Implementing the SEC's Final Conflict Mineral Rules: Guidelines and Commonly Asked Questions

October 26, 2012
(updated April 17, 2014)[*]

On August 22, 2012, the SEC issued **final rules** to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires companies that file reports under the Securities Exchange Act of 1934, including foreign private issuers and "voluntary filers," to provide disclosures about conflict minerals that are "necessary to the functionality or production of a product manufactured by the company." Conflict minerals are defined as cassiterite, columbite-tantalite, gold, wolframite and other minerals determined by the U.S. government to be financing conflict in the Democratic Republic of Congo or adjoining countries, called the "Covered Countries." The conflict minerals disclosures are required to be contained in a new form, **Form SD**, to be filed by May 31 for the prior calendar year, beginning May 31, 2014. See Annex A to this memorandum for a template Form SD.

Prior to January 1, 2013, the implementation date for the conflict mineral rules, companies must make a significant threshold determination—does the company manufacture or contract to manufacture products for which conflict minerals are necessary to the functionality or production? Companies that answer yes to this question will be subject to the conflict mineral disclosure requirements and must begin scrutinizing the origin of conflict minerals in their products on January 1, 2013. Part I of this memorandum provides some general guidelines for making this baseline determination, which is by its nature highly fact-specific. We believe these guidelines are reasonable, but it is important to note that there has only been limited guidance to date and the SEC staff may interpret the rules differently in some regards in the future. We encourage you to contact us to discuss the application of the rules under your specific facts and circumstances. In addition, it will be important to monitor how similarly situated companies respond to the rules as companies who take paths at odds with other similarly situated companies may find themselves in a spotlight.

Once a company determines that it does manufacture or contract to manufacture products for which conflict minerals are necessary to the functionality or production, the company must undertake a reasonable country of origin inquiry. If, as a result of that inquiry, the company has reason to believe that its conflict minerals may have originated in the Covered Countries and may not have come from scrap or recycled sources, the company must conduct due diligence to determine whether the conflict minerals in these products originated in the Covered Countries. These inquiries and the related disclosures invoke additional interpretative questions. Part II of this memorandum contains commonly asked questions related to the reasonable country of origin inquiry and the due diligence that may follow. Part III addresses commonly asked questions concerning the mandatory disclosure and reporting on Form SD.

[*] This client memorandum was originally distributed on October 26, 2012. On May 30, 2013 and again on April 7, 2014, the SEC staff released answers to several "**frequently asked questions**" (FAQs) about the rules, reducing uncertainty around some interpretive issues, the most important of which we summarized in this **client newsflash**. The staff's guidance was consistent with our analysis in the 2012 memorandum as originally distributed; we have updated this memorandum to remove caveats that were appropriate prior to the issuance of the guidance and to highlight additional useful information.

See Annex B to this memorandum for a quick reference flowchart illustrating the overall scope of the rules.

On October 19, 2012, the National Association of Manufacturers and the U.S. Chamber of Commerce petitioned the U.S. Court of Appeals for the D.C. Circuit to set aside or modify the conflict mineral rules in whole or in part. On April 14, 2014, the court released an **opinion** finding one aspect of the rules in violation of the free-speech guarantee of the First Amendment to the U.S. Constitution, an opinion we summarized in this **client newsflash**. As of April 17, 2014, the SEC had not responded to the court's ruling and the litigation remains unresolved. The SEC or the federal courts may decide to stay the conflict mineral rules until this judicial challenge is resolved, as has happened with similar petitions in the past. Until the SEC or the federal courts do so, however, companies should assume that the rules remain in effect.

Part I: Determining Whether the Conflict Mineral Rules Apply

As noted above, starting on January 1, 2013, reporting companies, including foreign private issuers and companies that voluntarily file reports under Section 13(a) or 15(d) of the Exchange Act, must identify whether conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the company. Subject companies must provide disclosure about these conflict minerals on a new form, Form SD, to be filed by May 31 for the prior calendar year, with the first Form SD due on June 2, 2014 (because May 31, 2014 falls on a Saturday). Below are the key questions and guidelines that a company should consider in order to establish whether the company is subject to the rules before the January 1, 2013 implementation date.

What is the company's product for purposes of the rules?

