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ALL THAT GLITTERS... UNITED STATES ISSUES "AFRICA GOLD ADVISORY"

Cataloguing the full array of risks, on June 27, 2023, the U.S. Departments of State, the Treasury, Commerce, Homeland Security, Labor, and the United States Agency for International Development jointly issued an Africa Gold Advisory **("Advisory")**. Like we have seen from this current Administration with the "whole of Government" approach, this Advisory, while not creating any new legal obligations, demonstrates a multi-agency focus in identifying areas of risk for companies, making recommendations for managing those risks, and reminding companies that this is an area of enforcement priority

WHY NOW?

The mining, refining, recycling, and exporting of gold from Africa is by no means a new phenomenon, nor generally are the compliance risks associated with the gold trade across Africa. Indeed, the Advisory acknowledges the international community's efforts to reduce gold-trade related risks in Africa and clarifies that the purpose of the Advisory is not to replace any existing guidance. The Advisory notes, however, that *"newer risks in areas such as Sudan, the Central African Republic (CAR), Mali, and elsewhere in connection with the Wagner Group have made clear the need for this Advisory."* These "newer risks" arise from two triggers: (1) illicit actors (including the Wagner Group) continued exploitation of the African gold supply chain; and (2) the high value of gold both as a currency and as a material used in other supply chains. The advisory warns *industry "should be prepare for increased U.S. government attention to the relationship between gold and these groups' revenue streams and . . . for the possibility that U.S. sanctions"* in this space.

The "other supply chain" is without a doubt a reference to, among other things, batteries. Given the potential use of gold in batteries (among other rare metals) and the explosion of demand for batteries to fuel electric vehicles and the energy transition, it should come as no surprise that the race for resources by both bad and good actors is heating up in Africa. See our prior briefings on batteries here.

Further, the Advisory devotes considerable space to describing opportunities in the Africa gold sector, almost inviting responsible actors to enter the market while doing so with appropriate safeguards. Companies that can manage these risks will operate at a competitive advantage over those that do not.

HIGHLIGHTING CERTAIN RISKS

The Advisory coalesce from various reports elements of the key risks arising from the gold trade across the Sub-Sharan Africa for both upstream activities (e.g., extraction) and downstream distribution and supply chains.

The risks are:

- Risks Associated With Mining (Upstream)
  - Corruption, conflict, upstream smuggling, human rights and labor abuses, and environmental concerns.
    - With respect to human rights and Labor abuses, the Advisory flags that *"Gold mined with forced labor also presents a business risk, as it can be subject to customs enforcement actions."* It also highlights the enforcement role U.S. Customs and Border Protection ("CBP") plays in detaining gold imported into the United States *when "information reasonably . . . indicates"* it was mined, produced, or otherwise manufactured by forced labor. CBP has recently issued Withhold Release Orders for certain gold imports in recent years, including for Gold imported from the Democratic Republic of Congo.
- Risks Concerning Conduct Associated with the Transport, Refining, and Sale of Gold (Downstream)
  - Misuse of "recycled" gold labeling and money laundering/ terrorist financing.
    - The Advisory specifically addresses that with the rise of "recycled" gold as a means of mitigating gold-mining related environmental impacts, there has also been increased risk of mis-using the recycling process to launder illicit gold. Such practices make it harder to identify illicit gold in supply chains.

The Advisory also references other region-specific guidance that discusses the risks arising from the gold trade, including the May 2022 Risks and Considerations for U.S. Businesses Operating in Sudan, which we addressed in detail here, and the June 2023 update to the same. Notably, the Advisory also states *"[i]t is anticipated that more specific country-focused or issue-focused documents will build on the general outline provided by this Advisory."*

SO, WHAT'S A COMPANY TO DO?

The Advisory also provides eight key recommendations, which are anchored in the stated objective of the Advisory, *"encourage U.S. industry participants [which includes importers into the U.S. market of good containing African sourced gold] to invest responsibly in the gold sector in the sub-Saharan Africa while strengthening due diligence practices and transparency in order to further restrict the ability of malign actors to exploit and profit from the sector."* The key recommendations are:

- Increase awareness of risks of corruption in relevant gold markets, including risks of potentially facilitating money laundering, violation of economic sanctions, or other financial crimes related to corruption.
- Conduct country/market specific due diligence to avoid commercial risks related to relevant red flags.
- Increase awareness and detection of potential smuggling risks.
- Conduct specific due diligence with respect to labor and human rights abuses.
- Conduct specific environmental due diligence.
- For those involved in the downstream purchases of recycled gold conducting due diligence on the supply chain.
- Integrate anti-money laundering typologies into compliance programs.
- Avoid business with or providing material assistance/support (including financial and technological support), or goods/services to sanctioned individuals or entities.

Focusing on due diligence, which is the crux of most of the recommendations, the Advisory provides additional guidance with reference to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affect and High-Risk Areas (2016) and endorses the "model" corporate policy for a responsible global supply chain, which includes a five-step approach:

- Establish strong company management systems.
- Identify and assess risk in the supply chain.
- Design and implement a strategy to respond to identified risks.
- Carry out independent third-party audits of supply chain due diligence at identified points in the supply chain.
- Report on supply chain due diligence.

The Advisory cautions companies; however, that the "model" approach alone is not enough to guard against all of the associated risks, including in particular money laundering and economic sanctions.

As we've cautioned previously, the expansion of whistleblower programs and the expansion and addition of whistleblower bounty programs to cover both money laundering and economic sanctions, creates further risk for companies in this space, which companies are well advised to take appropriate steps to proactively identify and manage the developing compliance risks presented by gold.

KEY TAKEAWAYS

Companies need to continue to be diligent when looking for and seizing on opportunities around the gold trade and Africa, especially now with the Advisory, which puts companies on notice of both the risks as well as the expectations of U.S. Authorities to conduct robust, country and market specific diligence before proceeding. Those looking to take advantage of the opportunities in gold trade across Africa should work with advisors on setting up appropriate risk assessment and compliance programs given the direction that the U.S. Government is telegraphing in the Advisory.

Our team of Clifford Chance lawyers routinely advises clients on developments in emerging markets and helps companies identify and mitigate compliance risks through our global strategies.

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