WHITE & CASE

Client**Alert**

Capital Markets

September 2012

SEC Adopts Conflict Minerals and Resource Extraction Payments Rules

On August 22, 2012, the US Securities and Exchange Commission ("SEC") adopted final rules requiring all issuers that file reports with the SEC to disclose supply chain and sourcing information on several minerals and metals, termed "conflict minerals", contained in products that the issuers manufacture or contract to manufacture in each calendar year, beginning on January 1, 2013.[1] This information must be disclosed in a new Form SD filed no later than May 31 of the following year. On the same date, the SEC also adopted final rules requiring resource extraction issuers to disclose information relating to their payments made to a foreign government or the US Federal Government on or after October 1, 2013 for the purpose of the commercial development of oil, natural gas or minerals. Disclosures of government payments must be filed with the SEC on Form SD within 150 days of an issuer's fiscal year-end (i.e., before May 31 for calendar year reporting companies). Both of these new SEC rules apply broadly and include domestic companies and foreign private issuers (including smaller reporting companies).

The SEC estimates that the rules regarding conflict minerals will apply to approximately 6,000 issuers out of approximately 14,600 total issuers.[2] Further, the SEC has estimated an initial cost of US$3 billion to US$4 billion to implement the conflict minerals rules and an annual ongoing cost of US$207 million to US$609 million.[3] This amounts to an average of US$500,000 per affected issuer in the first year alone. In contrast, a number of years ago when the SEC adopted internal controls reporting requirements, it estimated implementation costs of only US$91,000 per issuer.[4] Companies that believe they have no connection with "conflict minerals" may well find that the new rules apply to them.

The SEC's rules contain an initial two-year transition period (four years for smaller reporting companies) that imposes less stringent disclosure obligations on issuers with respect to conflict minerals disclosures. During this period, issuers should undertake appropriate due diligence on their supply chain with a view to ensuring that they do not need to go beyond step two of the three-step compliance process described below once the rules become fully effective. Step three requires relatively extensive and adverse disclosures if the issuer either knows that its conflict minerals originated in specified countries and are not from recycled or scrap sources, or has reason to believe that its conflict minerals may have originated in such specific countries and may not be from recycled or scrap sources.

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1 A copy of the SEC final rules can be found at the following hyperlink: http://www.sec.gov/rules/final/2012/34-67716.pdf.

2 *Conflict Minerals* Rel. No. 34-67716 (Aug. 22, 2012) ("Adopting Release") at 310, 315.

3 *Id.* at 240.

4 *Management's Report on Internal Controls over Financial Reporting and Certification of Disclosure in Exchange Act* Periodic Reports Rel. No. 33-8238 (June 5, 2003).

Conflict Minerals Rules

Issued pursuant to Section 1502 (the "Conflict Mineral Provision") of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the rules require that every issuer that files reports with the SEC under Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 (the "Exchange Act"), "having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that registrant to be manufactured, shall file a report on Form SD"[5] disclosing the registrant's conflict minerals information.

What Are "Conflict Minerals"?

Conflict minerals are defined as cassiterite, columbite-tantalite (coltan), gold, wolframite, and their derivatives, including tin, tantalum and tungsten, and any other minerals or their derivatives that the US Secretary of State may determine to be financing conflict in the Democratic Republic of the Congo and adjoining countries ("Covered Countries"). These minerals are found in a wide array of products, including consumer electronics, microchips, light bulbs, automobiles, orthopedic implants, footwear and jewelry. Without exaggeration, if an issuer manufactures or contracts to manufacture any product with an on-off switch, it will likely be subject to these rules. This is because almost all electronic components contain solder, and solder is a metal alloy commonly containing tin. In a significant change from the proposed rules, miners of conflict minerals will not be subject to the rules unless they engage in manufacturing in addition to mining, and retailers of products containing conflict minerals will also not be covered by the rules unless they exert a defined level of control over the manufacturing process of such products.

The Compliance Process

Annex A to this Client Alert contains a flowchart provided by the SEC, which illustrates the three-step compliance process.