First, a company must determine what its "product" is for purposes of the rules. The adopting release contains little discussion on this point but does suggest that a company is only required to provide disclosure under the rules if conflict minerals are *contained* in a *product* that the company places into the stream of commerce for consideration. In other words, even if a company uses conflict minerals in its operations, the conflict minerals are not subject to disclosure if they are not contained in the final product sold to third parties. Therefore, as a threshold matter, we suggest that a company consider (1) what the company is placing into the stream of commerce or providing to third parties for consideration and (2) whether these items contain conflict minerals. Some common examples of the application of this principle are as follows:

- **Means of production, distribution or sale.** The presence of conflict minerals in equipment or fixtures used to manufacture, distribute or sell a product that are not part of the final product placed into the stream of commerce are not subject to the rules. For example, a wrench containing conflict minerals that is used to create an automobile is not the product, the automobile is. The relevant inquiry is whether the automobile itself contains conflict minerals. Likewise, indirect equipment that contains conflict minerals, such as computers, which are used to produce software but not provided to customers, should not bring the software within the scope of the rules.
- **Services, such as transportation and delivery.** The SEC staff has explained that a service provider is not covered by the rules even if it manufactures equipment containing conflict minerals, as long as 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 use of the service. A transportation or freight company's product should therefore be viewed as the passage or carriage, not the physical equipment used to effect the passage. For example, an airline earns ticket revenue by transporting a passenger from point A to point B; this conveyance is the airline's product, the airplane that effects the transport is not. Therefore, even if the airplane contains conflict minerals, the airline (as opposed to the airline manufacturer) would not fall within the rules

as a result of the transport. A similar analysis would apply to transportation or freight services provided by railroads, cruise ships, trucking companies and couriers.

- **Media.** For software, video and music that is streamed or downloaded online, the "product" should be considered to be the content, not the servers or phone lines used for its transmission. If, however, the media is sold in a physical form, such as a DVD or CD, then the actual DVD or CD could constitute part of the product and further inquiry related to the presence of conflict minerals in this physical form may be called for. The physical form, however, could be viewed as packaging for the content "product."
- **Prototypes and promotional items.** Prototypes or demonstration models should not be subject to the rules unless offered to third parties for consideration. Likewise, a promotional item distributed for no consideration should not generally be a "product" for purposes of the rules. If the promotional item is bundled with an item that the company sells, however, then additional evaluation may be required to determine whether the promotional item is part of the product. For example, if a financial services company hands out a flashlight with its name on it at a general industry conference, we would not be concerned that the provision of the flashlight would subject the financial services company to the rules. On the other hand, a camping supply company that includes a "free" mini flashlight along with a tent sold to a customer may need to consider whether it meets any of the criteria that would subject it to the rules.
- **Sale of used equipment.** A company that manufactures tools, machines or other equipment containing conflict minerals for use in the manufacture of its products does not become subject to the rules merely by disposing of that equipment at a later date, even if it sells the equipment to a third party.
- **Packaging.** The packaging or container that a product is sold in is not a "product" for purposes of the rules – even where the packaging is needed to preserve the usability of the product up to and following the product's purchase. Therefore, for example, a food and beverage company selling its products in cans that are manufactured from tin is not required to file a Form SD covering that activity. A company in the business of selling the packaging itself would, however, be subject to the rules.

Does the company manufacture or contract to manufacture the product containing conflict minerals?

The second threshold question a company must ask is whether it manufactures or contracts to manufacture the product containing the conflict minerals. The term "manufacture" is not defined under the rules but the SEC has stated that its definition is generally understood and intuitive. Notwithstanding commentators' suggestions to the contrary, the SEC explicitly rejected the idea that companies that assemble products out of materials, substances or components that are not in raw material form are not manufacturers. On the other hand, the adopting release provides that a company that mines or contracts to mine conflict minerals is not considered to be manufacturing or contracting to manufacture those minerals unless the company also engages in manufacturing, whether directly or indirectly through contract, in addition to mining. The SEC staff has confirmed that activities customarily associated with mining, such as transportation, crushing, milling and smelting, are also not considered to be "manufacturing."

Whether a company "contracts to manufacture" a product depends on "the degree of influence it exercises over the materials, parts, ingredients, or components to be included in any product that contains conflict minerals or their derivatives." The requisite degree of influence depends on each company's individual facts and circumstances; however, it does not need to be "substantial." The adopting release says that a company will not be deemed to contract to manufacture a product if it does no more than:

- **Negotiate contractual terms not related to manufacturing.** If the company specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product (unless it 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), the company will not be deemed to contract to manufacture the product.
- **Branding and labeling.** A company that merely affixes its brand, marks, logo or label to a generic product manufactured by a third party does not contract to manufacture the product. Similarly, the SEC staff has stated that marking a product manufactured by a third party with a serial number or other identifier does not subject a company to the rules.
- **Servicing.** A company that only services, maintains or repairs a product containing conflict minerals does not contract to manufacture the product.
- **Specify functionality.** A wireless provider that specifies a cell phone must work on a particular network does not contract to manufacture the cell phone solely as a result of that specification.

The foregoing are not limits on the degree of influence a company may have over the manufacturing process. Rather, they are bright-line examples of permissible conduct.

