## SEC Adopts Final Rules for "Conflict Minerals"

The Securities and Exchange Commission has adopted final rules requiring disclosure of the use of "conflict minerals" by public companies (including smaller reporting companies and foreign private issuers) in products they manufacture (or for which they contract the manufacture). If gold, tantalum, tin, or tungsten is "necessary to the functionality or production" of a company's products, the company will be required to file reports annually, on new Form SD, regarding the sources of the mineral. The first report is due May 31, 2014, covering products manufactured in calendar year 2013 (excluding products containing conflict minerals that were outside the supply chain before January 1, 2013).

The rules were adopted pursuant to a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, "intended to further the humanitarian goal of ending the extremely violent conflict in the [Democratic Republic of Congo], which has been partially financed by the exploitation and trade of conflict minerals originating in the DRC." A lawsuit seeking to invalidate the rule has been filed, but it will be some time before the case is resolved.

The rules establish a three-step process for determining the extent of a company's reporting obligations.

Step One: A company must determine whether any conflict mineral was "necessary to the functionality or production" of a product manufactured or contracted for manufacture by the company. Although "necessary to the functionality or production" is not defined, the SEC provides guidance for making the determination. To be necessary to functionality or production, the mineral must be *contained* in the product, but even trace amounts of a conflict mineral remaining in the product after manufacture, if necessary to its production, will trigger the reporting requirement, although the conflict mineral is not otherwise necessary to the product's functionality.

The company should also consider whether the conflict mineral is added to the product intentionally, or is a naturally occurring by-product, and whether the conflict mineral is necessary to the product's generally expected function. Material used solely for ornamentation on a product that is not itself an ornament is not considered necessary to the product.

Whether a company is considered to "contract the manufacture" of a product depends on the amount of influence the company exercises over the materials or parts used in the product. A company that has only its own name or logo on a generically manufactured product or only repairs or services a product made by a third party would not be considered to contract for the manufacture of that product.

Step Two: If the company manufactured (or contracted for manufacture of) a conflict mineral product, the company must make a reasonable inquiry into the country of origin of the conflict mineral.

The SEC has given little concrete guidance regarding what constitutes a reasonable inquiry. Although the SEC has said that each company's particular facts and circumstances will determine what is reasonable, the inquiry must be reasonably designed to determine the mineral's country of origin and made in good faith. A company may rely on the representations of the facility at which its conflict minerals were processed, if the company has reason to believe the representations are true, *e.g.*, based on a publicly available

certification by a recognized industry group that requires an independent private sector audit. The Electronic Industry Citizenship Coalition (EICC) and Global e-Sustainability Initiative (GeSI) have instituted a program to identify conflict-free smelters and refiners.

The company must report the results of its inquiry using Form SD. In addition, if as a result of the inquiry, the company knows or has reason to believe that a product contained a conflict mineral that

- originated or may have originated in the DRC or an adjoining country, *i.e.*, Angola, Burundi, Central African Republic, Republic of Congo, Rwanda, South Sudan, Tanzania, Uganda, or Zambia, and
- was not or may not have been from scrap or recycled sources,
- the company must proceed in accordance with Step Three.

Step Three: If Step Three is applicable, the company must conduct due diligence regarding the source and chain of custody of the conflict minerals. The due diligence must conform to a nationally or internationally recognized due diligence framework. The only framework cited by the SEC is the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.

If due diligence establishes that the conflict minerals did not originate in a covered country, the company must disclose the determination and describe the due diligence on Form SD. Otherwise, the company must file a conflict minerals report (CMR) as an exhibit to the Form. The CMR must describe its due diligence efforts, and, if the company is unable to determine its products to be "DRC conflict free," provide information regarding the relevant products, the processing facility, and the mine or location of origin. "DRC conflict free" means a product contains no conflict mineral that directly or indirectly financed or benefited armed groups in the covered countries. The CMR must include an audit by an independent third party regarding the company's compliance with the due diligence framework.

Smaller reporting company reports for the years 2013 through 2016 and reports of other companies for the years 2013 and 2014 may state products to be "DRC conflict undeterminable," subject to alternative informational requirements.

The Form SD must include a link to the company's website where the information in the report also is available.



*Attorneys*

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|---|---|---|
| DAVID P. ANSEL | DANSEL@LOEB.COM | 212.407.4837 |
| STEPHEN H. COHEN | SCOHEN@LOEB.COM | 212.407.4279 |
| DAVID C. FISCHER | DFISCHER@LOEB.COM | 212.407.4827 |
| WILLIAM M. HAWKINS | WHAWKINS@LOEB.COM | 212.407.4126 |
| MICHAEL W. JAHNKE | MJAHNKE@LOEB.COM | 212.407.4285 |
| CHRISTOPHER J. KELLY | CKELLY@LOEB.COM | 310.282.2263 |
| ROBERT B. LACHENAUER | RLACHENAUER@LOEB.COM | 212.407.4854 |
| RICHARD M. LORENZO | RLORENZO@LOEB.COM | 212.407.4288 |
| COREY N. MARTIN | CMARTIN@LOEB.COM | 212.407.4841 |
| MICHAEL J. MCISAAC | MMCISAAC@LOEB.COM | 212.407.4194 |
| C. CHRISTOPHER MURILLO | CMURILLO@LOEB.COM | 212.407.4168 |
| MICHAEL A. THURMAN | MTHURMAN@LOEB.COM | 310.282.2122 |