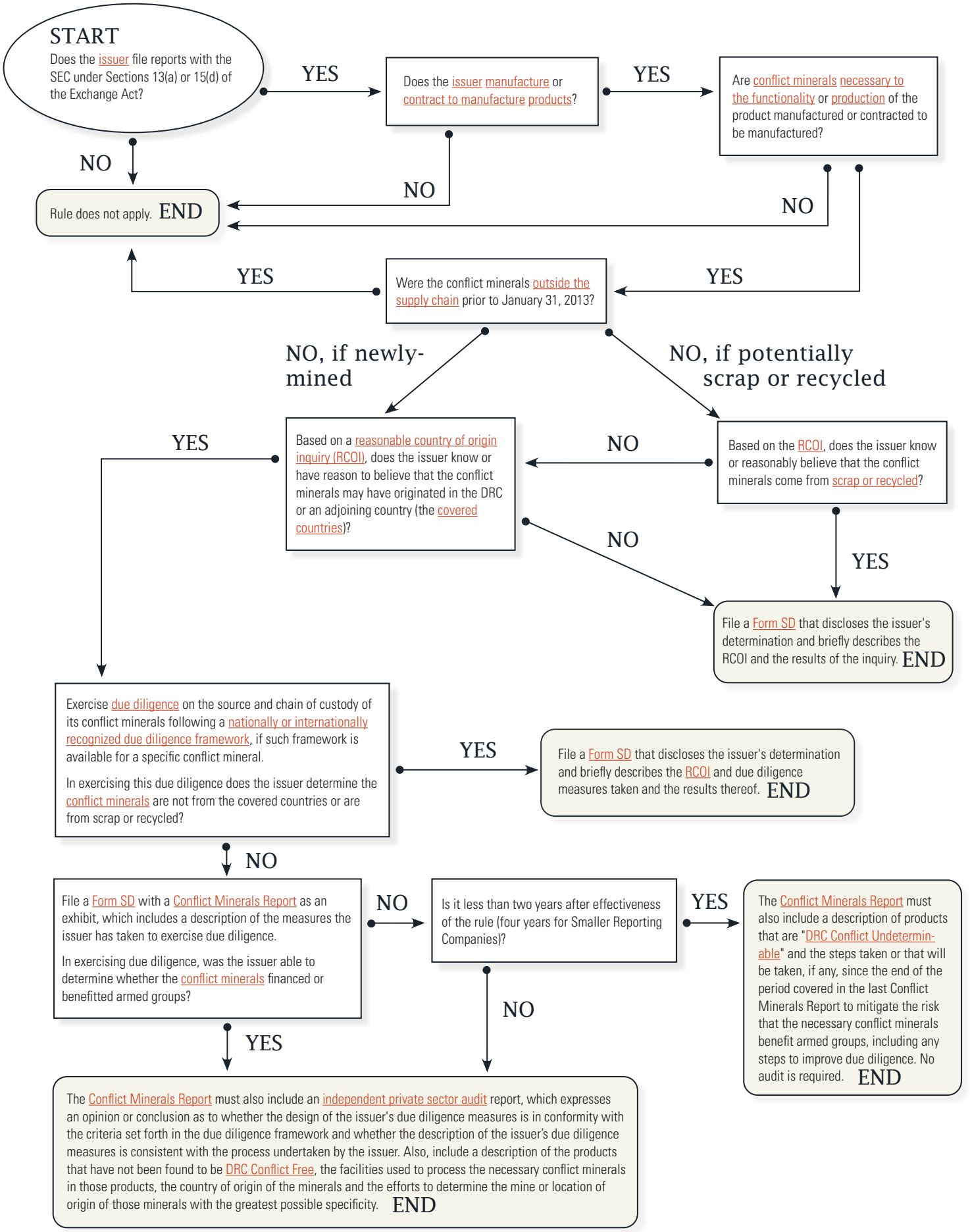
SEC Conflict Minerals Flowchart



Source: Adapted from SEC Conflict Minerals Release, August 2012

"Issuer/Reporting Company"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

If a company is not a "reporting company" under the Rule, the Rule does not apply and the company has no further obligations under the Rule. Release, pages 20-21, 48.

"Reporting Company" Defined

The Rule applies to any reporting company that files reports with the Commission under Section 13(a) or Section 15(d) of the Exchange Act, including domestic companies, foreign private issuers and smaller reporting companies. Release, pages 20-21, 48, 51-52.

- A Foreign Private Issuer (defined in Exchange Act Rule 3b-4(c)).
  - A foreign private reporting company is any foreign reporting company other than a foreign government, except for a reporting company that:
    - (1) has more than 50 percent of its outstanding voting securities held of record by US residents; and,
    - (2) any of the following:
      - (i) a majority of its officers and directors are citizens or residents of the United States,
      - (ii) more than 50 percent of its assets are located in the United States; or,
      - (iii) its business is principally administered in the United States.
- Smaller Reporting Company (defined in Exchange Act Rule 12b-2).
  - A reporting company that is not an investment company, an asset-backed security, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that had a public float of less than US$75 million. If a reporting company has no common equity public float or market price then the following revenue test applies: a company would be considered a smaller reporting company if its annual revenues are less than US$50 million.
- Investment Company (defined in Investment Company Act, Section 3(a)(1)).
  - The conflict minerals disclosure requirements do not apply to investment companies that file reports pursuant to Rule 30d-1 under the Investment Company Act. Instruction C to Form SD.

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Conflict Minerals Rule

The Rule applies to all reporting companies that file reports with the SEC under Exchange Act Sections 13(a) or 15(d), whether or not the reporting company is required to file such reports. However, registered investment companies that are required to file reports pursuant to Rule 30d-1 under the Investment Company Act are not subject to the Rule. FAQ, Answer #1.

A reporting company must determine the origin of conflict minerals, and make any required disclosures regarding conflict minerals, for itself and all of its consolidated subsidiaries. FAQ, Answer #3.

A reporting company may start reporting for the first reporting calendar year that begins no sooner than eight months after the effective date of its initial public offering registration statement. FAQ, Answer #11.

The filing of Form SD does not impact a reporting company's eligibility to use Form S-3. FAQ, Answer #12.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 20-21, 48-52, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

Dodd-Frank Wall Street Reform and Consumer Protection Act, Frequently Asked Questions, Conflict Minerals, May 30, 2013, *available at* http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm.

"Manufacture"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

If a reporting company does not "manufacture" or "contract to manufacture" a product, the Rule does not apply and the reporting company has no further obligations under the Rule. Release, pages 19-20, 60. Because the term is not defined, it is unclear how the SEC will interpret it. Thus, reporting companies should consider carefully when determining that they do not "manufacture" a product.

