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Breaking News

Conflict Minerals – Part II of III – SEC Adopts Final Rule Regarding Disclosure

August 23, 2012

Highlights of Final Rule Issued August 22, 2012

As required by Section 1502 of Dodd-Frank, the SEC adopted a final rule regarding disclosure of the use of conflict minerals that originate from the Democratic Republic of the Congo or adjoining countries (now called "covered countries").

This publication summarizes key changes from the rules as proposed by the SEC.

- Issuers must determine if they manufacture or contract to manufacture products that contain conflict minerals that are necessary to the production or functionality of the product. The SEC declined to define "manufacture," "necessary to the functionality" or "necessary to production."
- If an issuer uses the designated minerals, it must conduct a reasonable inquiry regarding the origins of those minerals – called a "reasonable country of origin inquiry." Precise requirements of the inquiry are not provided in the rule. But, the inquiry must be carried out in good faith and must be "reasonably designed" by the issuer to determine if the minerals originated in the covered countries or are from scrap or recycled sources.
- If, after reasonable inquiry, an issuer determines that its conflict minerals did not originate in the covered countries or the issuer has no reason to believe that the minerals may have originated in the covered countries, then the issuer is required to disclose that determination and provide a description of the reasonable country of origin inquiry and results of the inquiry on a newly created Form SD (which is also to be posted on the issuer's website).
- If, after reasonable inquiry, an issuer determines that its conflict minerals are from scrap or recycled sources or the issuer has no reason to believe that the minerals are not from scrap or recycled sources, then the issuer is required to disclose that determination and provide a description of the inquiry and results of the inquiry on the newly created Form SD (which is also to be posted on the issuer's website).
- If, after reasonable inquiry, an issuer knows or has reason to believe that its minerals may have originated in the covered countries or that its minerals may not be recycled or scrap, the issuer is then required to conduct supply chain due diligence to determine if the conflict minerals benefited armed groups in the covered countries. If the issuer is required to conduct such supply chain due diligence, the issuer is required to disclose information about that due diligence in a Conflict Minerals Report that is to be filed as an exhibit to its Form SD (which is also to be posted on the issuer's website).
- If the issuer is required to conduct the supply chain due diligence, that due diligence must be consistent with an existing nationally or internationally recognized due diligence framework (if any exists). The due diligence guidance provided by the OECD is one such recognized framework.

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- The Conflict Minerals Report must be audited by a third-party auditor. The auditor must state its opinion as to whether an existing nationally or internationally recognized due diligence framework (if any) was used and whether the issuer actually undertook the due diligence. The audit standard is not whether due diligence was effective or whether the supply chain is conflict free.
- Issuers that are unable to determine the source of their conflict minerals or unable to determine that the minerals have not benefited armed groups after conducting due diligence may, for two years, describe the products containing the minerals as "DRC conflict undeterminable" rather than "not conflict free." Smaller reporting companies may use the "DRC conflict undeterminable" characterization for four years.
- Conflict minerals disclosure is not required to be made on the issuer's Form 10-K, but on a newly prescribed form – Form SD. Form SD will be prepared on a calendar year basis for all issuers and will be due by May 31 of the following year, starting with May 31, 2014. Form SD will be filed under the Exchange Act and not merely furnished as was contemplated in the proposed rules.
- Note: there are no exemptions from the rules for small to medium-sized issuers. There is no phase-in period. There is no *de minimis* exception. There is no exemption for existing long-term supply contracts.

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