On the other hand, a company that manufactures (or contracts to manufacture) a product with generic third-party components containing conflict minerals is subject to the rules, even if the company did not manufacture (or contract to manufacture) the component. Further, while the term "manufacturing" is not defined, the SEC explicitly refused to limit the term to exclude companies that produce products by assembling them out of "materials, substances, or components that are not in raw material form."

Are conflict minerals necessary to the functionality or production of the company's product containing conflict minerals?

Once a company has determined that it manufactures or contracts to manufacture a product containing conflict minerals, it must ask whether conflict minerals are necessary to the functionality or production of the product. The adopting release states that in determining whether its conflict minerals are "necessary to the functionality" of a product or production, a company should consider:

- 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;
- whether a conflict mineral is necessary to the product's generally expected function, use or purpose; or
- if a conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration.

When the product has more than one purpose, if the conflict mineral is necessary to the function of even one purpose then it is considered necessary to the functionality of the product. Only a conflict mineral that is contained in the product, however, should be considered necessary to the functionality or production of that product. Some common examples of the application of these considerations are as follows:

- **Apparel.** The adopting release states that if a primary purpose of the product is mainly ornamentation or decoration, it is more likely that a conflict mineral added for purpose of ornamentation, decoration or embellishment is "necessary to the functionality" of the product. We do not believe that this implies that basic and luxury clothing should be treated differently under the rules, but various elements of clothing may be. For example, a zipper may be necessary to the functionality of a pair of pants, bringing them within the scope of the rules if the other criteria are present, but an ornamental buckle on a pair of flats would not be necessary to a pair of shoes' functionality, leading them to be excluded from the rules' scope.

- **Jewelry.** The adopting release notes that the gold in a gold pendant hanging on a necklace would be necessary to the functionality of the pendant because it is incorporated for purposes of ornamentation, decoration or embellishment and the primary purpose of the pendant is ornamentation or decoration. A similar analysis is likely to apply to other jewelry. Note, however, that even if a retailer sells jewelry containing conflict minerals, it will not necessarily be deemed to "contract to manufacture" that jewelry and therefore may not be subject to the rules.

How far down its ownership chain does a company need to look to determine whether it manufactures or contracts to manufacture?

The rules apply to products manufactured or contracted to be manufactured by the "registrant" and require the "registrant" to file a Form SD. The SEC staff has advised that a company must report on the activities of its consolidated subsidiaries. However, we believe that a company should not be required to report for joint ventures or minority investments that it does not control.

If a company makes a good faith determination that the conflict mineral rules do not apply and the SEC staff disagrees, will the company lose the ability to offer securities under Form S-3 or Form F-3?

Although a company would be subject to enforcement risk for failing to comply with the conflict mineral rules, the SEC staff has stated that the failure to file a Form SD would not automatically cost the company its ability to use Form S-3 or Form F-3 for shelf offerings. The staff reaffirmed its previous guidance that failure to comply with filing obligations results in shelf ineligibility only with respect to reports required by Section 13(a) or 15(d) of the Exchange Act; the conflict mineral rules are required by Section 13(p).

Part II: Reasonable Country of Origin Inquiry and Supply Chain Due Diligence

Once a reporting company has determined that conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the company, the company must conduct a good faith inquiry regarding the origin of its conflict minerals that is reasonably designed to determine whether any of its conflict minerals originated in the Covered Countries or are from recycled or scrap sources. If, as a result of the reasonable inquiry, the company determines that (1) its conflict minerals did not originate in the Covered Countries, (2) it has no reason to believe that its conflict minerals may have originated in the Covered Countries or (3) it reasonably believes that its conflict minerals are from scrap or recycled sources, the company is not required to conduct further due diligence on the origin of the conflict minerals. Instead, the company is only required to provide disclosure related to its reasonable country of origin inquiry in Form SD.

On the other hand, if, as a result of this inquiry, the company knows or has reason to believe that the conflict minerals may have originated in the Covered Countries, the company must exercise due diligence on the source and chain of custody of the conflict minerals following a nationally or internationally recognized due diligence framework. A company in this circumstance must file a Conflict Minerals Report and independent audit report related to this due diligence, even if its due diligence confirms that the conflict minerals did not finance armed groups.

In the Conflict Minerals Report, under the rules as promulgated by the SEC, a company must describe the products subject to due diligence as either "DRC conflict free" or "not having been found DRC conflict free." This particular aspect of the rules has been ruled unconstitutional by the D.C. Circuit Court in the ongoing challenge to the rules discussed above, and the ultimate resolution of this litigation is not predictable at this time.