Step One—Issuers Subject to the Conflict Mineral Provision

An issuer is subject to the new rules on conflict minerals disclosure if conflict minerals are necessary to the functionality or production of a product manufactured by the issuer or contracted by the issuer to be manufactured. An issuer proceeds to step two only if it determines that its use of conflict minerals makes it subject to the rules.

When Do Issuers "Manufacture" or "Contract to Manufacture" a Product?

The SEC declined to define "manufacture" because it believes the term is generally understood. Nevertheless, in the Adopting Release, the SEC confirmed that manufacturing includes assembling manufactured components into a subsequent product, as well as making products from raw materials.

Whether an issuer will be considered to "contract to manufacture" depends on the degree of influence it exercises over the manufacturing process, including the degree of influence over the materials, parts, ingredients or components to be included in the product. SEC guidance provides that an issuer will not be considered to "contract to manufacture" a product if it does no more than:

- specify or negotiate contractual terms with a manufacturer that do not directly relate to the manufacturing of the product, such as terms regarding training or technical support, price, insurance, indemnity, intellectual property rights, dispute resolution and other similar terms (unless the level of specificity of the contractual terms reaches a level that renders an agreement with a manufacturer practically equivalent to contracting on terms that directly relate to the manufacturing of the product);[6]
- affix its brand, marks, logo or label to a generic product manufactured by a third party;[7] and
- service, maintain or repair a product manufactured by a third party.[8]

5 17 CFR § 240.13p-1.

6 For example, a service provider that is also a retail provider of cell phones manufactured by a third party does not exert influence sufficient to be considered "contracting to manufacture" if it does no more than specify to the third party manufacturer that the cell phones must be able to function on the service provider's network. Conversely, if that service provider were to make more detailed design specifications, such as size and weight, screen resolution or battery life requirements, the service provider would be significantly more likely to be contracting to manufacture the cell phones.

7 For example, an electronics retailer that places its label on a generic computer mouse for which it does not make design specifications would likely not have "contracted to manufacture" that computer mouse. However, if an electronics retailer instead assembles multiple generic computer products into a subsequent product, thereby enabling those generic products to function together, and then puts its label on that subsequent product, reasonable minds may differ as to whether the retailer would be deemed to have manufactured or contracted to manufacture that subsequent product. The question would likely turn on the extent to which (1) the process of assembling the generic products together could be characterized as manufacturing itself and (2) the contractual terms concerning the acquisition of the component products are directly related to the manufacturing of those products.

8 Adopting Release at 65.

An issuer's determination as to whether it has contracted to manufacture a product will require a fact-intensive inquiry that depends on the issuer's particular circumstances. Nonetheless, the final rules generally do not encompass retailers unless, in contracting with a manufacturer, they exert sufficient influence over the product's materials, parts, ingredients or components.

Furthermore, under the final rules, an issuer that mines or contracts to mine conflict minerals is not deemed to be manufacturing or contracting to manufacture those minerals unless the issuer engages in manufacturing, directly or by contract, in addition to mining.

When Are Conflict Minerals "Necessary"to a Product?

As a threshold matter, conflict minerals can only be deemed necessary to an issuer's products if the products contain conflict minerals.[9] If an issuer's products do contain even trace amounts of conflict minerals, an issuer may be subject to the rules if conflict minerals are either (1) "necessary to the functionality" of the product or (2) "necessary to the production" of the product.

When considering whether conflict minerals are necessary to the functionality of the product, an issuer should consider:

- whether the 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 the conflict mineral is necessary to the product's generally expected function, use or purpose (or any one of multiple functions, uses or purposes); and
- if the conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration.

When considering whether conflict minerals are necessary to the production of a product, an issuer should consider whether the conflict mineral is:

- intentionally added in the product's production process, other than if it is included in a tool, machine or equipment used to produce the product (such as computers, power lines or a wrench);
- contained in the product; or
- necessary to produce the product.

Moreover, for a conflict mineral to be considered necessary to production, the mineral must both be contained in the product and necessary for a product's production. Therefore, a conflict mineral will not be deemed necessary to production only on the basis of its use as a catalyst in production. However, where a catalyst is used and not completely washed away so as to leave trace levels of the conflict minerals on the product, that product will be deemed to contain conflict minerals.