"Manufacture" Defined

The SEC has chosen not to define the term "manufacture" because it believes the term is generally understood. Release, page 60. The SEC provided guidance regarding the meaning of the term.

A reporting company that only engages in activities customarily associated with mining, including gold mining of lower grade ore, is not considered to be manufacturing those minerals. FAQ, Answer #2.

Examples of a "Manufacturer"

- A reporting company that manufactures a product by assembling the product out of materials, substances, or components that are not in raw material form. Release, page 61.
- A reporting company that manufactures products through assembly, such as certain auto and electronics manufacturers. Release, page 61.
- A reporting company that manufactures a product by assembling the product out of components manufactured by others for that reporting company. Release, page 63.

Examples of What Is Not a "Manufacturer"

- A reporting company that only services, maintains, or repairs a product containing conflict minerals. Release, page 60.
- "Manufacturer" under the North American Industry Classification System ("NAICS"), which defines manufacturer as one engaging in the mechanical, physical or chemical transformation of materials, substances or components into new products from raw materials that are products of agriculture, forestry, fishing, mining or quarrying. Release, page 61. The SEC believes that such a definition is too narrow and appears to exclude any reporting company that manufactures a product by assembling that product out of materials that are not in raw material form.
- A reporting company that only imports, exports, or sells conflict minerals. Release, page 61.
- A reporting company that solely mines or contracts to mine conflict minerals. Release, pages 23, 70-71.

- The Rule does not include "extraction-related activities" and only refers to "manufacturing." Release, page 71.

It is the SEC's interpretation of Section 1502 that pure retailers are excluded from the Rule, but reporting companies that have a role in the manufacturing of their products are included in the Rule. SEC Reply Brief, p. 54, footnote 10.

Grey Areas

- Is all assembly of components included in term "manufacturing"?
- When does pure assembly of components become "manufacturing"?

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 23, 60-61, 63, 70-71, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

Dodd-Frank Wall Street Reform and Consumer Protection Act, Frequently Asked Questions, Conflict Minerals, May 30, 2013, *available at* http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm.

NAM v. SEC, SEC Reply Brief, Mar. 28, 2013, *available at* http://www.squiresanders.com/pdf/Compliance/SEC-Reply-Brief.pdf.

"Contract to Manufacture"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

If a reporting company does not "manufacture" or "contract to manufacture" a product, the Rule does not apply and the reporting company has no further obligations under the Rule. Release, pages 19-20, 61. Because the term is not defined, it is unclear how the SEC will interpret it. Thus, reporting companies should consider carefully when determining that they do not "contract to manufacture" a product.

"Contract to Manufacture" Defined

The SEC has chosen not to define the term "contracts to manufacture" because it believes the concept to be intuitive. Release, pages 21, 62. The SEC, however, provided guidance regarding whether a reporting company is considered to "contract to manufacture" a product. A reporting company may be contracting to manufacture a product depending on the degree of influence it exercises over the materials, parts, ingredients, or components to be included in any product that contains conflict minerals. Release, pages 21, 64. The degree of influence necessary for a reporting company to be considered to be contracting to manufacture a product is based on each reporting company's individual facts and circumstances. Release, page 65.

A reporting company is not considered to be "contracting to manufacture" a generic product if its actions involve only "affixing its brand, marks, logo, or label to a generic product manufactured by a third party." Etching or otherwise marking a generic product that is manufactured by a third party, with a logo, serial number, or other identifier is not considered to be "contracting to manufacture." FAQ, Answer #4.

Equipment that reporting companies manufacture or contract to have manufactured is not covered by the Rule if that equipment is used for the service provided by the reporting company and the equipment is retained by the service provider, is required to be returned to the service provider, or is intended to be abandoned by the customer following the terms of the service. … [T]he staff does not interpret equipment used to provide services to be "products" under the Rule. FAQ, Answer #7.

Examples of What Is "Contracting to Manufacture"

- The phrase "contract to manufacture" captures manufacturers that contract with others to manufacture components of their products. Release, page 63.
- A reporting company specifies to a manufacturer the inclusion of a particular conflict mineral in the product. But reporting companies that do not specify the inclusion of a particular conflict mineral in the product may nevertheless be "contracting to manufacture." Release, page 66.
- A reporting company that offers a generic product under its own brand name or a separate brand name with additional involvement in manufacturing may be "contracting to manufacture" depending on all the facts and

circumstances. Release, page 67.

Examples of What Is Not "Contracting to Manufacture"

- A reporting company that has "any" influence over the product's manufacturing. Release, page 64.
- A reporting company that only specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product, such as training or technical support, price, insurance, indemnity, intellectual property rights, dispute resolution or other similar terms, unless the reporting company specifies or negotiates taking these actions so as to exercise a degree of influence over the manufacturing of the product that is practically equivalent to contracting on terms that directly relate to the manufacturing of the product. Release, pages 21, 65.
- A reporting company that only affixes its brand, marks, logo or label to a generic product manufactured by a third party (Release, page 22), without involvement in the product's manufacturing other than that brand name would need to consider all the facts and circumstances to determine whether its influence rises to the level of being a manufacturer. Release, pages 65, 67.
- A reporting company that only services, maintains or repairs a product manufactured by a third party. Release, pages 22, 65.
- A reporting company that is a service provider that specifies to a cell phone manufacturer that the cell phone must be able to function on a certain network does not in-and-of-itself exert sufficient influence to "contract to manufacture" the phone for purposes of the Rule. Release, page 65.
- "Substantial" influence or control over the manufacturing of a product is not required in order to fulfill the "contract to manufacture" requirement. Release, pages 65-66.
- Pure retailers. Release, page 67.

  It is the SEC's interpretation of Section 1502 that pure retailers are excluded from the Rule, but issuers that have a role in the manufacturing of their products are included in the Rule. SEC Reply Brief, p. 54, footnote 10.

Grey Areas

Degree of Influence that will be deemed to be "contracting to manufacture."

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 21-22, 61-67, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

Dodd-Frank Wall Street Reform and Consumer Protection Act, Frequently Asked Questions, Conflict Minerals, May 30, 2013, *available at* http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm.

NAM v. SEC, SEC Reply Brief, Mar. 28, 2013, *available at* http://www.squiresanders.com/pdf/Compliance/SEC-Reply-Brief.pdf.

"Product"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

If a reporting company does not manufacture, or contract to manufacture, a "product," the Rule does not apply and the reporting company has no further obligations under the Rule. Release, page 60. Because the term is not defined, it is unclear how the SEC will interpret it. Thus, reporting companies should consider carefully when determining that they do not manufacture a "product."