The rules provide a transition period which applies to Form SDs to be filed for the 2013 and 2014 calendar years by all companies and the Form SDs to be filed for the 2013-2016 calendar years by smaller reporting companies. During this transition period (and subject to developments relating to the

D.C. Circuit Court litigation discussed above), a company may describe certain products as "DRC conflict undeterminable" in its Conflict Minerals Report if the company has not been able to determine the origin of the conflict minerals in the product, or whether the minerals financed or benefited armed groups in the Covered Countries, after exercising due diligence. Below are commonly asked questions about the reasonable country of origin inquiry and the supply chain due diligence.

Reasonable Country of Origin Inquiry

What is a "reasonable country of origin inquiry"?

The adopting release does not provide prescriptive guidelines for performing a reasonable country of origin inquiry but instead indicates that what constitutes a reasonable country of origin inquiry will depend upon the facts and circumstances. The adopting release notes that what constitutes a reasonable inquiry will differ based on an issuer's size, products, relationships with suppliers and other factors. What is a "reasonable inquiry" is also likely to evolve over time as supply chain tracing and certification processes become more established and prevalent. As with the threshold determination discussed in Part I, it will be important to monitor how similarly situated companies respond to the rules as companies who take paths at odds with other similarly situated companies may find themselves in a spotlight.

Would a representation from the facility where the conflict minerals were processed regarding the origin of the conflict minerals be considered a "reasonable country of origin inquiry"?

The adopting release says that representations from the facility where the conflict minerals were processed demonstrating that the conflict minerals did not originate from the Covered Countries or came from recycled or scrap sources may be sufficient to satisfy the reasonable country of origin inquiry requirement. The representation could come either from the facility directly or the company's immediate suppliers. This assumes that the company does not have any warning signs or other reasons to question the authenticity or truthfulness of the representation. A processing facility's "conflict-free" designation by an industry group could solidify this determination.

We believe that in some cases it may be reasonable for a company to rely on representations from its suppliers certifying that the conflict minerals supplied to the company did not originate in the Covered Countries or came from recycled or scrap sources. How far down the supply chain a company makes inquiries will depend on the facts and circumstances. We can envision certain situations where a company could satisfy its reasonable country of origin inquiry by receiving affirmative representations or certifications from only its immediate suppliers.

If, after a company's reasonable country of origin inquiry, the company determines or reasonably believes that the necessary conflict minerals came from recycled or scrap sources, is it still required to file any conflict minerals disclosure?

In this situation, the company would be required to (1) file a Form SD disclosing the company's determination that the conflict minerals came from recycled or scrap resources and briefly describing the inquiry and the related results and (2) provide a link to its Internet website where the disclosure would be publicly available. In the Form SD, the company should briefly describe how it determined that its conflict minerals came from recycled or scrap resources.

A company in this situation would not be required to conduct further supply chain due diligence or prepare a Conflict Minerals Report.

What is the definition of "scrap or recycled material"?

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, including excess, obsolete, defective and scrap metal materials containing refined

or processed metals that are appropriate to recycle in the production of tin, tantalum, tungsten or gold. Minerals that are partially processed, unprocessed or a byproduct from another ore are not considered recycled metal.

If, after a company's reasonable country of origin inquiry, the company determines with reasonable certainty that its conflict minerals did not originate in a Covered Country or has no reason to believe that they may have originated in Covered Country, is it still required to file any conflict minerals disclosure or perform due diligence?

In this situation, the company would be required to (1) file a Form SD disclosing the company's determination that the conflict minerals did not originate in a Covered Country and briefly describing the inquiry and the related results and (2) provide a link to its Internet website where the disclosure would be publicly available. In the Form SD, the company should briefly describe how it determined it has no reason to believe that its conflict minerals did not originate in the Covered Countries.

A company in this situation would not be required to conduct further supply chain due diligence or prepare a Conflict Minerals Report.

Must an issuer conducting a reasonable country of origin inquiry determine to a certainty the origin of all its conflict minerals or whether they came from recycled or scrap sources?

No. The adopting release says that certainty is not required to satisfy the reasonable country of origin inquiry standard. As noted above, the adopting release also indicates that what is "reasonable" for this purpose will change over time based both on improved supply chain visibility and the results of a company's prior year inquiry.

Is a company required to retain records relating to its reasonable country of origin inquiry?

The rules do not require a company to retain reviewable business records to support its reasonable country of origin conclusion; however, maintenance of appropriate records may be useful in demonstrating compliance with the rules. We recommend companies maintain records to document their reasonable country of origin inquiry and, if required, their due diligence efforts.

Supply Chain Due Diligence

If, after a company's reasonable country of origin inquiry, it has reason to believe that its conflict minerals may have originated in the Covered Countries, what type of due diligence is a company required to do?

