

Conflict Minerals Rules: Impact on Pesticides?

New SEC Conflict Mineral Rules May Require First-Ever Disclosure for Certain Pesticides Used In Downstream Product Manufacturing Processes

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On December 23, 2010, the U.S. Securities and Exchange Commission (“SEC”) issued proposed regulations that would require public companies using any of four so-called “conflict minerals” in their product manufacturing processes to disclose whether those minerals originated in the Democratic Republic of Congo (“DRC”) or adjoining countries.[1] To date, the SEC has received over 500 comments on the proposal, has conducted a public roundtable, and has extended the comment period. Final regulations are anticipated before the end of 2011.

Although many electronics and consumer products companies have begun to focus intensively on the rule and its impact on their supply chains, the potential reach of the rules is sweeping, and could affect several sectors that are unlikely to have focused on the rules to date. One such sector is organotin pesticide manufacturers, as well as downstream manufacturers of other products (such as textiles) that may use those pesticides in their own manufacturing processes.

Organotin pesticides (such as tributyltin oxide, triphenyltin (fentin), tributyltin benzoate, tributyltin maleate, and fenbutatin oxide) contain tin which may be derived from cassiterite – one of the four conflict minerals subject to the proposed rules. If the final rules follow the SEC’s proposed rule and do not include a *de minimis* or “materiality threshold,” manufacturers of both the pesticides and the products that incorporate such pesticides could be covered by the disclosure requirements. This requirement might have important commercial implications for downstream manufacturers who must decide which pesticides should be incorporated into their own products. It may also serve as a precedent for future efforts by the U.S. Environmental Protection Agency (“EPA”) or other federal agencies seeking to subject use of specific pesticides of “concern” by a wide range of food, paper, or other product manufacturers to similar public disclosure requirements.

A. Overview of the SEC’s Proposal: Disclosing the Use of Conflict Minerals in Manufactured Products

The four conflict minerals subject to the SEC’s pending reporting

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requirements are cassiterite (used to produce tin), columbite-tantalite (used to produce tantalum), gold, and wolframite (used to produce tungsten). In its proposal, the SEC described numerous products that may incorporate these minerals, including mobile telephones, computers, videogame consoles, digital cameras, carbide tools, jet engine components, jewelry, aerospace equipment, and lighting, electronic, electrical heating and welding applications. According to the SEC, it is anticipated that the new requirements will “apply to many companies and industries.”[2]

Under the proposed regulation, all manufacturers that file annual reports with the SEC under the Securities Exchange Act of 1934 must determine whether any of the four conflict minerals or their derivatives “are necessary to the functionality or production of a product” that they manufacture.[3] If so, the manufacturer must next determine through a “reasonable country of origin inquiry” whether its conflict minerals originated in the DRC countries. If so (or if the origin of the conflict minerals cannot be determined), the manufacturer must publicly disclose this conclusion and furnish a “Conflict Minerals Report” identifying its products as “not DRC conflict free,” unless it is able to determine that the products did not “directly or indirectly finance or benefit armed groups” in the DRC countries.[4] Even if the manufacturer determines that its conflict minerals *did not* originate in the DRC countries, however, the manufacturer must still publicly disclose this determination in the body of its annual report to the SEC and on its website.

In its proposal, the SEC did not define when a conflict mineral will be considered “necessary to the functionality or production of a product” and thus trigger the reporting requirements.[5] The SEC did explain, however, that if a mineral is “necessary,” the product would be covered by the proposed rules irrespective of the “amount” of the mineral involved. Under the proposed rule, therefore, the disclosure obligation is not limited to manufacturers who purchase conflict minerals, but extends to downstream manufacturers incorporating manufactured products that contain conflict minerals into their own products. In addition, although only companies that file reports with the SEC will directly be affected by this obligation, even privately held or overseas companies may be indirectly affected if they sit in the supply chain of downstream customers who will face reporting requirements.

B. Implications for Pesticide Manufacturers and Users: Organotin Pesticides Under the Proposed Requirements

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The SEC's proposed requirements may be of particular interest to pesticide manufacturers because organotin pesticides – which contain tin that may be derived from cassiterite – would appear to come under the purview of the proposed rules. Organotin pesticides (including tributyltin oxide, triphenyltin (fentin), tributyltin benzoate, tributyltin maleate, and fenbutatin oxide) are registered under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) by nearly two dozen companies for a wide range of uses in the United States, including use as a wood preservative, biocide, miticide, water treatment, textile preservative, crop fungicide, and building material fungicide.

1. Is Tin “Necessary” to the Functionality or Production of Organotin Pesticides?

Although not specifically identified in the SEC's discussion of its proposal, organotin pesticide manufacturers using tin derived from cassiterite must determine as an initial step whether the tin is “necessary to the functionality or production” of the pesticide product. If so, such products could come under the proposal's reporting requirements.