"Product" Defined

The SEC has chosen not to define the term "product," presumably because it believes the concept to be intuitive. Further, the SEC does not even provide any guidance relating to the term "product." One test that may be used to identify a company's product is to consider the source of the company's revenue. If a company is making money from sales of an item, then that item will likely be considered a "product" under the Rule. This test may be too expansive, however. An alternative test that may be used is to consider the content or the item of value, and not the packaging or medium used to deliver the content (see examples of the soft drink and the pharmaceutical companies below). Under the content test, even though the medium or package used to deliver the product contains conflict minerals, the content itself is conflict mineral free and therefore the Rule does not apply. This test may be helpful to service-oriented companies as they analyze whether they sell a product. Reporting companies should watch for future SEC guidance as to how to define a "product."

A reporting company is required to conduct a reasonable country of origin inquiry with respect to conflict minerals included in generic components included in products it manufactures or contracts to manufacture. In this regard, there is no distinction between the components of a product that a reporting company directly manufactures or contracts to manufacture and the "generic" ones it purchases to include in a product. FAQ, Answer #5.

The packaging or container sold with a product is not considered to be part of the product. Once the consumer starts to use a product, the packaging is generally discarded. This conclusion is true even if a product's package or container is necessary to preserve the usability of that product up to and following the product's purchase. If, however, a reporting company manufactures and sells packaging or containers independent of the product, the packaging or containers would be considered a product for that reporting company. FAQ, Answer #6.

A reporting company manufactures or contracts to have manufactured tools, machines, or other equipment for it to use in the manufacture of products, and those tools, machines, or other equipment contain conflict minerals. Even if the reporting company subsequently sells such equipment after using it, the conflict minerals in such equipment are not covered by the Rule. Such tools, machines, or other equipment are not products of that reporting company, and their later entry into the stream of commerce does not transform them into products of that reporting company. FAQ, Answer #8.

Concerns that the Rule could be read to include a product's packaging are overstated, as nothing in the Release states that packaging is included. SEC Reply Brief, p. 50, footnote 9.

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Conflict Minerals Rule

From the limited facts presented, concerns about new formulations of products would be addressed by the explicit exclusion of prototypes and demonstration devices. SEC Reply Brief, p. 50, footnote 9.

Examples of What a "Product" May Be

- The automobiles of an automotive manufacture. Release, page 61.
- A portable media player that a technology company creates and designs. Release, page 61.
- Materials, prototype, demonstration devices put into the stream of commerce and sold to third parties. Release, page 91.

Examples of What a "Product" May Not Be

- Materials, prototypes and other demonstration devices containing or produced using conflict minerals that are not sold to third parties. Release, page 91.
- Products or components used by a company for engineering or testing purposes and not sold to third parties. Release, page 79.
- A soft drink company that manufactures soft drinks which it sells in cans and containers.
  - The soft drink does not contain conflict minerals and the SEC should conclude that the soft drink is not a product under the Rule and therefore is not subject to the Rule.
    - However, the SEC could conclude that the soft drink, including the can which may contain conflict minerals, is the product. Such a conclusion would subject the soft drink company to the Rule.
- A pharmaceutical company that packages its medication in a foil-backed package.
  - The medication does not contain conflict minerals and the SEC should conclude that the medication is not a product under the Rule.
    - However, the SEC could conclude that the medication, including the foil-backed package which may contain conflict minerals, is the product.
- An airline is likely selling a service – a safe, reliable flight from one city to another – even though the airplane itself likely contains conflict minerals.
- A cable television company is likely selling a service (cable access to content) and not manufacturing a "product" even though its set-top box (that likely includes conflict minerals) is a product used to deliver the service.

Grey Areas

- Will containers or delivery devices be deemed to be products?
- Will products used to deliver a service convert the item being sold from a service to a product?
- Will the SEC adopt a more expansive source of revenue test, or something similar to a content test?
- Is a manufacturer that leases the "product" covered by the Rule?

Reference

Dodd-Frank Wall Street Reform and Consumer Protection Act, Frequently Asked Questions, Conflict Minerals, May 30, 2013, *available at* http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm.

NAM v. SEC, SEC Reply Brief, Mar. 28, 2013, *available at* http://www.squiresanders.com/pdf/Compliance/SEC-Reply-Brief.pdf.

"Conflict Mineral"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

If a reporting company's product does not contain one of the listed "conflict minerals," the Rule does not apply and the reporting company has no further obligations under the Rule with respect to that product. Release, pages 20-21, 60.

"Conflict Mineral" Defined

The term "conflict mineral" in the Rule is defined to include cassiterite, columbite-tantalite, gold, wolframite or their derivatives (which are limited to tantalum, tin and tungsten (the "3T's")), unless the Secretary of State determines that additional derivatives are financing conflict in the Covered Countries, in which case those additional derivatives are also considered "conflict minerals." Dodd-Frank Act, Section 1502(e)(4). Release, page 39. The listed minerals are "conflict minerals" whether or not they actually financed or benefited armed groups. Release, page 40.

Further Description of "Conflict Minerals"

- A Cassiterite is the ore that is commonly used to produce tin. Tin is used in alloys, tin plating and solders to join pipes and electronic circuits. Release, page 34.
- Columbite-tantalite is the ore from which tantalum is extracted. Tantalum is used in electronic components, including mobile telephones, computers, videogame consoles and digital cameras, and as an alloy for making carbide tools and jet engine components. Release, page 34.
- Gold is used for making jewelry and is used in electronic, communications and aerospace equipment. Release, page 34.
- Wolframite is the ore that is used to produce tungsten. Tungsten is used for metal wires, electrodes and contacts in lighting, electronic, electrical, heating and welding applications. Release, page 34.

Examples of What Is Not a "Conflict Mineral"

- Oxygen and iron are derivatives of wolframite that are not subject to the Rule. Release, page 35, 40.
- Niobium is a derivative of columbite-tantalite that is not subject to the Rule. Release, page 35, 40.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 38-40, 60, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

"Necessary to the Functionality"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

If the conflict minerals contained in the product are not "necessary to the functionality" of the product, the Rule does not apply and the reporting company has no further obligations under the Rule with respect to that product. Release, page 60.

"Necessary to the Functionality" of a Product Defined

The Rule does not define when a conflict mineral is "necessary to the functionality" of a product. Release, pages 21, 81. Whether a conflict mineral is deemed "necessary to the functionality" of a product depends on the reporting company's particular facts and circumstances. Release, pages 22, 82. Only a conflict mineral that is contained in the product is "necessary to the functionality" of that product. Release, pages 83, 84. In determining whether its conflict minerals are "necessary to the functionality" of a product, a reporting company should consider: (a) whether a conflict mineral is contained in and intentionally added to the product or any component of the product and is not a naturally-occurring by-product; (b) whether a conflict mineral is necessary to the product's generally expected function, use or purpose; (c) if a conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration; and, (d) any conflict mineral is contained in its product and intentionally added in the production process of the product or in the production process of any component of the product. Release, pages 82, 87. Based on the applicable facts and circumstances, *any* of these factors, either individually or in the aggregate, may be determinative as to whether conflict minerals are "necessary to the functionality" of a given product. Release, page 82.