A company that has reason to believe that its conflict minerals may have originated in the Covered Countries is required to conduct due diligence to determine the origin of the minerals using a nationally or internationally recognized due diligence framework, if such a framework is available for the specific conflict mineral. The Organisation for Economic Co-operation and Development's ("**OECD**") "**Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas**" currently satisfies the requirement for source and chain of custody due diligence.

Other evaluation standards may develop that would satisfy the requirements of the rule, but the SEC has indicated that any such framework 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 **Government Auditing Standards ("GAGAS")** established by the U.S. Government Accountability Office (the "**GAO**").

If the company uses scrap or recycled material in the products it manufactures or contracts to manufacture, does it still need to perform due diligence?

A company with conflict minerals from recycled or scrap sources only needs to exercise due diligence if it has reason to believe, following its reasonable country of origin inquiry, that conflict minerals it thought were from scrap or recycled sources may not be from such sources.

As discussed above, a company must exercise due diligence that conforms to a nationally or internationally recognized due diligence framework if such a framework is available. For due diligence for gold that might be from scrap or recycled sources, companies should use the OECD's supplement for gold which currently is the only nationally or internationally recognized due diligence framework for any conflict mineral from recycled or scrap sources. For due diligence on cassiterite, columbite-tantalite or wolframite that may be from scrap or recycled sources, companies may exercise due diligence without the benefit of a due diligence framework until a nationally or internationally recognized due diligence framework becomes available.

May a company use different due diligence processes for different parts of its supply chain?

Yes. It might make sense for a company to use different due diligence processes for different conflict minerals or different products.

What if the company is not able to determine the origin of the conflict minerals in a product after conducting due diligence?

As noted above, the rules contain a transition period which will apply to Form SDs to be filed by all companies for the 2013 and 2014 calendar years and Form SDs to be filed by smaller reporting companies for the 2013-2016 calendar years. During this transition period, a company may describe certain products as "DRC conflict undeterminable" rather than not having been found to be DRC conflict free if, after conducting supply chain due diligence, the company is unable to determine that its conflict minerals did not originate in the Covered Countries, did not directly or indirectly finance or benefit armed groups or did not come from scrap or recycled sources. In this instance, a company would still be required to conduct due diligence on the source and chain of custody and provide a Conflict Minerals Report describing this due diligence, but would not be required to provide an independent audit of the report.

After the transition period ends, and subject to developments relating to the D.C. Circuit Court litigation discussed above, a company would need to describe these products as not having been found to be DRC conflict free in its Conflict Minerals Report and provide an independent audit of the report.

Part III: Form SD—Disclosure, Conflict Minerals Report and Audit Report

Companies subject to the rules are required to provide conflict minerals disclosures in the body of a new Exchange Act form, Form SD. In addition, a company that, as a result of its reasonable country of origin inquiry, has reason to believe that its conflict minerals may have originated in the Covered Countries and are not from scrap or recycled sources must conduct due diligence on the origin of those conflict minerals and attach a Conflict Minerals Report, together with an independent audit report, as an exhibit to the Form SD. Below are some commonly asked questions about Form SD, the Conflict Minerals Report and the independent audit report and the disclosure required to be contained therein.

When is a company required to file its conflict minerals disclosure on Form SD?

A company with conflict minerals necessary to the functionality or production of a product it manufactures or contracts to manufacture is required to provide the required disclosure on Form SD by May 31 of each year, reporting on the preceding calendar year.

When is the first Form SD required to be filed?

The first Form SD must be filed on or before June 2, 2014 (because May 31, 2014 falls on a Saturday) and will cover the reporting period January 1, 2013 to December 31, 2013.

What if a company's fiscal year does not end on December 31st?

A company must report its conflict minerals information for each calendar year, regardless of its fiscal year. All companies required to report on Form SD must file the report by May 31 regardless of their fiscal year.

Will Form SD be furnished or filed?

Form SD, including the conflict minerals information contained therein and any Conflict Minerals Report submitted as an exhibit to the form, will be "filed" under the Exchange Act. Accordingly, a company would be subject to liability under Section 18 of the Exchange Act for any misstatement or omission in the Form SD that is found to be material to investors. However, the Form SD will not be automatically incorporated into a company's shelf registration statement.

What if a company has begun to manufacture, or contracted to manufacture, a product with conflict minerals but the manufacture of the product has not been completed in a calendar year? Would that company need to report on the conflict mineral for that calendar year?

No. The company must provide a disclosure report for any year in which it *completes* the manufacture of a product containing conflict minerals necessary to the functionality or production of that product. For example, if a product containing conflict minerals is a work in progress as of December 2013 but completed in January 2014, the company would file a Conflict Minerals Report for that item in May 2015. The May 2015 report would cover products completed during the 2014 calendar year.

What if a contractor has completed the manufacture of the product in a calendar year, but the company that contracted for the manufacture does not receive the product from the contractor until January of the following year?