The final rules do not contain a *de minimis* exception, by which an issuer might be exempted from the rules for limited use of conflict minerals. Given concern over the aggregate financial impact of repeated uses of small amounts of conflict minerals, issuers may be subject to conflict minerals disclosure obligations for *any* amount of conflict minerals in its product.

If an issuer determines that conflict minerals are necessary to the functionality or production of a product manufactured by the issuer or contracted by the issuer to be manufactured, then the issuer is subject to the disclosure rules and must proceed to step two of the conflict minerals compliance process. Issuers that determine conflict minerals are not necessary for the products they manufacture or contract to manufacture need not make any further inquiry or make any conflict mineral disclosures.

Step Two—Whether Conflict Minerals Originated in the Covered Countries

Step two of the conflict minerals compliance process requires the issuer to determine whether its conflict minerals originated in a Covered Country by conducting a preliminary review of its conflict mineral supply chain, known as a reasonable country of origin inquiry ("RCOI").

Reasonable Country of Origin Inquiry

The SEC's two primary requirements of an issuer's RCOI are that the inquiry must be (1) reasonably designed to determine whether the issuer's conflict minerals originated in a Covered Country or came from recycled or scrap sources and (2) performed in good faith. An issuer may be considered to satisfy those standards if it seeks and obtains reasonably reliable representations indicating the facility at which its conflict minerals were processed and demonstrating whether those conflict minerals originated in a Covered Country or came from recycled or scrap sources. Such information can come directly from the facility or indirectly through the issuer's immediate suppliers, but the issuer must have reason to believe the representations are true given the surrounding circumstances. Information regarding the issuer's own sourcing policies with respect to conflict minerals is also relevant to the inquiry, and a review of such policies would generally be expected as part of the issuer's reasonably designed RCOI.

9 *Id.* at 83.

The purpose of the RCOI is to provide an issuer with a reasonable belief, as opposed to absolute certainty, regarding the origins of its conflict minerals. Accordingly, an issuer is not required to receive representations from all its suppliers accounting for the origins of all its conflict minerals. If an issuer reasonably designs an RCOI and implements it in good faith, receiving representations from some but not all of its suppliers, it may conclude that its conflict minerals did not originate in a Covered Country, provided that it did not ignore circumstances or warning signs indicating that the remaining suppliers originated in a Covered Country.

Required Disclosure Based on Reasonable Country of Origin Inquiry

Based on its RCOI, if the issuer determines that either (1) its conflict minerals did not originate in a Covered Country or has no reason to believe its conflict minerals originated there, or (2) its conflict minerals came from recycled or scrap sources or reasonably believes its conflict minerals came from recycled or scrap sources, then the issuer is not obligated to investigate its conflict minerals supply chain further and is only required to file a Form SD. In the Form SD, such an issuer is required to provide a brief description of the RCOI it undertook, including the issuer's policies with respect to sourcing conflict minerals, if applicable, a brief description of the results of the inquiry it performed to demonstrate the basis for concluding that it is not required to engage in further investigation, and a link to its website where such disclosures are publicly available.

In a change from the proposed rules, the final rules do not require an issuer to maintain reviewable business records supporting its conclusion that conflict minerals did not originate in a Covered Country based on its RCOI.

If, based on its RCOI, the issuer (1) knows or has reason to believe that its conflict minerals originated in a Covered Country and (2) does not know or does not reasonably believe that its conflict minerals come from recycled or scrap sources, the issuer is required to proceed to step three of the conflict minerals compliance process and will be required to make certain disclosures with respect to its use of conflict minerals, including the filing of a Form SD.

Step Three—Supply Chain Due Diligence

In step three of the conflict minerals compliance process, an issuer undertakes due diligence of the source and chain of custody of its conflict minerals in order to more clearly determine whether the conflict minerals originated in a Covered Country and, if so, whether the conflict minerals directly or indirectly financed or benefited armed groups[10] in a Covered Country, as a result of which the issuer might be required to file a Conflict Minerals Report which would include an independent private sector audit. Additionally, the issuer might be required to conduct due diligence to determine whether such conflict minerals are from recycled or scrap sources.