A conflict mineral is "necessary" to the product whether it was added by the reporting company or added to a component of the product that the reporting company receives from a third party. Release, pages 86-87.

To be "necessary" to the product, the conflict mineral need not be limited to the products "basic function" or "economic utility." Release, page 87. When there are multiple functions and uses, the conflict mineral need only be necessary for one function to be "necessary to the functionality" of that product. Release, page 88.

Examples of What Is "Necessary to the Functionality" of a Product

- Products where a catalyst is used in the production of a product and any amount (even a trace amount) of that catalyst remains in the product. Release, page 85.
- A smart phone has multiple generally expected functions, uses and purposes, such as making and receiving phone calls, accessing the internet and listening to stored music. If a conflict mineral is necessary to the function, use or purpose of any one of these functions, it is "necessary to the functionality" of the phone. Release, page 88.

- The gold in a gold pendant hanging on a necklace is necessary to the functionality of the pendant because it is incorporated for purposes of ornamentation, decoration or embellishment, and a primary purpose of the pendant is ornamentation or decoration. Release, page 88.
- A conflict mineral used in or contained in a very small amount, even a trace amount, could be "necessary" to the product's functionality, and therefore trigger a reasonable country of origin inquiry. *Release, page 91-93*. A *de minimis* amount of conflict mineral triggers such obligations only if it is necessary to the functionality of the product. Release, page 93. A minute amount could be "necessary." Release, page 93.
- Tin found in metal alloys (including high volume materials of cold rolled steel, hot rolled steel and stainless steel) is a contaminant and not part of the specification of the alloys. Release, page 94.
- A conflict mineral must be "contained" in a product to be "necessary" to that product's functionality, so a product must "contain" a conflict mineral in order for a reasonable country of origin inquiry to be required. Release, page 85.

Examples of What Is Not "Necessary to the Functionality" of a Product

- Product where a conflict mineral is a naturally-occurring by-product in the production process. Release, page 86.
- If a conflict mineral is incorporated into a product for purposes of ornamentation, decoration or embellishment, and the primary purposes of the product is not ornamentation or decoration, it is less likely to be "necessary to the functionality of the product." Release, pages 88-89.

Grey Areas

- Is packaging of the product "necessary to the functionality?"

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 21-22, 81-94, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

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Conflict Minerals Rule

"Necessary to the Production"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

If the conflict minerals contained in the product are not "necessary to the production" of the product, the Rule does not apply and the reporting company has no further obligations under the Rule with respect to that product. Release, page 60.

"Necessary to the Production" of a Product Defined

The Rule does not define when a conflict mineral is "necessary to the production" of a product. Release, pages 21, 81. Whether a conflict mineral is deemed "necessary to the production" of a product depends on the reporting companies' particular facts and circumstances. Release, pages 22, 82, 89. To be "necessary to the production" of a product, the conflict mineral must be contained in the product and intentionally added in the production process of the product, including the production process of any component of the product (Release, pages 82, 89) and the conflict mineral must be necessary to produce the product. Release, pages 22, 82, 89. Finally, in determining whether a conflict mineral is "necessary to the production" of a product, a reporting company must consider any conflict mineral contained in its product, even if that conflict mineral is only in the product because it was included as part of a component of the product that was manufactured by a third party. Release, page 87.

Examples of What Is "Necessary to the Production" of a Product

- A conflict mineral used as a catalyst or in another manner in the production process of a product is "necessary to the production" of the product if that conflict mineral is otherwise necessary to the production of the product *and* is contained in the final product (even in trace amounts). Release, pages 23, 85, 89-90.
- A conflict mineral used in or contained in a very small amount, even a trace amount, could be "necessary" to the production of the product, and therefore trigger a reasonable country of origin inquiry. Release, page 91-93. A *de minimis* amount of conflict mineral triggers such obligations only if it is necessary to the production of the product. Release, page 93. A minute amount could be "necessary." Release, page 93.
- Tin found in metal alloys (including high volume materials of cold rolled steel, hot rolled steel and stainless steel) is a contaminant and not part of the specification of the alloys. Release, page 94.
- A conflict mineral must be "contained" in a product to be "necessary" to the production of that product, so a product must "contain" a conflict mineral in order for a reasonable country of origin inquiry to be required. Release, page 85.

Examples of What Is Not "Necessary to the Production" of a Product

- A conflict mineral in a physical tool or machine used to produce a product is not "necessary to the production" and is therefore not subject to the Rule. Release, pages 90-91.

- Indirect equipment used to produce a product, such as computers and power lines, is not "necessary to the production" of the product, and is not subject to the Rule. Release, page 91.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 21-23, 81-94, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

"Outside the Supply Chain" Exception

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

The Rule excludes any conflict minerals that are "outside the supply chain" before January 31, 2013. Release, pages 23, 128. That is, even if a product contains a conflict mineral, if the conflict mineral in the product was outside the supply chain before January 31, 2013, the Rule does not apply to such product. Release, pages 23, 128-129. The SEC concluded that such minerals would not contribute further to armed conflict, so there is no reason to subject them to the Rule. Release, page 129.

"Outside the Supply Chain" Defined

Conflict minerals are "outside the supply chain" only:

- after tantalum, tin or tungsten have been smelted;
- after gold has been fully refined; or
- after any conflict mineral that has not yet been smelted or fully refined is located outside of the Covered Countries. Release, pages 23, 129.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 23, 128-131, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

"Reasonable Country of Origin Inquiry"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

Once a reporting company determines that conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the reporting company, the reporting company must conduct a reasonable country of origin inquiry to determine if the minerals originated in the Covered Countries or if they came from recycled or scrap sources. Release, pages 147-148.

After conducting a reasonable country of origin inquiry, the reporting company could reach one of four conclusions:

1. its necessary conflict minerals did not originate in the Covered Countries or did come from recycled or scrap sources, which would require the reporting company to file a Form SD that discloses the reporting company's determination and briefly describes its reasonable country of origin inquiry, due diligence measures taken, and the results thereof (Release, page 25);
2. it has no reason to believe that its conflict minerals may have originated in the Covered Countries or it reasonably believes that its conflict minerals are from recycled or scrap sources, which would require the reporting company to file a Form SD that discloses the reporting company's determination and briefly describes its reasonable country of origin inquiry, due diligence measures taken, and the results thereof (Release, pages 26-27);
3. it knows that it has necessary conflict minerals that originated in the Covered Countries and did not come from recycled or scrap sources, or it has reason to believe that its necessary conflict minerals may have originated in the Covered Countries and may not have come from recycled or scrap sources, which would require the reporting company to exercise due diligence on the source and chain of custody of its conflict minerals and provide a Conflict Minerals Report (Release, pages 26, 152, 228); or,
4. it originally thought its conflict minerals were from recycled or scrap sources but comes to believe, following its reasonable country of origin inquiry, that such conflict minerals are not from recycled or scrap sources which would require the reporting company to exercise due diligence on source and supply chain (Release, page 232). This is an on-ramp to Step 3 of the Rule's requirements.

