI will need to modify their programmes so that it supports company compliance with any new requirements. As the proposed EU legislation is global in scope, applying to any conflict-affected region, it is important to avoid the creation of de facto embargoes, similar to what occurred when Dodd-Frank was released. To minimise market distortion, it is important there be as much synergy as possible to minimise cost and complexity to industry. There is still the unknown of who and how the definition of 'high risk and conflict

affected areas' will be decided; therefore, this must be done consistently across regions, industries and governments.

Sinha: The SEC's Dodd-Frank Section 1502 shares a common objective with other conflict mineral regulations from across the globe: to encourage organisations to adopt responsible sourcing practices and to end violence funded by conflict minerals extraction, production and trade. As EU companies are now governed by a proposed regulation, there is more scope for cross-over with the Dodd-Frank Act now than there was previously. However, while there remain differences in the reporting requirements and the fact that businesses are governed by local regulation, it may be difficult to implement a blanket act. We will need to come up with a hybrid approach to meet local regulations as versions of the conflict minerals law are passed in other parts of the world.

Moloney: Dodd-Frank led the way in terms of legislation requiring the reporting of conflict minerals by public companies. And now we have seen similar regulations debated in the EU and Canada. We anticipate that as time passes, more and more nations will require some level of reporting with respect to conflict minerals contained in the products companies provide. Collectively, these regulations have the potential to increase the number of companies required to report worldwide, putting even greater pressure on the smelters and refiners that are not certified as conflict-free to change their practices and thus serve to reduce the size of the market of customers of non-conflict free minerals. Increasing the number of companies required to report worldwide could also serve to make available greater amounts of information on smelters and refiners in the DRC and its adjoining countries, in turn allowing companies around the world to better assess whether their suppliers are indeed sourcing from conflict-free smelters and refiners.

Heim: It's always perilous to look into the crystal ball so we shall try not to prognosticate on the development of additional conflict minerals requirements. The EU situation is a case in point – we saw the pendulum unexpectedly swing back and forth a couple times and now it's up to the member states. Canada demonstrated it lacks the political will to legislate the matter. We are still waiting to see how the ICGLR develops and implements their programmes. However, I would not be surprised if we see global requirements develop that expand the definition of conflict areas beyond Eastern Africa and cover more materials than 3TG. It would be nice to believe that there would be some element of global coordination of efforts on this front, but that isn't something we expect. Each sovereignty will choose its own path based on its own situation and goals. We are hopeful, however, that we won't see other due diligence frameworks evolve that compete with, or substantively diverge from, the OECD Framework.

Sullivan: It is likely that global developments such as the EU's conflict minerals regulation will continue to evolve, and greater clarity on requirements may emerge. The manner in which the EU regulation has evolved since it was first introduced illustrates for registrants that proposed requirements can change drastically in a short time. While debate on the EU regulation is likely to continue and any mandated requirement is still a few years away, US registrants are encouraged to stay apprised of this regulation and other global developments that may have an impact on the global supply chain of industries affected by the SEC's final rule. As the EU regulation, and potentially other policy developments around the world with respect to conflict minerals, evolve market participants will look to identify synergies to promote greater standardisation and transparency in conflict minerals disclosures.

RC: Do you expect the scope of conflict minerals reporting to change in the future? How can companies most effectively monitor ongoing compliance with changing expectations and evolving guidance around conflict minerals due diligence and reporting?

Heim: Conflict minerals reporting will likely change over time. Effective ways of keeping track of developments are leveraging industry associations, attending key conferences and seminars – many of which are sponsored by industry associations – and building your own personal network of contacts globally who are involved in the subject. Newsletters from law firms, audit firms and consultants can be helpful, but we would suggest using those only as indicators. Many times, newsletters function primarily as marketing tools to capture an audience's attention and reflect a specific agenda on the part of the firm sponsoring the newsletter. But they can be useful in locating the source documents themselves. Finally, we are all awaiting the SEC's response to the 18 August 2015 US Court of Appeals decision and how that will shape the reporting and auditing obligations.

"It is currently too early to tell if Dodd-Frank is the most appropriate and cost effective way to address this social and human rights-related issue."

Mike Loch,
Responsible Trade, LLC

Sullivan: As registrants await the final resolution of the legal challenge to the final rule, they can prepare for the future IPSA by undertaking assurance readiness steps for improving the organisation of their CMR content and enhancing the documentation supporting their conflict minerals compliance programmes. In addition, as conflict minerals compliance requirements continue to evolve, registrants will be well served to stay abreast of marketplace developments that may influence compliance demands — real or perceived — such as NGO or stakeholder expectations or additional SEC staff guidance.

Loch: There is no expectation that the scope of Dodd-Frank is going to change in the near future. With that said, future change will be influenced on how successful this approach is over time. Companies need to source responsibly, but this is only one aspect. To be truly effective and have lasting impact, governments, civil society and industry all have a role to play and everyone must meet their obligations. It is currently too early to tell if Dodd-Frank is the most appropriate and cost effective way to address this social and human rights-related issue. There is a trend to regulate companies and their supply chains, as we have seen with anti-corruption, conflict minerals and human trafficking regulations. Companies can continue to evolve their responsible sourcing programmes to be more consistent with industry norms and accepted stakeholder expectations by participating in industry initiatives such as the CFSI or AIAG.

Sinha: As the developed world continues to innovate, many predict that the usage of conflict minerals will continue to increase. More smartphones, tablets and laptops are driving the demand for 3TG metals, and, as such, regulations controlling how these metals are mined, traded and used will only become more stringent. It's therefore essential for firms to establish real-time and 360-degree visibility across the supply chain to ensure they are aware of, and can mitigate, the reputational, financial and operational risks that arise from conflict minerals. Not only will this prepare companies for the inevitable – evolving and increasingly stringent regulatory requirements – it will also provide businesses with a strategic and competitive advantage over their competitors.

Moloney: While some uncertainty in the scope of the conflict minerals rule remains in the wake of the recent D.C. Circuit court decision, we do not expect the scope of the required conflict minerals reporting in the US to change significantly in the near future. Long-term, these requirements are likely to evolve, especially as other countries begin to pass their own conflict minerals regulations. The scope of reporting may also continue to evolve as NGOs and other third parties use the information supplied in Form SDs and elsewhere to influence public opinion, placing greater

pressure on companies to disclose information beyond what is required by the current regulations. Companies conducting business internationally should keep in mind that they may become subject to additional conflict minerals rules in different jurisdictions in the future. With respect to US reporting requirements, companies should monitor press releases issued by the SEC and monitor the publication of new client alerts by law firms such as ours for information on the evolving guidance around the conflict minerals rule. RC