What Is Required by Due Diligence?

An issuer's due diligence of the source and chain of custody of its conflict minerals must follow a nationally or internationally recognized due diligence framework for each particular conflict mineral. Acceptable due diligence frameworks 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 must be consistent with the criteria standards in the Government Auditing Standards established by the Government Accountability Office.[11] In the Adopting Release, the SEC suggests that issuers use the OECD's "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" which, the SEC observes, has supplements for each conflict mineral and meets its diligence framework criteria.[12] An issuer is not required to use the same framework for conducting diligence with respect to each conflict mineral or product or aspect of its supply chain. However, if the issuer uses multiple frameworks in the course of its due diligence and if those frameworks are significantly different from each other, the issuer should describe how the frameworks differ. In the exercise of due diligence as to whether its conflict minerals are from recycled or scrap sources, the due diligence must likewise follow a nationally or internationally recognized diligence framework.[13]

10 An "armed group" is defined in Section 1502(e)(3) of Dodd-Frank as "an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under section 116(d) and 502(b) of the Foreign Assistance Act of 1961."

11 Item 1.01(d)(8) of Form SD.

12 *See* OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, available at http://www.oecd.org/corporate/guidelinesformultinationalenterprises/mining.htm. The Tin, Tantalum and Tungsten Supplement is incorporated into the OECD Due Diligence Guidance. The Gold Supplement is available separately.

13 Currently, the only diligence framework for conflict minerals from recycled or scrap sources that meets the SEC's criteria is the OECD supplement for gold. Issuers should use this OECD framework for their due diligence on gold ostensibly from recycled or scrap sources, but their diligence on other conflict minerals from recycled or scrap sources must be done without a framework until an appropriate framework becomes available. If a diligence framework is developed prior to June 30th of a calendar year, issuers will be required to use that framework to conduct diligence on conflict minerals during the subsequent calendar year.

How Are the Results of the Due Diligence Disclosed?

Following due diligence, if an issuer determines that the conflict minerals did not originate in a Covered Country or did come from recycled or scrap sources, then the issuer is only required to disclose its determination and describe its diligence and the results of its diligence in the body of the Form SD, which it must file with the SEC and make publicly available on its website.

On the other hand, if after conducting due diligence the issuer either (1) determines that its conflict minerals did originate in a Covered Country and were not from recycled or scrap sources or (2) cannot determine the source of its conflict minerals, the issuer is required to submit a Conflict Minerals Report as an exhibit to Form SD, both of which must be filed with the SEC and made publicly available on the issuer's website. In a change from the proposed rules, the final rules do not require an issuer to disclose in Form SD or in its annual report the reason for the issuer's submission of a Conflict Minerals Report. Instead of being required to disclose in Form SD whether it knows or is unable to determine the origin of its conflict minerals, the issuer only needs to state in Form SD that it is providing a Conflict Minerals Report as an exhibit and to provide a link to its website where the Conflict Minerals Report is publicly available.

What Information Does a Conflict Minerals Report Contain?

The contents of an issuer's Conflict Minerals Report will vary depending upon whether the results of the issuer's due diligence enable it to determine that its conflict minerals are "DRC conflict free", meaning that they did not directly or indirectly finance or benefit armed groups in a Covered Country. If an issuer is able to determine that its products are DRC conflict free, its Conflict Minerals Report is only required to include (1) a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals, (2) an independent private sector audit of the Conflict Minerals Report and (3) the issuer's certification of the Conflict Minerals Report audit.

If, on the other hand, an issuer determines that its conflict minerals did finance or benefit armed groups in a Covered Country or is unable to determine that its conflict minerals did not benefit or finance armed groups in a Covered Country, the issuer must disclose, in addition to the three items listed above:

- a description of the products manufactured or contracted to be manufactured that have not been found to be DRC conflict free;
- the entity that conducted the independent private sector audit;
- the facilities used to process the conflict minerals;
- the country of origin of the conflict minerals; and
- the efforts to determine the mine or location of origin with the greatest possible specificity.[14]

In a change from the proposed rules, and out of concern for misrepresenting the issuer's conflict mineral supply chain, the final rules require the products of an issuer unable to determine the origin of its conflict minerals to be disclosed as "not been found to be 'DRC conflict free'", as opposed to "are not 'DRC conflict free'".