The company would be required to file a Form SD for the year in which the manufacture of the product was completed, not the year the company received it.

If a company completes the manufacture of components to be used in another product in one year, but the manufacture of the final product is not complete until the next year, is the reporting period for the component manufacturer the year in which the component is completed or the year in which the manufacture of the final product is complete?

In this case, the reporting period for the component manufacturer would be the year in which the component was completed and provided to its customer. The manufacturer of the product containing the component would report on the conflict minerals in the year that it completes the final product containing the component.

What if a company acquires another company that manufactures or contracts to manufacture products with conflict minerals?

If the acquired company had not previously been required to provide conflict minerals information, the acquirer may delay the initial reporting period on the products manufactured by the acquired company until the first calendar year beginning no sooner than eight months after the effective date of the acquisition.

When is an IPO company required to report?

Similar to the rule for acquisitions, a company that recently completed its IPO may delay gathering information on its products until the next calendar year if the IPO occurs on or before May 1, and may delay for one additional year if the IPO occurs after May 1.

How long does a company need to post its conflict minerals disclosure or its Conflict Minerals Report on its website?

A company must post its conflict minerals disclosure or its Conflict Minerals Report on its website for one year.

What information needs to be included in the Form SD with respect to the reasonable country of origin inquiry?

Form SD should disclose the company's reasonable country of origin determination and briefly describe its inquiry and the results, which should demonstrate how the company determined that the conflict minerals did not originate in the Covered Countries or that they came from recycled or scrap sources.

What if a company determines in the midst of its due diligence that its conflict minerals did not come from a Covered Country?

A company is not required to file a Conflict Minerals Report and the related audit report if it determines as a result of its due diligence that its conflict minerals did not originate in a Covered Country, or are from scrap or recycled sources. However, such a company is still required to file a Form SD.

What should be included in the Conflict Minerals Report?

Unless a company's products are "DRC conflict free," the Conflict Minerals Report should include a description of the facilities, such as refineries and smelters, used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity. Subject to developments relating to the D.C. Circuit Court litigation discussed above, the Conflict Minerals Report should also include a description of the company's products that have not been found to be DRC conflict free.

What does "DRC conflict free" mean?

A product is "DRC conflict free" if it does not contain minerals that directly or indirectly finance or benefit armed groups in the Covered Countries. An "armed group" is defined in the rules as "an armed group that is identified as a perpetrator of serious human rights abuses in annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961" relating to the Covered Countries.

If a company purchases conflict minerals from a mine that subsequently comes under control of an armed group, are those conflict minerals considered "DRC conflict free"?

If at the time of the purchase of the minerals the mine does not directly or indirectly finance armed groups in the Covered Countries, those minerals would be considered "DRC conflict free" even if at a later date the mine was taken over by armed forces and the armed group takes control of money from the purchase of such minerals.

What is the purpose of the independent audit report?

The purpose of the audit is to determine whether the company's due diligence measures conform with the criteria set forth in the nationally or internationally recognized due diligence framework and whether the company's description of the due diligence measures it performed as set forth in the Conflict Minerals Report is consistent with the due diligence process that the company undertook.

May the company's independent public accountant also perform the independent audit of the Conflict Minerals Report?

Yes. Note, however, that such services would be considered non-audit services subject to the pre-approval requirements of Rule 2-01(c)(7) of Regulation S-X and the related fees would need to be disclosed under the "All Other Fees" category in the annual proxy statement.

May an auditor that is not a certified public accountant perform the independent audit of the Conflict Minerals Report?

Yes, if the audit is conducted in accordance with standards established by the GAO and the other applicable requirements are met.

Should the independent audit cover the portions of the Conflict Minerals Report that discuss products that are "not DRC conflict free"?

No. The independent audit must only cover whether the company's due diligence conforms with the applicable framework and whether the company's description of its due diligence is consistent with the due diligence that the company performed.

What are the standards of the independent audit?

Section 1502 of the Dodd-Frank Act requires the GAO to establish appropriate standards for the independent audit. The GAO staff has indicated that it does not intend to establish new standards for the Conflict Minerals Report audit. Instead, the GAO plans to look to its **existing GAGAS**, such as the standards for Attestation Engagements or the standards for Performance Audits, for guidance. In circumstances in which an independent audit is required, the company must certify in its Conflict Minerals Report that the company obtained an independent private sector audit. An officer of the company need not sign the certification.

What independence standards must the auditors meet?

The conflict mineral rules do not impose any additional independence requirements. The auditors must comply with existing GAO independence standards or any other independence standards established by the GAO. The current GAO independence standards, which are based on a conceptual framework requiring auditors to be independent in mind and appearance, are set out in Chapter 3 of the **existing GAGAS**.

