Impact of new EU chemicals legislation on the mining industry

The EU’s REACH Regulation (Regulation No 1907/2006 concerning the Registration, Evaluation Authorisation and Restriction of Chemicals) is a highly complex and contentious piece of legislation which impacts all businesses which manufacture, import, distribute, sell or use chemical substances, within the EU. By some estimates, REACH is the most complex piece of legislation ever enacted by the EU and will require the registration and submission of detailed technical data on over 30,000 substances.

Its application is much wider than just the chemical industry. In this article, we summarise what the REACH Regulation requires and its impact on the mining sector.
Outline of the REACH Regulation

The main elements of the REACH system include:

- The establishment of the European Chemical Agency ("ECHA") located in Helsinki, Finland which will oversee the process of registration and control of chemical substances.

- A pre-registration phase until **1 December 2008**, during which manufacturers and importers of chemical substances must submit basic information regarding those substances to the ECHA, in order to take advantage of the phase-in periods provided for Registration.

  **Without pre-registration, manufacturers and importers will lose the benefit of the extended deadlines for preparation of the detailed information needed to support registration.**

- Registration on a central database of all substances which are manufactured or imported into the EU in quantities of greater than 1 tonne per year. There are phased registration deadlines in 2010, 2013 and 2018, depending on the quantities in which substances are manufactured or imported, and the level of concern which they pose (provided that appropriate pre-registrations have been filed). A registration dossier must be submitted to the ECHA by each manufacturer and importer of each substance, containing specified data, proposals for additional testing and anticipated uses of the substance.

  **If registrations are not filed then substances may not be produced or sold in the EU.**

- The formation of “Substance Information Exchange Fora” ("SIEF") comprising companies which have pre-registered the same substance, to encourage data sharing and minimise additional testing requirements. Affected companies may also form consortia under which they may create their own processes to address their REACH obligations.

- Evaluation, comprising initial checks by ECHA that registration dossiers and testing proposals are sufficient; and then further review by Member States’ authorities under the co-ordination of the ECHA, of substances which may pose a risk to human health or the environment.

- “Substances of very high concern” will be subject to an authorisation process, under which authorisation for specific uses must be obtained. Authorisation will only be granted if it can be shown that risks are adequately controlled, or that the advantages outweigh the risk and these is no substitute. All uses of the substance other than those covered by the authorisation will be prohibited.

- Existing EU restrictions on the marketing and use of chemicals will be carried forward into the REACH regime, and a process is set up under which the Commission may adopt further restrictions on marketing and use of substances which present unacceptable risks to human health or the environment.
How does REACH impact on mining?

REACH will potentially impact on mining operations conducted in the EU, or where the resulting product is imported into the EU. Businesses involved in developing and conducting such operations need to consider how REACH impacts on their activities to ensure that compliance is achieved and maintained.

Financiers should conduct due diligence to ensure that appropriate steps have been and are being taken, since non-compliance could lead to loss of market for the mined product.

Examples of some of the most important issues to consider include the following:

• **What must be registered?**

  There are several exemptions from all or part of the REACH regulation. One such exemption applies to ores and ore concentrates which occur in nature, which do not need to be registered. However, the benefit of the exemption is lost when the ore/concentrate is subjected to chemical modification. Analysis of the processing steps in the production chain is required in order to identify the point at which the registration obligation arises. There are also partial exemptions for intermediary products in a process.

  Specific considerations apply to the registration of alloys, which may be registrable as a “preparation” of different constituent substances where the alloy is a mixture prepared by melting, or as a single “multi-constituent substance” if formed by a chemical reaction (smelting).

• **Who should pre-register and register?**

  Where the product is mined in the EU, the “manufacturer” (i.e. the entity producing the substance) must register.

  If the operation is conducted outside the EU then either the importer(s) of the substance must register, or alternatively the non-EU manufacturer (producer) may appoint an “only representative” within the EU to perform registration obligations under REACH. This relieves the importers of the need to register. An only representative could be either a company in the same group as the producer, or a third party.

  Careful consideration of this issue is required in connection with off-take arrangements, as the registration route chosen may affect security of supplies or the producer’s ability to sell to customers in the EU.

  Financiers should also consider the implications if they have to exercise step-in rights – pre-registrations and registrations are legal entity specific and will not cover operations conducted by a new party if a project entity fails.
• Consider legal and strategic implications for data sharing and consortia

All companies pre-registering the same substance will form a substance information exchange forum (SIEF) and will be required to share data and costs before jointly submitting data for Registration purposes. There are complex mechanisms which will often require companies to enter into consortium agreements that specify the rights and obligations of the players involved and will affect their liabilities. Defining a company policy on data sharing/consortia requires legal input, staffing and strategic considerations that may impact on a company’s competitive position. Companies will need to consider how to approach protecting proprietary information (where this is possible) and minimising the risk of contravening competition laws through unlawful exchanges of information (which could potentially lead to heavy fines).

• Anticipate potential effects of substance withdrawal

Operators and financiers should consider whether the mined products (or other products further down the supply chain) are on the candidate list of substances being considered for authorisation, or may become subject to authorisation or restriction under REACH in future. The potential exists for market collapse, for example if other substances supplied by third parties to customers for use as part of the same application are affected, leading to possible withdrawals and a consequent decrease in demand for the product. Identifying and avoiding this requires a comprehensive review of downstream markets.

Mining operators and financiers should not consider preparation for and implementation of REACH requirements to be merely an onerous administrative, technical and scientific exercise. The implementation of this wide-ranging regulation gives rise to serious legal, commercial and strategic issues, which will require careful consideration and could have potentially serious consequences if not correctly handled.