What are the Requirements for the Independent Private Sector Audit?

All Conflict Mineral Reports must contain an independent private sector audit conducted in accordance with the General Auditing Standards of the US Government Accountability Office. Accordingly, standards such as those for Attestation Engagements or Performance Audits will apply. The independence standards set forth by the US Government Accountability Office will also apply. In the Adopting Release, the SEC states that it considers the use of the same accountant as an issuer's independent public accountant and the independent private sector auditor of the issuer's Conflict Minerals Report to be consistent with the independence requirements of Rule 2-01 of Regulation S-X. Nonetheless, in such a case, the independent private sector audit would be considered a permitted non-audit service subject to the pre-approval requirements of Rule 2-01(c)(7) of Regulation S-X, and fees related to the audit would need to be included in the "All Other Fees" category of the principal accountant fee disclosures.

The purpose of the audit is to express an opinion or conclusion as to (1) whether the design of the issuer's due diligence framework as set forth in the Conflict Minerals Report is in conformity with, in all material respects, the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and (2) whether the issuer'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 issuer undertook. Because the audit is limited to the issuer's diligence framework and diligence performance, the audit does not need to express an opinion or conclusion as to whether the diligence measures were effective or to express an opinion or conclusion as to whether the issuer's conflict minerals are DRC conflict free.

14 Adopting Release at 183.

Filing Conflict Minerals Information

An issuer's required disclosure of conflict minerals information must be provided under cover of a new Form SD and, where an issuer either determines that its conflict minerals did originate in a Covered Country and were not from recycled or scrap sources, or cannot determine the source of its conflict minerals, further disclosure must be provided in a Conflict Minerals Report attached as an exhibit to Form SD.

When Does Form SD Need to Be Filed?

Each issuer is required to provide its conflict minerals on a calendar year basis regardless of the issuer's fiscal year-end. Consequently, annual conflict minerals information will cover a period from January 1 to December 31 each year. Form SD must be filed with the SEC on or before May 31 of the following year.

The first reporting period will be January 1, 2013 to December 31, 2013, and the first Form SD must be filed on or before May 31, 2014.

The final rules require an issuer to report the products containing conflict minerals in the calendar year that manufacture was completed. This is a change from the proposed rules, which had linked the timing of reporting requirements to the time the issuer took possession of the products. Under the rules adopted by the SEC, if a product is contracted to be manufactured, the reporting period in which it may need to be disclosed will depend upon when the contractor completes its manufacture of the product.

Will Form SD Be Filed or Furnished?

In a significant change from the proposed rules, Form SD must be filed, rather than furnished, with the SEC. The filing requirement creates liability under Section 18 of the Exchange Act for making false or misleading statements in information filed under cover of Form SD. However, a person will not be liable for any misleading statement in a filed document, such as Form SD, if that person can establish that it acted in good faith and had no knowledge that the statement was false or misleading.

Exemption for Existing Stockpiles

In an effort to prevent the waste or devaluation of existing stockpiles of conflict minerals that will no longer finance or benefit armed groups in the Covered Countries, the final rules were modified to exclude from consideration under the rules any conflict minerals that are "outside of the supply chain" prior to January 31, 2013. Outside of the supply chain refers to any conflict minerals that have been smelted or fully refined and any conflict minerals that, while not smelted or fully refined, are located outside of a Covered Country. As a result, an issuer is not subject to the Conflict Minerals Provision and is not required to make any conflict mineral disclosures if its use of conflict minerals is limited to those minerals outside of the supply chain prior to January 31, 2013.