The SEC's requirements may also apply to pesticide registrants who contract with other companies to manufacture their products as long as they, under the terms of the SEC's proposed rule, “have any influence regarding the manufacturing of those products.”^[6] Of special relevance to the pesticide industry, the SEC has also explained that its requirements will apply to generic companies – regardless of whether the generic companies “have any influence over the manufacturing specifications of those products” – as long as there is a contract in place between the generic company and the product manufacturer directing the manufacture of the products for the generic company.

2. Is Tin Necessary to the Functionality or Production of Textiles and Other Products That Incorporate Organotin Pesticides as Preservatives?

Beyond the direct applicability of the SEC's proposed reporting requirements to manufacturers of organotin pesticides themselves, the phrase “necessary to the functionality or production” may also place reporting obligations on a wide range of downstream companies that use organotin pesticides in their own product manufacturing processes. For example, an organotin pesticide purchased by a textile manufacturer for incorporation into the production of mattress covers as a material

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preservative might be considered “necessary to the functionality or production” of that manufacturer’s mattress covers and thus trigger the SEC’s conflict mineral disclosure requirements – separate from and even in addition to any reporting obligations placed directly on the pesticide’s manufacturer.

To date, downstream manufacturers that incorporate pesticides into their own products as material preservatives intended solely to protect those products themselves have generally not been required to publicly disclose information regarding the pesticides used in their products. Under FIFRA, a product is considered to be a pesticide and thus require registration if it is intended to prevent, destroy, repel or mitigate a pest. Pesticides – including manufactured products that incorporate registered pesticides and make claims to provide consumers with antimicrobial or other pesticidal protection – must be labeled in accordance with EPA’s regulatory requirements, which include identification of the name and percentage by weight of a pesticide’s active ingredient.

However, those manufactured products that incorporate registered pesticides for the sole purpose of providing ongoing protection to the product itself (for example, certain textiles or kitchen utensils treated with antimicrobial pesticides, or paints incorporating antimicrobial preservatives) are expressly exempt from FIFRA’s registration and labeling requirements pursuant to the “treated articles exemption.”^[7] Such products may make limited claims about their incorporation of a pesticide to protect the product, but are not required to disclose the identity of the incorporated pesticide or comply with any other FIFRA requirements. In the case of manufacturers using registered organotin products in the production processes of textiles and other products, however, the SEC’s proposal may now require compliance with the annual conflict minerals reporting and disclosure requirements.

3. New Supply Chain Communication Requirements

While certain voluntary organic certifications have provided manufacturers with an option to disclose the *absence* of pesticides used in their products, requiring textile and other product manufacturers to publicly report the *use* of tin-containing pesticides in their products would represent the first disclosure requirement of its kind in the United States.

Companies that may be affected by these requirements will therefore have

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to consider taking steps both to identify whether their products contain tin and to put in place steps to conduct the required “reasonable country of origin inquiry.” The SEC’s proposal states that receipt of a “reasonably reliable” representation from the facility that processes the conflict minerals may be sufficient, and that such representations may come directly from the facility or indirectly through the manufacturer’s suppliers, as long as the manufacturer “reasonably believe[s] these representations to be true based upon the facts and circumstances.”^[8] Whether or not a downstream product manufacturer may be able to rely on representations obtained from the pesticide manufacturer, for example, or whether further investigation into the direct source of the tin is warranted, may depend on an analysis of the reliability of those representations in each case.

Finally, the impacts of the SEC’s new disclosure requirements on manufacturers who use organotin pesticides may be viewed as a test case for federal agencies or non-governmental organizations that seek to more broadly require manufacturers to disclose their use of other pesticides to address a variety of humanitarian, trade, health, or environmental concerns. Given the diversity of industries that incorporate pesticides in their product processes -- including food products and packaging, plastics, adhesives, paper, textiles, wood, and paint – implementation of the SEC’s rules, and future related developments, should be watched very carefully by pesticide manufacturers and downstream users alike.

For more information about the SEC’s conflict mineral rules and its potential implications for pesticide manufacturers and users, please contact Russ LaMotte at Beveridge & Diamond, P.C. (rlamotte@bdlaw.com or 202-789-6080) or Alan Sachs, Independent Consultant Attorney (asachs@bdlaw.com or 410-230-1345).

[1] 75 Fed. Reg. 80948 (Dec. 23, 2010).

[2] *Id.* at 80950.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 80593.

[6] *Id.* at 80952.

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[7] 40 C.F.R. § 152.25(a) (exempting from all provisions of FIFRA “[a]n article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use”).

[8] 75 Fed. Reg. at 80957.