Even if a reporting company is unable to determine the origin of its conflict minerals with certainty, if its reasonable country of origin inquiry yields no reason to believe its minerals may have originated in the Covered Countries, it is not required to conduct due diligence. SEC Reply Brief, p. 55.

"Reasonable Country of Origin Inquiry" Defined

The Rule does not specify what steps and outcomes are necessary to satisfy the reasonable country of origin inquiry requirement because such a determination depends on each reporting company's particular facts and circumstances. Release, pages 24, 147. A reasonable country of origin inquiry can differ among reporting companies based on the reporting companies' size, products, relationships with suppliers or other factors. Release, pages 24, 147. The Rule includes general standards governing the inquiry and the steps required as a result of the inquiry. Release, page 147. (1) The Rule provides that a reporting company's reasonable country of origin inquiry must be reasonably designed to determine whether the reporting company's conflict minerals did originate in the Covered Countries, or did come from recycled or scrap sources, and it must be performed in good faith. Release, pages 25, 147. (2) The reasonable country of origin inquiry standard does not require a reporting company to determine to a certainty that all its conflict minerals did not originate in the Covered Countries because the standard required is a reasonable inquiry, and require a certainty in this setting would not be reasonable and may impose undue costs. Release, page 151.

A reporting company may conclude that its conflict minerals did not originate in the Covered Counties even if it does not receive responses from all its suppliers as long as it does not ignore warning signs or other circumstances that indicate that the rest of its conflict minerals originated or may have originated in the Covered Countries. Release, pages 149-150, 164.

Reporting companies are permitted to rely on reasonable representations from suppliers and/or smelters in certain circumstances. SEC Reply Brief, p. 59.

The Rule does not require exact tracking of every stage of a component's manufacture. SEC Reply Brief, p. 59.

The SEC did not adopt specific flow-down clause proposals, but it did not prohibit them either. Flow-down clauses plus verification of the credibility of suppliers' information appears consistent with the SEC's guidance. SEC Reply Brief, p. 59.

Reasonably reliable representations indicating the origin of conflict minerals may come directly (from a smelter or refiner) or indirectly (through the reporting company's immediate suppliers). SEC Reply Brief, p. 61.

If, after a reasonable inquiry, no evidence of a Covered Country being a source of gold has arisen, and if the origin of only a small amount of gold is still unknown, the manufacturer should be allowed to declare that its gold is not from a Covered Country and is DRC conflict free. Release, page 150.

Disclosure regarding the reasonable country of origin inquiry that the reporting company made can be used to evaluate the degree of care the reporting company used in making the determination that the next step of diligence was not necessary. Release, page 163.

The Rule does not require a reporting company to retain reviewable business records to support its reasonable country of origin inquiry conclusion. However, retaining records can be useful to demonstrate compliance with the Rule generally or may be required by a required due diligence framework. Release, pages 27, 165.

Examples of a "Reasonable Country of Origin Inquiry"

- A reporting company that seeks and obtains reasonably reliable representations indicating the facility at which its conflict minerals were processed and demonstrating that those conflict minerals did not originate in the Covered Countries or that they came from recycled or scrap sources. Release, page 148. These representations could come either directly from that facility or indirectly through the reporting companies immediate suppliers, but the reporting company must have a reason to believe these representations are true given the facts and circumstances surrounding those representations. Release, page 148.
- A reporting company may conclude that its conflict minerals did not originate in the Covered Countries, even though it

does not hear from all of its suppliers as long as it does not ignore warning signs that the remaining conflict minerals may have originated from the Covered Countries. Release, pages 149 and 150. The standard of inquiry and information is a reasonable inquiry standard and not a certainty standard.

- The reasonable country of origin inquiry must be reasonably designed and executed in good faith. Release, page 164.

  "Reasonably reliable representations" would include:

  (a) conflict-free designation of a processing facility by a recognized industry group supported by an independent private sector audit.

  (b) conflict-free designation of an individual processing facility by an independent private sector audit that is made publicly available.

  Release, page 149.

  Red Flags/Warning Signs that would need to be considered and will often lead to additional diligence:

  - Conflict minerals are claimed to originate from a country with few known reserves of the conflict mineral. Release, page 153, fn. 455.
  - Conflict minerals processed by smelters that sourced from many countries (including Covered Countries) and the reporting company cannot determine whether the conflict minerals it received from the "mixed smelter" were from Covered Countries. Release, page 154.

Examples of What Is Not a "Reasonable Country of Origin Inquiry"

- The reasonable country of origin requirement was not meant to suggest that reporting companies would have to determine with absolute certainty whether their conflict minerals originated in the Covered Countries. Release, pages 151, 157.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 24-27, 147-157, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

NAM v. SEC, SEC Reply Brief, Mar. 28, 2013, *available at* http://www.squiresanders.com/pdf/Compliance/SEC-Reply-Brief.pdf.

"Covered Countries"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

If the conflict minerals contained in the reporting companies' product do not originate from one of the covered countries (or the reporting company has reason to believe that they do not originate from there), the reporting company merely discloses this determination in a Form SD, and no further due diligence is necessary. Release, pages 161-162. However, if the conflict minerals contained in the reporting companies' product do originate from one of the covered countries (or the reporting company has reason to believe that they do), then the reporting company must conduct further due diligence and will likely have to submit a lengthy Conflict Minerals Report to the SEC. Release, pages 182-183.

"Covered Countries" Defined

The Covered Countries include the Democratic Republic of the Congo and its "adjoining countries." Release, page 6. The term "adjoining country" is defined in Dodd-Frank Act, Section 1502(e)(1) as a country that shares an internationally recognized border with the Democratic Republic of the Congo, which presently includes Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia. Release, page 6.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 6, fn. 7, 161-162, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

"Recycled and Scrap Minerals"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

Products with conflict minerals from recycled or scrap sources are considered to be "DRC conflict free," and there is no requirement to discuss their processing facilities, countries of origin or efforts to determine mine or location of origin. Release, page 234. Recycled and scrap minerals are given special treatment under the Rule due to the difficulty of looking through the recycling or scrap process to determine the mine or other location of origin of the minerals. Release, page 219. Because of this special treatment, the Rule only requires a reporting company with conflict minerals from recycled or scrap sources to exercise due diligence if it has reason to believe, following its reasonable country of origin inquiry, that its conflict minerals that it thought were from recycled or scrap sources may not be from such sources. Release, page 232. A reporting company with products containing conflict minerals from recycled or scrap services are not required to provide a Conflict Minerals Report for those products, but should disclose how it determined that its conflict minerals are from recycled or scrap sources. Release, page 234.