Temporary Transition Provisions

In order to accommodate issuers, the final rules provide for a transition period of two years for all issuers (the 2013 and 2014 reporting periods) and four years for smaller reporting companies (the 2013 through 2016 reporting periods), during which time the issuers will be permitted to describe their products as "DRC conflict undeterminable" if they are unable to determine whether their minerals originated in the covered countries, came from recycled or scrap sources or financed or benefited armed groups in the covered countries. Issuers describing their products as "DRC conflict undeterminable" will still be required to submit a Conflict Minerals Report. The Conflict Minerals Report must include:

- a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of the conflict minerals;
- a description of the products manufactured or contracted to be manufactured that are "DRC conflict undeterminable", as well as the facilities used to process the conflict minerals of such products, if known, the country of origin of those conflict minerals, if known, and the efforts to determine the mine or location of origin with the greatest possible specificity; and
- the steps the issuer 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 its due diligence.[15]

Issuers that describe their products as "DRC conflict undeterminable" during the temporary transition period are not required to obtain an independent private sector audit of their Conflict Minerals Report.

After the temporary transition period, issuers that would have described their products as "DRC conflict undeterminable" will be required, if no changes are made to the results of their supply chain or diligence efforts, to describe their products as "not found to be 'DRC conflict free'".

15 Adopting Release at 186.

The final rules also provide for a transition provision for issuers that become subject to the Conflict Minerals Provision due to an acquisition. An issuer that was not previously obligated to file Form SD for conflict minerals that acquires a target under such obligations may delay reporting on the acquired company's products until the end of the first reporting calendar year that begins no earlier than eight months after the effective date of such acquisition.

Resource Extraction Payments Rules

The SEC also adopted final rules requiring resource extraction issuers to disclose information relating to any payment made by the issuer, a subsidiary of the issuer or an entity under the control of the issuer, to a foreign government or the US Federal Government for the purpose of the commercial development of oil, natural gas or minerals.[16]

These rules will have wide applicability due in large part to the lack of exceptions. The new rules apply to all domestic and foreign private issuers that file annual reports with the SEC and engage in the commercial development of oil, natural gas or minerals. Furthermore, the rules apply regardless of an issuer's size, the extent of its business operations constituting commercial development of oil, natural gas or minerals, or the issuer's status as a government-owned entity.

The final rules adopted by the SEC do not allow requirements imposed on issuers by third parties to limit or exempt the issuers from the disclosure requirements of the new rules. There is no exemption for issuers who are subject to similar reporting requirements under home-country laws, listing rules or an Extractive Industries Transparency Initiative ("EITI") program, no exemption for situations in which foreign law may prohibit the disclosure of payments to governments, and no exemption for confidentiality provisions in contracts or for confidential treatment of commercially sensitive information.

The far-reaching sweep of the new rules is extended further by the definition of "commercial development of oil, natural gas or minerals" to include "exploration, extraction, processing, export and other significant actions relating to oil, natural gas or minerals, or the acquisition of a license for any such activity".[17] This definition, which is not confined to upstream extraction activities, is broader than that of the EITI and broader than the definition of "oil and gas-producing activities" in Rule 4-10 of Regulation S-X. The rules also include an "anti-evasion provision" to prevent resource extraction issuers from recharacterizing any activity or payment that would otherwise be covered under the rules.[18]

Resource extraction issuers are required to provide information about the type and total amount of such payments made for each project related to the commercial development of oil, natural gas or minerals, as well as the type and total amount of payments made to each government. Under the new rules, issuers are required to provide the payment information in XBRL, which must include electronic tags to identify, for any payment required to be disclosed:

- the total amounts of payments, by category;
- the currency used to make the payments;
- the financial period in which the payments were made;
- the business segment of the resource extraction issuer that made the payments;
- the government that received the payments and the country in which the government is located; and
- the project of the resource extraction issuer to which the payments relate.[19]

Disclosure of the payment information must be made under cover of Form SD, which must be submitted to the SEC no later than 150 days after the end of the issuer's most recent fiscal year (i.e., before May 31 for calendar year reporting companies). Reporting will be required for fiscal years ending after September 30, 2013; however, for the first report, issuers will be able to provide a partial year report covering the period from October 1, 2013 to the issuer's fiscal year-end.

The disclosures are required to be filed, rather than furnished, and therefore create the potential for liability for false or misleading statements under Section 18 of the Exchange Act.

