Conflict Minerals: Dodd-Frank, the SEC's Rule...and Beyond

By Arcie Jordan

Designed to reduce funding sources for those perpetrating human rights abuses and engaging in armed conflict in the Democratic Republic of the Congo ("DRC") and adjoining countries, Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") directed the U.S. Securities and Exchange Commission ("SEC") to establish regulations requiring certain issuers with "conflict minerals" that are ***necessary to the functionality or production of a product manufactured by them*** *(1)* to disclose annually whether any of those minerals originated in the DRC or an adjoining country (the "conflict region"), and - if the conflict minerals did originate in the conflict region, *(2)* to submit a report to the SEC that includes a description of the measures taken to exercise due diligence on the source and chain of custody of their conflict minerals.

As codified in new Section 13(p) of the Securities Exchange Act of 1934, Section 1502 requires that the measures taken to exercise due diligence must include an independent private sector audit of the report; the audit must be conducted in accordance with standards established by the Comptroller General of the United States; and the auditor must be identified in the report. Also, the report must be certified by the issuer and must include a description of (i) the products manufactured or contracted to be manufactured for the issuer that are not "DRC conflict free," (ii) the facilities used to process the conflict minerals, (iii) the country of origin of such minerals, and (iv) the efforts undertaken to determine the mine or location of origin. The information disclosed by the issuer must be made available to the public on the issuer's website. (See, SEC, *Release No. 34-67716; File No. S7-40-10* dated Aug. 22, 2012, published at 77 Federal Register No. 177, Part II, Sept. 12, 2012).

The SEC "Rule" implementing the Section 1502 mandate became effective on November 13, 2012. Although challenged by several groups, it was upheld by the District Court for the D.C. Circuit in July, 2013; that decision is currently under appeal. Pursuant to the Rule, covered companies are required to make their first disclosure by May 31, 2014.

If an issuer determines that it uses conflict minerals and they are necessary to the functionality or production of a product manufactured by it, the issuer must conduct a "reasonable country of origin inquiry" ("RCOI"). If the issuer determines that the conflict minerals did not originate in the conflict region, it must still file Form SD and describe its RCOI in it. If the company cannot conclude where its conflict minerals originated or determines that its conflict minerals did originate in the conflict region and did not come from scrap or recycled sources, it must conduct due diligence to determine their source and chain of custody, with the goal of determining whether they are "conflict-free" – that is, that such minerals did not directly or indirectly finance or benefit armed groups in the conflict region. The company must base its diligence on its facts and circumstances, and a nationally or internationally recognized due diligence framework. If through such diligence it is able to determine *either* that its conflict minerals did not originate in the conflict region, or - if they did - that they are "conflict free," the company must file Form SD, disclose its determination, and describe its RCOI, its diligence measures, the results thereof, and its conflict mineral sourcing policies.

Companies that cannot make either of the required determinations must file a Conflict Minerals Report as an exhibit to Form SD and make it available on their website. Unless the company is availing itself of the temporary designation: "DRC Conflict Undeterminable" – which is available only for calendar years 2013 and 2014 – the Conflict Minerals Report must also include an independent private sector audit report that satisfies prescribed criteria. In cases where the company determines that its conflict minerals financed or benefitted armed groups in the conflict region, it must designate its affected products as "not DRC Conflict Free" and, among the matters prescribed by Section 1502, must describe the smelter or refiner used to process the conflict minerals in those products.

Albeit, the Rule only applies to "reporting companies" – i.e., companies required to file reports with the SEC under section

13(a) or 15(d) of the Securities Exchange Act of 1934, except those that are exempt under Rule 12g3-2(b) – that manufacture or contract to manufacture products, **its impact is much broader:** ***All reporting*** companies must ascertain whether they use or whether their products include conflict minerals in a manner that triggers the reporting requirement, and ***all non-reporting*** companies that participate in the supply chains of reporting companies must be able to respond to their customers' requests for information concerning the upstream sourcing of components and minerals. Mining company issuers are not automatically covered by the Rule – unless they are also engaged in manufacturing, either directly or through contract, in addition to mining. **But, although mining companies are not covered solely by virtue of their mining activities, they may nonetheless be required by their customers to provide sourcing information.**

The "conflict minerals" currently covered by the U.S. enactments are: cassiterite, columbite-tantalite (also known as coltan), gold, wolframite, and their derivatives (tin, which is extracted from cassiterite; tantalum, which is extracted from columbite-tantalite; and tungsten, which is extracted from wolframite). **But, any other mineral or its derivatives may be added if the Secretary of State determines that they are financing conflict in the DRC or adjoining countries.** (Section 1502 (e)(4)).

Furthermore, Dodd-Frank's Section 1502 and the SEC's Rule are not the only initiatives in the "responsible sourcing" arena. Several factors, including socially responsible investor interest, consumer concerns, and competitive forces, are driving the enactment or proposal of similar measures, both at the state level within the United States, and globally: According to one source, as of January 2014, California and Maryland have adopted conflict minerals legislation, Connecticut and Massachusetts have proposed their own, the Canadian Conflict Minerals Act has been introduced, and the European Commission is expected to propose conflict minerals legislation in early 2014. (Schulte Roth & Zabel, *Conflict Minerals Compliance: Observations and Recommendations for 2014 and Beyond*, www.srz.com, Jan. 22, 2014). It is anticipated that the European initiative will not expand the list of conflict minerals covered beyond those mentioned above, but, several sources have reported it is likely the EU legislation's geographic scope will expand the designated conflict areas beyond the Central Africa region; Latin America has been specifically mentioned in this regard. (*Id.*; iPoint Conflict Minerals Platform, *European Conflict Minerals legislation expected by the end of 2013/iPoint conducts Conflict Minerals study for the European Commission*, www.conflict-minerals.com/newsroom). A glance at a world map identifying major production areas of conflict minerals (*See*, e.g., www.mining.com/infographic-four-leading-conflict-minerals-26308) quickly reveals other conflict regions across the globe. It does not seem too great a stretch to envision that those regions may be similarly designated given the current trend toward responsible sourcing. As a consequence, best practice for manufacturers – as well as those who contract for products to be manufactured – is to remain ever vigilant and monitor developments in this area. Developing a robust supply chain management system, with a high degree of visibility into vendor practices, will permit companies to be better prepared to respond in the event of expanded definitions of "conflict minerals" or the geographical scope of these initiatives.

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