



# Supplier Declarations Under EU's RoHS Directive

Christopher Bell

202-736-8118 or [cbell@sidley.com](mailto:cbell@sidley.com)

# EU's RoHS DIRECTIVE

- Restricts the presence of certain materials in specific categories of electrical or electronic equipment (EEE)
- Applies to covered EEE “placed on the EU market” effective July 1, 2006
- Restricted materials
  - Metals: lead, mercury, cadmium, hexavalent chromium
  - Polybrominated biphenyls, polybrominated diphenyls/ethers
  - Up to 1000 ppm allowed for each of these substances in homogeneous materials except for cadmium, which has an allowable level of 100 ppm
- 8 Broad Categories of EEE
  - Large and small household appliances, IT, telecom, consumer and lighting equipment, tools, toys and sport equipment, auto-dispensing machines (e.g., ATMs, vending machines)
  - Several Exemptions for Specific Applications
  - EC seeking comment on a broad range of additional possible exemptions

# RoHS DIRECTIVE: WHO MUST COMPLY?

- “Producers” of covered EEE introduced into the EU market as of July 1, 2006 are subject to the Directive
- Non-EU suppliers to “producers” generally **not** subject to the RoHS Directive (assuming those suppliers are not themselves “producers”)
  - Suppliers are subject to the Directive only indirectly, to the extent that “producers” contractually flow requirements up or down the supply chain
  - Those obligations are established by contract between the supplier and “producer,” not by the Directive

# RoHS DIRECTIVE: COMPLIANCE

- The RoHS Directive does not establish how compliance will be determined
  - No governmental approvals, inspections, certifications, testing methods, etc.
  - Individual EU Member States will implement the RoHS Directive through national laws
- In the absence of explicit requirements in the Directive, a “due diligence” supply-chain solution is being suggested by some EU Member States
  - Systematic and verifiable combination of testing, materials review, supply-chain “declarations”

# RoHS DIRECTIVE: SUPPLIER DECLARATIONS

- RoHS Directive does not require them, though EU Member States might
- There is no legally-mandated format or content
  - Some standards bodies and business associations are developing standardized formats
- Legal effect of such declarations as yet unclear
  - Degree to which declarations will protect the producer is uncertain: even if they mitigate or eliminate potential penalties, will they prevent injunctive relief (e.g., recall, embargo)?
  - Suppliers' liability to producers for incorrect declarations is unclear as well
    - Strict liability? Negligence? Who gets left holding the ball with "cascading" declarations?
    - Nature and extent of damages and remedies
- Contract and declaration language will be critical

# RoHS Supplier Declaration Issues

- Not everything sold in the EU is covered by the RoHS Directive
- It must be EEE
  - If it does not depend on electric currents or electro-magnet fields in order to work properly, it probably is not EEE
  - It has to be equipment: most packaging, manuals, etc. are not EEE
- It has to be EEE covered by the RoHS Directive categories
  - Medical devices and monitoring devices, which are covered by the WEEE Directive, are not covered by the RoHS Directive
  - There are also a number of very specific exemptions
  - There is a lot of electrical equipment that is not EEE under either Directive, such as most electrical components in automobiles (which may be covered by the ELV Directive)

# RoHS Supplier Declaration Issues

- RoHS covers only 6 substances
  - Other requirements may include other substances, such as CFCs under Montreal Protocol
  - Some producers simply add certain chemicals to their restricted list as a matter of policy, not law
- RoHS does not establish a total ban on restricted substances: you can have allowable concentrations in homogeneous materials
- The RoHS Directive regulates product content, not process content
  - The Directive does not restrict the use of hazardous substances in the manufacturing process
- What is your basis for making a declaration?
  - Testing?
  - Your own suppliers' declarations?
  - Reviewing MSDS?
  - Whatever it is, be clear in the declaration

# CONCLUSION

- Compliance with the RoHS Directive will be achieved largely through supply-chain management
- Declarations are not required by the Directive and are negotiable
- Clearly understand the scope and applicability of the RoHS Directive to your business
- Balance between business and legal considerations
- Understand the contract language
  - Factual basis for the declaration: what are you promising?
  - Allocation of liability
  - Damages
  - Dispute resolution
  - Mechanism for changing requirements
- Internal mechanism for creating or signing declarations
  - Authority
  - Where does the information come from and how good is it?
    - Is it based on a system or is it ad hoc?