16 *See Disclosure of Payments by Resource Extraction Issuers*, Rel. No. 34-67717 (Aug. 22, 2012). A copy of the SEC final rules can be found at the following hyperlink: http://www.sec.gov/rules/final/2012/34-67717.pdf.

17 Item 2.01(c)(1) of Form SD.

18 *See* Instruction 9 to Item 2.01 of Form SD.

19 Item 2.01(a) of Form SD.

Next Steps for Conflict Mineral Rules

The conflict mineral rules create significant new disclosure obligations for a surprisingly large number of domestic and foreign private issuers. If any of the four minerals or their derivatives are necessary to the production or functionality of a product that an issuer manufactures or contracts to manufacture, that issuer will have to file a Form SD, without regard to where those minerals originated (subject only to the transition exception if such minerals were outside the supply chain prior to January 31, 2013). Every issuer, whether or not it engages in traditional manufacturing activities, will need to determine the degree to which these rules apply to it and to its products. This initial assessment may be complicated, expensive and time-consuming, and issuers will need to work quickly to ensure that they can satisfy these new disclosure requirements. Among the actions issuers should consider taking are the following.

- **Initial assessment.** Issuers will need to start by determining whether they manufacture or contract to manufacture products or stand a reasonable chance of being judged to do so now or in the future. Given the facts and circumstances aspects of the concept of what constitutes contracting to manufacture, this may require inquiries of front-line employees. For example, retailers may need to inquire about the scope of their purchase orders (e.g., do they cross the line of having "some actual influence over the manufacturing" by including detailed design specifications). Issuers that want to avoid conflict mineral reporting should consider instituting policies designed to avoid activities that would meet the test of "contracting to manufacture" a product if the adoption of such policies is possible.

- **Evaluating product inputs.** Issuers that manufacture or contract to manufacture products (or could be judged to do so now or in the future) should examine their products and supply chain early in preparation for the initial reporting period beginning January 1, 2013. Developing reliable product and supply information will not only help issuers meet the upcoming disclosure requirements, but may also allow them to make adjustments to the sources and contents of their supply chains that reduce the cost of compliance.

- **Consolidating product information.** Under the new rules, issuers are responsible for investigating, analyzing and disclosing a potentially vast amount of information. Consolidating product and supply chain information into a central database can reduce the amount of money and time spent on investigating an issuer's conflict mineral inputs and sourcing.

- **Utilizing transition provisions.** Issuers unable to determine whether their products are "DRC conflict free" should take advantage of the option to describe products as "DRC conflict undeterminable". This temporarily available designation affords issuers a reprieve from the expense of obtaining an audit of conflict mineral diligence. Further, the new rules entirely exempt issuers that use conflict minerals "outside the supply chain" prior to January 31, 2013. To the extent practicable, using these existing stockpiles of conflict minerals as product inputs rather than trying to source conflict minerals of uncertain origin can save issuers money that would otherwise be spent on investigating their supply chain.

- **Implementing disclosure controls.** An issuer should implement effective internal reporting mechanisms to ensure that it is aware of any changes in the conflict mineral content of any new or existing products. These internal reporting mechanisms will be particularly important for larger manufacturing issuers, issuers with decentralized management over product design, and issuers with numerous, diverse and highly variable inputs.

