

April 14, 2014

SEC Staff Issues Additional Guidance on Conflict Minerals

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Contacts

Richard J.B. Price
London
+44.20.7655.5097
rprice@shearman.com

David Dexter
London
+44.20.7655.5633
david.dexter@shearman.com

Robert Evans III
New York
+1.212.848.8830
revans@shearman.com

Pamela M. Gibson
London
+44.20.7655.5006
pgibson@shearman.com

Masahisa Ikeda
Tokyo
+81.3.5251.1601
mikeda@shearman.com

Lisa L. Jacobs
New York
+1.212.848.7678
ljacobs@shearman.com

Marc O. Plepelits
Frankfurt
+49.69.9711.1623
mplepelits@shearman.com

Sami L. Toutounji
Paris
+33.1.53.89.70.62
stoutounji@shearman.com

Robert C. Treuhold
New York
+1.212.848.7895
rtreuhold@shearman.com

SHEARMAN.COM

On April 7, 2014, the SEC Division of Corporation Finance (the Division) issued responses to nine frequently asked questions (FAQs) on the reporting requirements regarding conflict minerals originating in the Democratic Republic of the Congo (DRC) and adjoining countries (Conflict Minerals Rules). These nine new FAQs supplement the 12 FAQs issued by the Division on May 30, 2013.¹

The new FAQs published by the Division relate to the Conflict Minerals Report that some issuers must provide beginning for calendar year 2013 in a new Form SD and to the independent private sector audit (IPSA) of the Conflict Minerals Report. The following is a summary of significant guidance in the nine new FAQs:

An Auditor Other Than a Certified Public Accountant May Perform the IPSA

An auditor that is not a certified public accountant may perform the IPSA of an issuer's Conflict Minerals Report pursuant to the Performance Audit provisions of the US Government Accountability Office's Government Auditing Standards (also known as the "Yellow Book").

No IPSA is Required if Any Products are "DRC Conflict Undeterminable" During the Transition Period

During the temporary transition period (four years for smaller reporting companies and two years for all other issuers), an issuer is not required to obtain an IPSA of its Conflict Minerals Report if it determines that at least one of its products may be described as "DRC conflict undeterminable."

¹ The FAQs can be found at <http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm>. The Conflict Minerals Rules were adopted in SEC Release No. 34-67716 (August 22, 2012). More information and analysis of the Conflict Minerals Rules may be found in our previous client publications at <http://www.shearman.com/sec-adopts-dodd-frank-conflict-minerals-and-government-payments-rules-08-27-2012/> and <http://www.shearman.com/all-that-glitters-may-be-a-reportable-conflict-mineral-12-19-2012/>. Our analysis of the 12 FAQs issued on May 30, 2013 is available at <http://www.shearman.com/sec-staff-issues-guidance-on-conflict-minerals-05-31-2013/>.

IPSA is Required if Any Products are Described as “DRC Conflict Free” in Conflict Minerals Report

An issuer may describe its products with conflict minerals sourced from the DRC or its adjoining countries as “DRC conflict free” in its Conflict Minerals Report only if the issuer is able to determine that the conflict minerals in those products did not finance or benefit armed groups in that region. This determination must be based on due diligence that includes an IPSA of the Conflict Minerals Report.

Description of Products with Conflict Minerals in Conflict Minerals Report

A product that contains a conflict mineral that did finance or benefit armed groups in the DRC or an adjoining country must be described in the Conflict Minerals Report as “having not been found to be ‘DRC conflict free.’” During the temporary transition period, a product that contains a conflict mineral that the issuer is unable to determine did not originate in the DRC or an adjoining country, or is unable to determine did not directly or indirectly finance or benefit armed groups in those countries, may not be described as “DRC conflict free,” but may be described as “DRC conflict undeterminable.”

Scope of IPSA Does Not Include Completeness or Reasonableness of Diligence

The scope of the IPSA is limited to the IPSA objective provided in the Conflict Minerals Rules, which is to express an opinion or conclusion as to (1) whether the design of the issuer’s due diligence measures as set forth in, and with respect to the period covered by, the issuer’s Conflict Minerals Report is in conformity with the due diligence framework used by the issuer and (2) whether the issuer’s description of the due diligence measures in the Conflict Minerals Report is consistent with the due diligence process that the issuer undertook. The IPSA is not required to cover the completeness or reasonableness of the due diligence measures.

IPSA Does Not Include Reasonable Country of Origin Inquiry

The IPSA does not need to cover the reasonable country of origin inquiry because that inquiry is a different step from the due diligence process under the Conflict Minerals Rules. This is the case even if the due diligence framework used by an issuer includes procedures for obtaining information about a conflict mineral’s country of origin and those procedures are used by the issuer in its reasonable country of origin inquiry.

Disclosure About Conflict Minerals from Recycled or Scrap Sources is Not Required in Conflict Minerals Report

If an issuer determines that any conflict minerals in its products came from recycled or scrap sources, it must include the required disclosure only in the body of its Form SD. If the issuer files a Conflict Minerals Report as an exhibit to the Form SD to describe its diligence and other required disclosures for conflict minerals that are not from recycled or scrap sources, that report is not required to include disclosure for the conflict minerals that are from recycled or scrap sources.

Due Diligence Measures Do Not Need to be Carried Out Constantly

An issuer’s due diligence measures must apply to the conflict minerals in products manufactured during the period covered by the report (e.g., the calendar year). The issuer’s due diligence measures may begin before or extend beyond the period covered by the report and do not need to be carried out constantly throughout the year.

Full Description of Design of Diligence Measures is Not Required in Conflict Minerals Report

An issuer does not need to include a full description of the design of its due diligence procedures in its Conflict Minerals Report. However, the description of the due diligence measures undertaken by the issuer must be detailed enough for the auditor to reach a conclusion about whether the description is consistent with the process actually performed by the issuer.

ABU DHABI | BEIJING | BRUSSELS | FRANKFURT | HONG KONG | LONDON | MILAN | NEW YORK | PALO ALTO
PARIS | ROME | SAN FRANCISCO | SÃO PAULO | SHANGHAI | SINGAPORE | TOKYO | TORONTO | WASHINGTON, DC

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

599 LEXINGTON AVENUE | NEW YORK | NY | 10022-6069

Copyright © 2014 Shearman & Sterling LLP. Shearman & Sterling LLP is a limited liability partnership organized under the laws of the State of Delaware, with an affiliated limited liability partnership organized for the practice of law in the United Kingdom and Italy and an affiliated partnership organized for the practice of law in Hong Kong.