"Recycled and Scrap Minerals" Defined

Conflict minerals are considered to be from recycled or scrap sources if they are from recycled metals, which are reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing. Release, page 231. The Rule's definition of recycled or scrap sources is the same as the definition for such term used by the OECD. Release, pages 230, 232.

Examples of "Recycled and Scrap Minerals"

- Recycled metal includes excess, obsolete, defective and scrap metal materials that contain refined or processed metals that are appropriate to recycle in the production of tantalum, tin, tungsten and/or gold. Release, page 231.

Examples of What Is Not "Recycled and Scrap Minerals"

- Minerals partially processed, unprocessed or a byproduct from another ore will not be included in the definition of recycled metal. Release, page 231.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 228-242, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

"Form SD"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

At the very least, a reporting company that is subject to the Conflict Minerals Rule is required to make certain disclosures in the body of its specialized disclosure report on Form SD under the "Conflict Minerals Disclosure" heading. Release, pages 161-162.

"Form SD" Defined

The Rule requires a reporting company to provide its annual conflict minerals information on Form SD ("specialized disclosure"), which is to be provided on a calendar year basis and will be due by May 31 of the following year. Release, pages 23-24, 106, 119-120. The first reporting period for all reporting companies will be from January 1, 2013 to December 31, 2013, and the first Form SD must be filed on or before May 31, 2014. Release pages 24, 120.

The Form SD (with the Conflict Minerals Report, if required, and any independent private sector audit reports, if required) must be filed with the SEC under the Exchange Act and is subject to potential Exchange Act Section 18 liability. Release, page 24, 115.

Under Section 18(a) of the Exchange Act, a person who makes a statement in a report that is filed under the Exchange Act that was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, is liable for damages to a person who purchased or sold a security in reliance on that statement at a price that was affected by that false or misleading statement, unless the person sued can prove that he acted in good faith and had no knowledge that the statement was false or misleading. Exchange Act, Section 18(a).

The SEC noted that Section 18 does not create strict liability for filed information. Instead, under Section 18, the reporting company will not be liable for a false or misleading statement in the Form SD (and any required Conflict Minerals Report filed as an exhibit to Form SD) if the reporting company can establish that it acted in good faith and had no knowledge that the statement was false or misleading. Release, page 117.

The reporting company must make its Form SD (with the Conflict Minerals Report, if required) available on its website for one (1) year. Release, page 108.

What Should Be Included in Form SD

- A reporting company is required to provide a brief description of the reasonable country of origin inquiry it undertook. Release, page 163.
- A reporting company that is required to provide a Conflict Minerals Report must disclose in its Form SD, under a heading entitled "Conflict Minerals Disclosure," that a Conflict Minerals Report is provided as an exhibit to its Form SD and must disclose a link to its website where the Conflict Minerals Report is publicly available. Release, pages 162, 166.
- A reporting company must provide conflict minerals information for the calendar year in which the manufacture of a product containing a conflict mineral is completed whether the product is manufactured by the reporting company or contracted for manufacture by the reporting company. Release, pages 123-124.
    - If manufacture of the product is completed on December 30, 2018, the reporting company must include information about that product in the Form SD for calendar year 2018. If manufacture of such product is completed on January 2, 2019, the reporting company must include information about that product in the Form SD for calendar year 2019. Release, page 123.
- The timing of the filing depends on when the manufacturing of the product is completed, regardless of when the product is shipped. Release, page 124.
- The reporting period for an independent third party manufacturer of a component of another product is determined by when the third party manufacturer completes the manufacturing of the component product. Release, page 124.
- The reporting period for a manufacturer that incorporates components manufactured by an independent third party is determined by when the manufacturer completes the manufacture of the product that incorporates the component. Release, page 124.
- Therefore, the reporting period for the manufacturer of a component and the manufacturer that includes the component may be different years. Release, page 124.
- There is no requirement that the reporting company maintains reviewable business records in support of its reasonable country of origin inquiry conclusion that its conflict mineral did not originate in the Covered Countries. Release, pages 27, 165.
- The Rule does not require a physical label on any product. Release, page 194.

What Should Not be Included in Form SD

- The Rule does not require a reporting company to disclose in the body of its Form SD the reason that the reporting company is providing a Conflict Minerals Report because that information will be disclosed by the reporting company in the Conflict Minerals Report. Release, page 166.
- The Rule does not require a reporting company to disclose in its specialized disclosure report that it has provided an audit report or a certification of the audit, if applicable, because the audit report and certification would be part of the Conflict Minerals Report. Release, page 166.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 23-24, 27, 161-166, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

Copy of Form SD, pgs. 344-356, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

"Due Diligence"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

Based on a reasonable country of origin inquiry, once a reporting company knows or has reason to believe that conflict minerals may have originated in one of the Covered Countries or knows or has reason to believe the necessary conflict minerals may not have come from recycled or scrap sources (Release, page 152), it must conduct heightened due diligence on the source and chain of custody of its conflict minerals. Release, page 152. After such heightened due diligence on the source and chain of custody of its conflict minerals, the reporting company must file a Conflict Mineral Report and describe its due diligence measures and other matters unless the reporting company determined that they were not from the Covered Countries. Release, page 152.

If, after such heightened due diligence, the reporting company determines that its conflict minerals did not originate in a Covered Country or determines that its conflict minerals did come from recycled or scrap sources, that reporting company is required to file a Form SD (disclosing its determination, briefly describing its reasonable country of origin inquiry and due diligence and results of that inquiry – demonstrating why the reporting company believes that the conflict minerals did not in fact, originate in a Covered Country or that the conflict minerals did come from recycled or scrap sources), but it is not required to file a Conflict Minerals Report. Release, page 26, 155.

Reporting companies are permitted to rely on reasonable representations from suppliers and/or smelters in certain circumstances. SEC Reply Brief, p. 59.

The Rule does not require exact tracking of every stage of a component's manufacture. SEC Reply Brief, p. 59.

The SEC did not adopt specific flow-down clause proposals, but it did not prohibit them either. Flow-down clauses plus verification of the credibility of suppliers' information appears consistent with the SEC's guidance. SEC Reply Brief, p. 59.

Reasonably reliable representations indicating the origin of conflict minerals may come directly (from a smelter or refiner) or indirectly (through the reporting company's immediate suppliers). SEC Reply Brief, p. 61.