How should a company report on Form SD when it is not able to determine the origin of the conflict minerals in a product?

As mentioned in Part II, the rules contain a transition period which will apply to Form SDs to be filed by all companies for the 2013 and 2014 calendar years and the Form SDs to be filed by smaller reporting companies for the 2013-2016 calendar years. During this transition period, and subject to developments relating to the D.C. Circuit Court litigation discussed above, a company may describe its products as "DRC conflict undeterminable" rather than "not having been found to be DRC conflict free" if, after conducting supply chain due diligence, the company is unable to determine that its conflict minerals did not originate in the Covered Countries, did not directly or indirectly finance or benefit armed groups or did not come from scrap or recycled sources. In this instance, a company would still be required to conduct due diligence on the source and chain of custody and provide a Conflict Minerals Report describing this due diligence, but would not be required to provide an independent audit report. The SEC staff has emphasized that if any of a company's products are "DRC conflict undeterminable" during the transition period, the company is not required to obtain an independent audit of its Conflict Minerals Report; however if no audit is obtained, a company may not characterize any of its products as "DRC conflict free."

After the transition period ends, subject to litigation-related developments, a company would describe such products in the Conflict Minerals Report as "not having been found to be DRC conflict free" and an independent audit report would be required.

If a company's product is "DRC conflict undeterminable" during the transition period, what should be included in the Conflict Minerals Report?

The Conflict Minerals Report should describe the company's 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. An independent audit would not be required in this case.

If a company already has conflict minerals in its supply chain, including stockpiles, as of January 31, 2013, must it report on those minerals?

Any conflict minerals that have been fully refined before January 31, 2013 are excluded from the rule. Also, any conflict minerals or their derivatives that have not been smelted or fully refined but are located outside of the Covered Countries by January 31, 2013 are excluded. For example, a jewelry company that uses gold bars clearly manufactured before January 31, 2013 would not need to conduct a reasonable country of origin inquiry, perform due diligence or report on Form SD for those bars or their resulting products.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Bruce K. Dallas	**650 752 2022**	**bruce.dallas@davispolk.com**
Joseph A. Hall	**212 450 4565**	**joseph.hall@davispolk.com**
Michael Kaplan	**212 450 4111**	**michael.kaplan@davispolk.com**
Richard J. Sandler	**212 450 4224**	**richard.sandler@davispolk.com**
Richard D. Truesdell, Jr.	**212 450 4674**	**richard.truesdell@davispolk.com**

Davis Polk

Any U.S. federal tax advice contained in this communication (including any attachments) is not intended to be used, and cannot be used, to avoid penalties under the Internal Revenue Code or to promote, market or recommend any transaction or matter addressed herein.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM SD
Specialized Disclosure Report

[*NAME OF REGISTRANT*]
(Exact name of registrant as specified in its charter)

[*Jurisdiction*]	[*File No.*]	[*IRS No.*]
(State or other jurisdiction of incorporation or organization)	(Commission File Number)	(IRS Employer Identification No.)

[*Address*]	[*Zip*]
(Address of principal executive offices)	(Zip Code)

[*Name of Contact Person*] [*Telephone No.*]
(Name and telephone number, including area code, of the person to contact in connection with this report)

Check the appropriate box to indicate the rule pursuant to which this form is being filed, and provide the period to which the information in this form applies:

☒ Rule 13p-1 under the Securities Exchange Act (17 CFR 240.13p-1) for the reporting period from January 1 to December 31, [*Year*].

Item 1.01 Conflict Minerals Disclosure and Report

Conflict Minerals Disclosure

[*Alternative A: disclose determination regarding source of conflict minerals; briefly describe reasonable country of origin inquiry and results of inquiry.*

The information discussed above is also available at www.[*companywebsite*]. The website and information accessible through it are not incorporated into this specialized disclosure report.][1]

[*Alternative B: disclose determination regarding source of conflict minerals; briefly describe reasonable country of origin inquiry and due diligence efforts and results of inquiry and efforts.*

The information discussed above is also available at www.[*companywebsite*]. The website and information accessible through it are not incorporated into this specialized disclosure report.][2]

[*Alternative C:* We have filed a Conflict Minerals Report as Exhibit 1.02 to this specialized disclosure report. The Conflict Minerals Report is also available at www.[*companywebsite*]. The website and information accessible through it are not incorporated into this specialized disclosure report.

Item 1.02 Exhibit

See Exhibit 1.02 to this specialized disclosure report, incorporated herein by reference.

