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SEC ADOPTS RULE FOR DISCLOSING USE OF CONFLICT MINERALS

The Securities and Exchange Commission (SEC) recently adopted a rule pursuant to Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requiring certain issuers to publicly disclose their use of "conflict minerals" that originate in the Democratic Republic of the Congo (DRC) or an adjoining country.

Congress enacted Section 1502 of the Dodd-Frank Act because of concerns that the exploitation and trade of conflict minerals by armed groups helps to finance conflict in the DRC region and contributes to an emergency humanitarian crisis. Section 1502 of the Dodd-Frank Act amends the Securities Exchange Act of 1934 (Exchange Act) by adding a new section, Section 13(p).

The Dodd-Frank Act directed the SEC to issue rules requiring certain issuers to disclose their use of "conflict minerals" that include tantalum, tin, gold, and tungsten[1] if those minerals are "necessary to the functionality or production" of a product manufactured, or contracted to be manufactured, by those issuers. Issuers are required to provide this disclosure on a new form, Form SD, to be filed with the SEC.

Timing of Required Disclosure

Issuers required to provide the disclosures discussed herein will be required to file their first specialized disclosure report on May 31, 2014 (for the 2013 calendar year) and annually on May 31 every year thereafter, in each case without regard for the issuers' own fiscal year end.

Entities Required to Provide Disclosure

The rule applies to any issuer that uses designated "conflict minerals" including tantalum, tin, gold and tungsten if:

- The issuer files reports with the SEC under the Exchange Act; and
- The applicable minerals are "necessary to the functionality or production" of a product manufactured, or contracted to be manufactured, by the issuer.

An issuer is considered to be "contracting to manufacture" a product if it has some actual influence over the manufacturing of that product. This determination is based on facts and circumstances, taking into account the degree of influence an issuer exercises over the product's manufacturing. There is no "*de minimis*" exception contained in the final rule. However, an issuer is not deemed to have influence over the manufacturing if it merely:

- Affixes its brand, marks, logo, or label to a generic product manufactured by a third party;
- Services, maintains, or repairs a product manufactured by a third party; or

[1] The term "conflict mineral" is defined in Section 1502(e)(4) of the Dodd-Frank Act as (A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten is extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the U.S. Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

- Specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product.

The new disclosure requirements apply to domestic and non-U.S. issuers and to smaller reporting companies.

Importantly, a non-U.S. entity exempt from Exchange Act reporting pursuant to Rule 12g3-2(b) of the Exchange Act (i.e. an issuer sponsoring a Level I ADR program or a Rule 144A/Reg S GDR program) will be exempt from the disclosure required by the newly adopted rule.

Required Inquiries, Due Diligence and Disclosures

Under the rule, an issuer that uses any of the designated minerals is required to conduct, in good faith, a 'country of origin' inquiry that must be reasonably designed to determine whether any of its "designated minerals" originated in the covered countries or are from scrap or recycled sources.

If the inquiry results in the issuer determining:

- The designated minerals did not originate in the covered countries or are from scrap or recycled sources; or
- It has no reason to believe that the designated minerals may have originated in the covered countries or may not be from scrap or recycled sources;

then the issuer must disclose its determination, provide a brief description of the inquiry it undertook and the results of the inquiry on Form SD. The issuer also is required to:

- Publish this information on its internet website; and
- Provide the internet address of that site in the Form SD.

If the inquiry finds both of the following to be true:

- The issuer knows or has reason to believe that its conflict minerals may have originated in the covered countries; and
- The issuer knows or has reason to believe that the conflict minerals may not be from scrap or recycled sources,

then the issuer must undertake a "due diligence" inquiry or investigation on the source and chain of custody of the designated minerals and file a Conflict Minerals Report as an exhibit to the Form SD. The due diligence measures must conform to a nationally or internationally recognized due diligence framework, such as the due diligence guidance approved by the Organisation for Economic Co-operation and Development (OECD). The issuer also is required to:

- Publish the Conflict Minerals Report on its internet website; and
- Provide the internet address of that site on Form SD.

DRC Conflict Free — If an issuer determines that its products are "DRC conflict free" — that is the minerals may originate from the covered countries but did not finance or benefit armed groups — then the issuer must undertake the following audit and certification requirements:

- Obtain, and certify it obtained, an independent private sector audit of the findings in its Conflict Minerals Report; and
- Include the audit report in its Conflict Minerals Report.

Not DRC Conflict Free — If an issuer finds its products not to be "DRC conflict free," then the issuer, in addition to the audit and certification requirements discussed above, must describe the following in its Conflict Minerals Report:

- The products manufactured, or contracted to be manufactured, that have not been found to be "DRC conflict free";
- The facilities used to process the conflict minerals in those products;
- The country of origin of the conflict minerals in those products; and
- Using the greatest possible specificity, the efforts to determine the mine or location of origin.

Special Rules for Recycled or Scrap Sources

Special rules govern the treatment of minerals from recycled or scrap sources. If derived from recycled or scrap sources rather than from mined sources, the issuer's products containing such minerals will be deemed "DRC conflict free."

If an issuer cannot reasonably conclude after its inquiry that its gold is from recycled or scrap sources, then it is required to undertake due diligence in accordance with the OECD Due Diligence Guidance, and obtain an audit of its Conflict Minerals Report. Currently, gold is the only conflict mineral with a nationally or internationally recognized due diligence framework for determining whether it is recycled or scrap, which is part of the OECD Due Diligence Guidance.

For the other three conflict minerals, if an issuer cannot reasonably conclude after its inquiry that its minerals are from recycled or scrap sources, until a due diligence framework is developed, the issuer is required to describe the due diligence measures it exercised in determining whether its conflict minerals are from recycled or scrap sources in its Conflict Minerals Report, without an independent private sector audit regarding such materials.

Transition Period – "DRC Conflict Undeterminable"

During the first two years of the rule (four years for smaller reporting companies), if the issuer is unable to determine whether the minerals in its products originated in the covered countries or financed or benefited armed groups in those countries, then those products are considered "DRC conflict undeterminable", and the issuer must set forth in its Conflict Minerals Report (which need not be audited):

- The products manufactured or contracted to be manufactured that are "DRC conflict undeterminable";
- The facilities used to process the conflict minerals in those products, if known;
- The country of origin of the conflict minerals in those products, if known;The efforts to determine the mine or location of origin with the greatest possible specificity; and

- 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.

"Filed" vs. "Furnished" Disclosure/No Senior Officer Certifications

The rules as adopted provide that the Form SD will be considered "filed" with the SEC. As such, the disclosure will be subject to liability under Section 18 of the Exchange Act (liability for material misstatements in, or omissions from, documents filed with the SEC). However, such information will not be deemed to be incorporated by reference into any other documents (such as prospectuses) filed with the SEC unless the issuer explicitly provides otherwise. Finally, as discussed above, the required disclosure information is to be contained in, or an exhibit to, the new Form SD, and not the issuer's annual report. Accordingly, the senior officer certifications mandated by Exchange Act Rules 13a-14 and 15d-14 are not required for the information supplied in, or pursuant to, Form SD.

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