To guide its due diligence efforts, the reporting company must use a nationally or internationally recognized due diligence framework, if one is available for the specific conflict mineral. Release, pages 27, 205.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 26-27, 205-208, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

NAM v. SEC, SEC Reply Brief, Mar. 28, 2013, *available at* http://www.squiresanders.com/pdf/Compliance/SEC-Reply-Brief.pdf.

"Nationally or Internationally Recognized Due Diligence Framework"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

Based on its reasonable country of origin inquiry, once a reporting company knows or has reason to believe that conflict minerals may have originated in one of the Covered Countries, it must conduct heightened due diligence to determine the source and chain of custody of its conflict minerals. This heightened due diligence is required to conform to a nationally or internationally recognized framework if one exists. Release, page 205.

"Nationally or Internationally Recognized Due Diligence Framework" Defined

To satisfy the requirements of the Rule, the nationally or internationally recognized due diligence framework used by the reporting company must have been established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment, and be consistent with the criteria standards in GAGAS established by the GAO. Release, page 207. "GAGAS" stands for Generally Accepted Governmental Auditing Standards.

As of the date the Rule was issued, only one nationally or internationally recognized due diligence framework existed, and that was the due diligence guidance approved by the Organisation for Economic Co-operation and Development (OECD). Release, page 28.

If a nationally or internationally recognized framework becomes available for any of the conflict minerals, reporting companies will be required to utilize that framework for that mineral. Release, page 233.

- If a new framework for a conflict mineral becomes available before June 30 of a calendar year, the first reporting period in which the reporting company must use the new framework for that conflict mineral will be the subsequent calendar year after approval. Release, page 233.
- If a new framework for a conflict mineral becomes available after June 30 of a calendar year, the first reporting period in which the reporting company must use the new framework for that conflict mineral will be the second calendar year after approval. Release, page 233.
- Note: the Rule is not clear when reporting companies must implement a new framework that is approved on June 30 of a given year.

Examples of "Nationally or Internationally Recognized Due Diligence Framework"

- The OECD's "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" satisfies the SEC's criteria and may be used as a framework of satisfying the requirement that a reporting company exercise due diligence in determining the source and chain of custody of its conflict minerals. Release, page 206.
- A gold supplement to the OECD's due diligence guidance has been approved by the OECD. Release, page 31. That gold supplement is presently the only nationally or internationally recognized due diligence framework for any conflict mineral from recycled or scrap sources. Release, page 232. The SEC expects that reporting companies will use the OECD's gold supplement to conduct their due diligence for recycled or scrap gold. Release, pages 31, 232.
- Neither the OECD nor any other group has developed a due diligence framework for recycled or scrap sources of any conflict minerals other than gold. Release, page 232-233.
- Whether a reporting company may rely on reasonable representations of suppliers and/or smelters to satisfy its due diligence requirements, depends upon what the nationally or internationally recognized framework provides. Release, Page 208.
- Even if no nationally or internationally recognized due diligence framework exists, the reporting company is still required to exercise due diligence in determining whether it's necessary conflict minerals were from recycled or scrap sources. Release, page 31.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 27-28, 31, 205-208, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

OECD's Due Diligence Guidance

"Conflict Minerals Report"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

After a reporting company completes the reasonable country of origin inquiry and the heightened due diligence concerning sources and chain of custody of conflict minerals using a nationally or internationally recognized framework, if a reporting company cannot come to the conclusion either that its conflict minerals are not from Covered Countries or that they are from scrap or recycled minerals, then the reporting company must file a Form SD with a Conflict Minerals Report as an exhibit. The Conflict Minerals Report must, include a description of the measures the reporting company has taken to exercise due diligence. Release, pages 27, 182-183.

"Conflict Minerals Report" Defined

Unless a reporting company's products are "DRC Conflict Free," a Conflict Minerals Report must include a description of the facilities used to process those conflict minerals (that is, the smelter or refinery through which the conflict minerals passed), the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity. Release, pages 183-184. Also, the Conflict Minerals Report should include a description of the reporting company's products that have "not been found to be 'DRC conflict free.'" Release, pages 184, 217. Products are considered "DRC conflict free" if they do not contain minerals that directly or indirectly finance or benefit armed groups in the Covered Countries. Release, page 185.

A reporting companies' description of its due diligence should be based on the individual reporting companies' facts and circumstances. Release, page 207. If a reporting companies' due diligence process is relatively consistent throughout its supply chain, the reporting company could satisfy the requirements by generally describing its due diligence. Release, page 208. If a reporting company exercises significantly different due diligence processes for different aspects of its supply chain, such as with separate conflict minerals or products, that reporting company should describe how they are different. Release, page 208.

If a reporting company describes its conflict minerals as "DRC Conflict Undeterminable," the reporting company must describe the following in its Conflict Minerals Report: (1) its products manufactured or contracted to be manufactured that are "DRC conflict undeterminable"; (2) its due diligence review; (3) the facilities used to process the conflict minerals in those products, if known; [(4) the country of origin of the conflict minerals in those products, if known;] (5) the efforts to determine the mine or location of origin with the greatest possible specificity; and, (6) the steps it has taken or will take, if any, since the end of the period covered in its most recent Conflict Minerals Report to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve due diligence. Release, pages 30, 186-187.

The Conflict Minerals Report must be submitted to the SEC as an exhibit to the Form SD. Therefore, it will be filed under the Exchange Act and subject to potential Exchange Act Section 18 liability. Release, page 24, 27.

If reasonable inquiry has been made, and if no evidence of Covered Country origin has arisen, and if the origin of only a small amount of gold were still unknown, a manufacturer should be allowed to declare that its gold is not from the Covered Countries and is DRC conflict free. Release, pages 150, 157.

If a "DRC conflict undeterminable" conclusion is reported in the Conflict Minerals Report, no private sector audit is required as to the products so designated. Release, pages 30, 187.

An issuer with products that are "DRC conflict free" does not have to describe those products in the Conflict Minerals Report in any manner. Release, page 194.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 23-27, 182-198, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

"DRC Conflict Undeterminable"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

For a temporary period, a reporting company will not be burdened by the costs and effort in obtaining an independent private sector audit if it is unable to determine whether the conflict minerals in its products originated in the Covered Countries. The reporting company, however, will still be required to file a Conflict Minerals Report. Release, pages 186-187.

