

Conflict Mineral Filings To Draw Harsher Spotlight

By **Ed Beeson**

Law360, New York (June 03, 2014, 9:28 PM ET) -- Now that Monday's deadline has passed for public companies to report whether their products contain conflict minerals, experts say the real pressure facing businesses such as Barnes & Noble and Target Corp. won't be from federal regulators, but from outside parties challenging them to disclose even more.

Thousands of companies from Alcoa Inc. to Wet Seal Inc. have filed the new Form SD with the U.S. Securities and Exchange Commission, disclosing whether they have found if their products contain gold, tin, tantalum and tungsten from the Democratic Republic of Congo and its border countries. But to advocates of the rules requiring these filings, there has been one frustrating outcome: Many companies reported they simply could not get enough information from their suppliers to say whether or not their products contain conflict minerals.

Chances are that such inconclusive disclosures will fly, at least for now, with SEC staffers reviewing the filings, experts say.

"I don't really see the SEC as being punitive when people are still learning how to do this," said Laura Richman, a counsel at Mayer Brown LLP. "I don't think they're looking to make a martyr out of a company who perhaps did not file a perfect form."

Attorneys also say companies will probably face little litigation risk growing out of the disclosures they make. Instead, what companies should watch out for is how outside parties — from nongovernmental organizations to mom-and-pop customers — react to what they disclose and the diligence they demonstrate in determining if there is a link between their goods and the funding of brutal wars in Central Africa.

"For companies, the real risk is: What is the market going to think of your compliance efforts?" said Michael Littenberg, partner with Schulte Roth & Zabel LLP. "The real pressures around compliance are going to come from external stakeholders, and I think that was really the intent here."

Depending on what they have reported, companies could come under a human rights group's name-and-shame campaign, face related shareholder proposals during next year's proxy season, or find commercial customers switching to a competitor that knows more about its supply chain, Littenberg said.

Some human rights groups already have sounded alarms over the imprecise findings companies have

reported so far. Corinna Gilfillan, director of the U.S. office of advocacy group Global Witness, said she found it concerning that many firms simply say they have not been able to get to the bottom of whether their products contain conflict minerals.

“Companies have had since 2010 to do the work and figure out where their minerals come from,” she said.

Global Witness will encourage companies to go beyond the guidance the SEC issued on complying with the rule in light of a D.C. Circuit decision that struck down a provision of it as unconstitutional, Gilfillan said. This would include submitting conflict mineral reports for independent audits, which was required under Dodd-Frank Act but excised by the SEC under its recent guidance.

Gilfillan also said Global Witness would look to recognize where companies have made good progress at identifying the source of the materials or conducted strong due diligence.

“We’re not just out to point fingers and say ‘We got you.’ This really is an iterative process,” she said.

To Dynda A. Thomas, the head of Squire Patton Boggs’ conflict minerals practice, the review of the disclosure filings by NGOs is the “other shoe to drop” in the conflict mineral reporting process. But she said it did not strike her as fair to criticize company efforts for not going beyond SEC requirements.

“It would be unfair to judge a report if it doesn’t say more than what the rules require it to say,” she said. “Even if disclosures were brief or summary in fashion, there was a lot of work behind them.”

Companies have struggled to get responses out of operators of smelters and other suppliers about the source of their materials, and when they do, it is often so generalized that one cannot make a determination based on it, Thomas said.

Others note that while some companies will choose to be more open in their disclosures, that too could come back and haunt them.

“The more you disclose, the longer the disclosure, the more opportunities there are for problems,” said Lawrence Heim, director of Elm Consulting Group International LLC, which advises companies on conflict mineral disclosures. For example, Heim said that in the run-up to Monday’s deadline, he had reviewed one company’s submission that contained a mind-boggling amount of data about the responses it received from smelters that he found problematic.

Heim, who is analyzing the disclosures of more than 100 companies, also said he had been surprised by how some companies appear willing to accept whatever they have been told by their suppliers about the origins of their materials, when other companies are not readily convinced.

“There are other companies that recognize that the certainty, the validity of data from suppliers is not there,” he said. “I’m hopeful we’ll see improvements in the credibility and validity of the information that everyone is relying upon.”

To Thomas, those improvements have already started to be made. She also said the good news about the first round of disclosures is that it gets public companies and their suppliers ready for an inevitable uptick in human rights-oriented disclosure requirements put in place by regulators around the world.

“There are going to be more and more of these issues that arise,” she said, pointing in particular to anticipated European legislation to create a voluntary disclosure regime around the use of global conflict minerals. “The value of what they gained is they will be able to adapt to whatever other requirements come into play in the future.”

--Editing by Elizabeth Bowen and Chris Yates.

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