Item 2.01 Exhibits

Exhibit 1.02 – Conflict Minerals Report as required by Items 1.01 and 1.02 of this Form][3]

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[1] *Alternative A is for use if no supply chain due diligence or Conflict Minerals Report is required, per Item 1.01(b) of Form SD.*

[2] *Alternative B is for use if supply chain due diligence was required but a Conflict Minerals Report is not required, per Item 1.01(c) of Form SD.*

[3] *Alternative C is for use if a Conflict Minerals Report is required, per Item 1.01(c) of Form SD.*

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the duly authorized undersigned.

[*NAME OF REGISTRANT*]
(Registrant)

By: /s/ [*Name of Executive Officer*]	[*Date*]
Name: [*Name of Executive Officer*]	(Date)
Title: [*Title of Executive Officer*]	

[EXHIBIT 1.02

Conflict Minerals Report][4]

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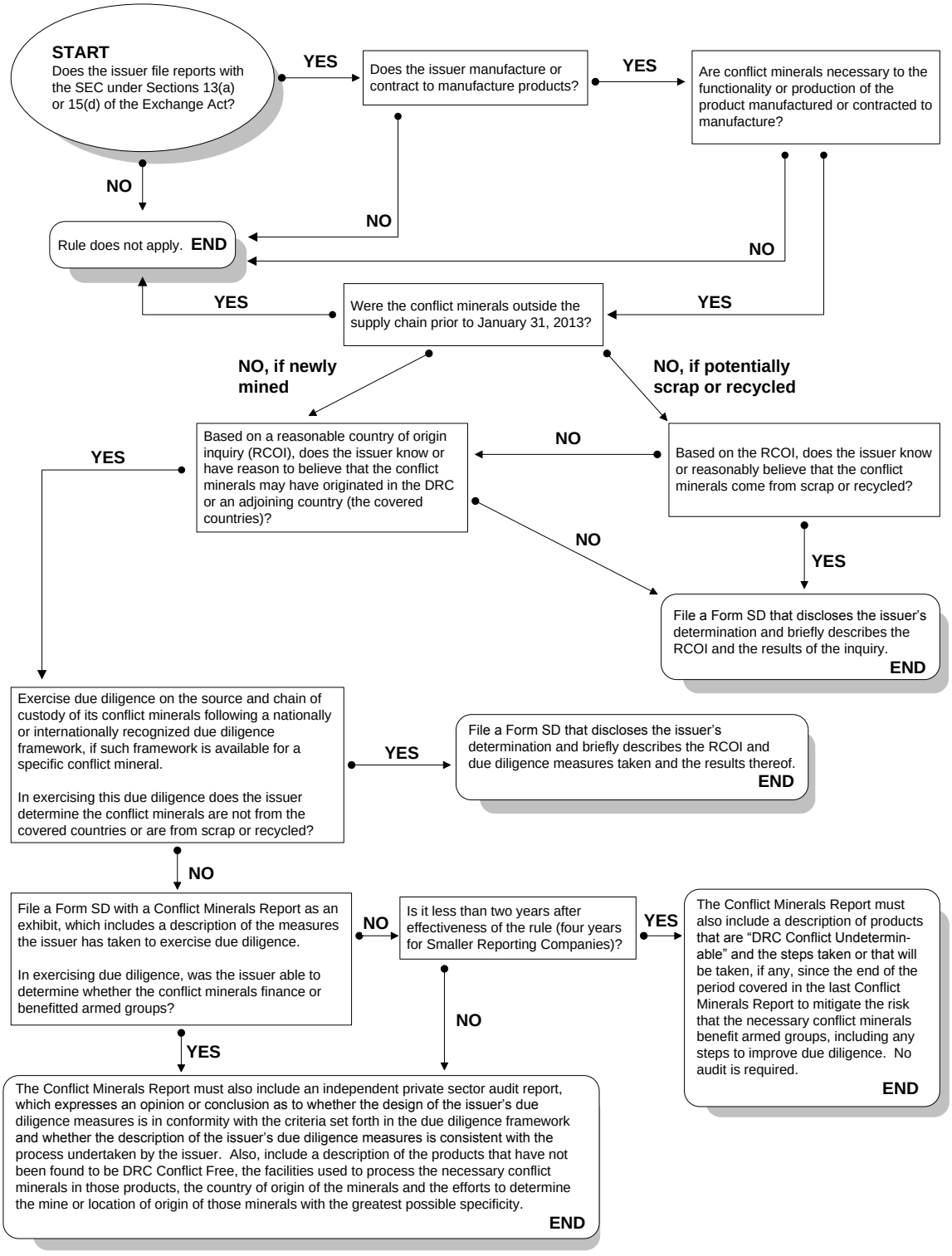
[4] *Only for Alternative C.*

Annex B

Conflict Mineral Disclosure Analysis



Source: SEC Release No. 34-67716, File No. S7-40-10, *Conflict Minerals*.