"DRC Conflict Undeterminable" Defined

For a temporary two-year period (or four-year period for "smaller reporting companies"), if the reporting company is unable to determine that its conflict minerals meet the statutory definition of "DRC conflict free" either because (1) after the heightened due diligence, the reporting company is unable to determine whether its conflict minerals financed or benefitted armed groups in the Covered Countries; or (2) after its reasonable country of origin inquiry, the reporting company has reason to believe that its necessary conflict minerals may have originated in a Covered Country and may not have come from recycled or scrap sources and its heightened due diligence did not clarify whether its necessary conflict minerals benefitted or financed armed groups or whether they came from recycled or scrap sources, the reporting company may describe those products as "DRC conflict undeterminable." Release, pages 29-30, 51, 139-140, 186. If these products also contain conflict minerals that the reporting company knows benefitted or financed armed groups in the Covered Countries, that reporting company may not describe these products as "DRC conflict undeterminable." Release, page 30, 140. For all reporting companies, this alternative will be permitted on the Form SD for 2013 and 2014. Release, pages 138, 188. For "smaller reporting companies," this alternative will be permitted on Form SD for 2013 through 2016. Release, pages 138, 188. After those initial periods, every such reporting company will have to describe any such products in its Conflict Minerals Report as having "not been found to be 'DRC conflict free.'" Release, page 188.

A reporting company with products that are "DRC conflict undeterminable" is required to exercise due diligence on the source and chain of custody of its conflict minerals and submit a Conflict Minerals Report describing its due diligence; the steps it has taken or will take, if any, since the end of the period covered in its most recent prior Conflict Minerals Report to mitigate the risk that its necessary conflict minerals benefit armed groups, including any steps to improve its due diligence; the country of origin of the conflict minerals, if known; the facilities used to process the conflict minerals, if known; and the efforts to determine the mine or location of origin with the greatest possible specificity, if applicable. Such reporting company is not, however, required to obtain an independent private sector audit of that Conflict Minerals Report. Release, pages 139-140, 186.

The SEC indicates that it believes that the transition period will allow reporting companies sufficient time to gather information about their supply chain and get control over their supply chain through revised contracts with suppliers and smelter verification confirmations. Release, pages 117-118.

After the respective transition period has passed, reporting companies that are not able to determine that their conflict minerals did not originate in the Covered Countries or are unable to determine that their conflict minerals that originated in Covered Countries did not benefit or finance armed groups must describe their products containing these conflict minerals as having "not been found to be 'DRC conflict free.'" Release, pages 31, 188.

After the initial transition period, when the "undeterminable" reporting alternatives is no longer available, a reporting company that cannot determine that its conflict minerals did not originate in the Covered Countries, or that they did not benefit or finance armed groups, or that they came from recycled or scrap sources, will be required to describe relevant products as having "not been found to be 'DRC conflict free.'" Release, page 188. Such reporting companies will be required to provide a private sector audit of their Conflict Minerals Report as to such products. Release, page 188.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 29-31, 139-140, 186-189, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

"Independent Private Sector Audit Report"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

Accompanying the Conflict Minerals Report, an independent private sector audit report will review the reporting company's due diligence to assess and express an opinion as to whether the due diligence measures as set forth in the Conflict Minerals Report conform, in all material respects, with the criteria set forth in the national or international due diligence framework used by the reporting company and whether the description of the due diligence measures it performed as described in the Conflict Minerals Report is consistent with the due diligence the reporting company actually performed. Release, pages 28, 183, 217.

"Independent Private Sector Audit Report" Defined

A certified public sector audit must be conducted in accordance with standards of the US Comptroller General (Release, page 183), unless the GAO makes a formal announcement that it is adapting some other audit standards. Release, pages 214-215. Existing Generally Accepted Government Auditing Standards ("GAGAS") (also known as the Yellow Book), such as the standards for Attestation Engagements or the standards for Performance Audits, will apply to the private sector audit. Release, pages 28-29, 214. Also, it would not be inconsistent with the independence requirements in Rule 2-01 of Regulation S-X if the reporting company's independent public accountant also performs the independent private sector audit of the Conflict Minerals Report. Release, page 216. Any questions about how the independence standards apply to the audit should be directed to the GAO. Release, page 215.

When reporting companies describe their products as "DRC conflict undeterminable," no independent private sector audit report is required as to such products. Release, page 31.

If a reporting company describes products in its Conflict Minerals Report as having "not been found to be 'DRC conflict free,'" that reporting company will be required to provide an independent private sector audit of its Conflict Minerals Report. Release, page 188.

The independence required for the independent private sector audit of the Conflict Minerals Report is not the same as the OECD's independence requirements for auditors who conduct audits of conflict minerals smelters. Release, page 215.

The Rule does not require an audit of the entire Conflict Minerals Report, but limits the audit to the sections of the Conflict Minerals Report that discuss the design of the due diligence framework and the due diligence measures performed by the reporting company. Release, pages 217-218.

The audit is not required to cover the description of the products themselves that have "not been found to be 'DRC conflict free.'" Release, page 218.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 28-31, 214-219, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.

"DRC Conflict Free"

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"[Each reporting company] having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that [reporting company] to be manufactured, shall report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form." – Exchange Act Rule 13p-1.

The Big Picture

The Rule imposes three separate reporting obligations on the reporting company depending on whether the reporting company's conflict minerals are "DRC conflict free." "DRC conflict undeterminable," or were "not found to be 'DRC conflict free.'" Release, pages 183, 184, 186.

"DRC Conflict Free" Defined

The Conflict Minerals Statutory Provision does not define "not DRC conflict free," but instead defined "DRC conflict free." Release, pages 83, 184. Products are considered "DRC conflict free" under Exchange Act, Section 13(p)(1)(A)(ii) if they do not contain minerals that directly or indirectly finance or benefit armed groups in the Covered Countries. Release, pages 83, 185. Armed groups are those that are identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as they relate to the Covered Countries. Release, page 197.

In the Conflict Minerals Report, a reporting company can include the statutory definition of "DRC conflict free" in the disclosure to make clear that "DRC conflict free" has a very specific meaning, or to otherwise address their particular situation. Release, page 189. Below are two examples of potential disclosure statements:

1. "The following is a description of our products that have not been found to be "DRC conflict free" (where 'DRC conflict free' is defined under the federal securities laws to mean that a product does not contain conflict minerals necessary to the functionality or production of that product that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country)." Release, page 189.
2. "We have been unable to determine the origins of some of our conflict minerals. Because we cannot determine the origins of the minerals, we are not able to state that products containing such minerals do not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Therefore, under the federal securities laws we must describe the products containing such minerals as having "not been found to be 'DRC conflict free.'" Those products are listed below." Release, page 189.

The final rule does not require a physical label on any product. Release, page 194.

An issuer with products that are "DRC conflict free" does not have to describe those products in the Conflict Minerals Report in any manner. Release, page 194.

Reference

SEC Adopts Rule for Disclosing Use of Conflict Minerals, SEC, Summary of Changes to Final Rule and Discussion of Final Rule, pgs. 183-198, Aug. 22, 2012, *available at* http://www.sec.gov/rules/final/2012/34-67716.pdf.