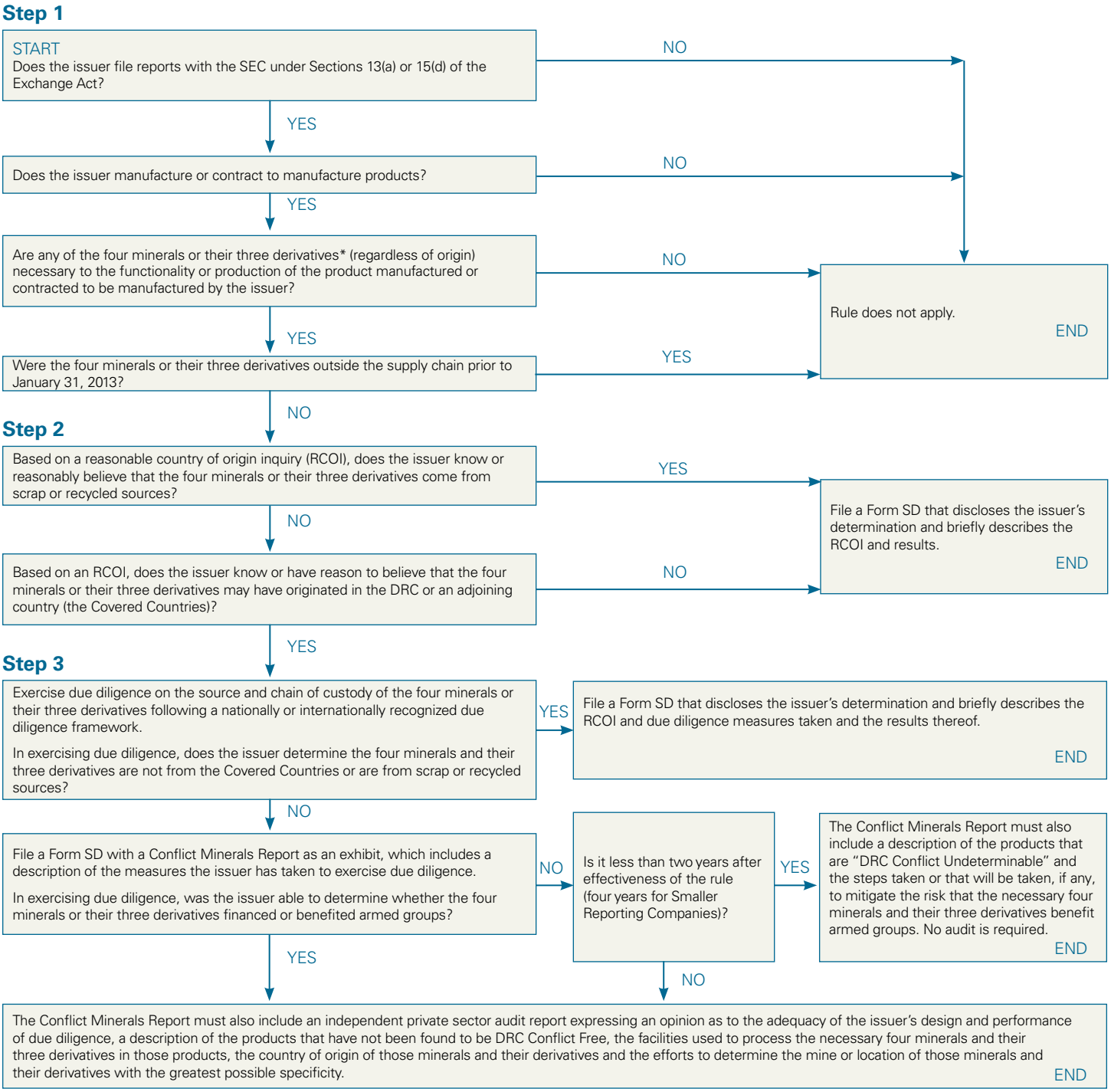
- **Working with suppliers.** Issuers subject to the new disclosure obligations can minimize their diligence costs by building relationships with transparent and reliable suppliers. In this regard, issuers may find it beneficial to seek out suppliers that are certified "DRC conflict free" by an independent private sector auditor or by a recognized industry group that requires such audits. Indeed, the most expensive aspects of the conflict minerals disclosure obligations can be avoided if an issuer is able to reasonably rely on its suppliers' representations that their conflict minerals do not originate in the Covered Countries altogether.

- **Choosing an auditor.** An issuer required to undertake an independent private sector audit of its conflict minerals due diligence should consider well in advance the desirability of using the same auditor as it uses for its financial statements. An issuer's use of the same auditor for financial statements and conflict minerals is permitted, but the issuer must have such an engagement pre-approved by the issuer's audit committee.

Annex A

Flowchart Summary of Conflict Minerals Rule

The following flowchart illustrating the three-step compliance process is based on a similar flowchart provided by the SEC on page 33 of the Adopting Release.



* The four minerals are cassiterite, columbite-tantalite (coltan), gold and wolframite, and their three derivatives are tantalum, tungsten and tin.

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