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Client**Alert**

Capital Markets

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SEC Issues Guidance on Conflict Minerals Rule

On May 30, 2013, the staff of the US Securities and Exchange Commission (the "Staff") Division of Corporation Finance issued guidance in the form of frequently asked questions ("FAQs") regarding the SEC's rules requiring issuers to disclose their use of conflict minerals (the "Conflict Minerals Rule").

While many aspects of the Conflict Minerals Rule remain in need of further clarification, the FAQs provide issuers with some helpful interpretations.

Failure to Timely File a Form SD Does Not Affect Form S-3 Eligibility

In the FAQs, the Staff provides that an issuer that fails to timely file a Form SD regarding conflict minerals or that fails to comply with resource-extraction disclosure rules will not automatically lose its eligibility to use Form S-3. Eligibility to use Form S-3 is based on a registrant's timely filing of all materials required under Sections 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Disclosing the use of conflict minerals falls under Exchange Act Section 13(p) and resource-extraction disclosure falls under Exchange Act Section 13(q). As a result, failure to timely file regarding conflict minerals or to comply with resource-extraction disclosures will not impact an issuer's eligibility to use Form S-3. In addition, although not expressly stated, we believe that the same guidance should apply with respect to the Form F-3 eligibility of foreign private issuers.

Products Covered Under the Conflict Minerals Rule

Packaging and Containers Are Not Considered Part of the Product

The Staff provides in the FAQs that the packaging or container of a manufactured product is not considered part of the manufactured product for purposes of the Conflict Minerals Rule. The Staff's response alleviates concerns that a product's packaging could result in a product that was otherwise free of conflict minerals causing an issuer to become subject to the Conflict Minerals Rule. The Staff states that "only a conflict mineral that is contained in the product [will] be considered 'necessary to the functionality and production' of the product." Accordingly, packages and containers necessary to preserve a product until the time the product is purchased or used will not, in and of themselves, trigger conflict mineral reporting obligations. The pharmaceutical and food and beverage industries, which often use wrappers containing conflict minerals, will be most impacted by this decision, as it could result in having no in-scope materials and therefore no reporting requirements under the Conflict Minerals Rule.

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Although packaging is not considered part of the product when sold or manufactured as a unit, packages and containers sold independently are themselves considered a product, as stated in the FAQs. An issuer that manufactures packaging as an end-product remains obligated to make conflict mineral disclosures with respect to such packaging under the Conflict Minerals Rule.

Generic Components Are Subject to the Same Reporting Requirements as Other Product Components

The Staff draws no distinction between components of a product that an issuer directly manufactures or contracts to manufacture and generic components that the issuer chooses to include in its product. Therefore, an issuer using generic components containing conflict minerals is subject to the same reporting requirements as those issuers contracting to manufacture components, even if the issuer did not contract to manufacture the generic component.

For example, if Packard were to include an "off-the-shelf" RCA radio containing conflict minerals in the dashboards of its sedans, the Staff would not consider Packard to be relieved of its disclosure obligations on the basis that the RCA radio is a generic component of the car or because Packard did not contract to manufacture the radio. Instead, according to the FAQs, the conflict minerals contained in the generic RCA radio would be attributable to the car, just as if they were contained in a component of the car that Packard had contracted to manufacture, and the RCA radio would thereby trigger Packard's disclosure obligations under the Conflict Minerals Rule.

Equipment Used to Provide a Service Is Not Considered a Product

Equipment manufactured or contracted to be manufactured by an issuer that the issuer uses in providing a service it sells will not be considered a product under the Conflict Minerals Rule provided that:

- The equipment is used and retained by the service provider
- The equipment is required to be returned to the service provider or
- The equipment is intended to be abandoned by the customer following the terms of service

As an example, the FAQs noted that issuers operating cruise ships would not have to file reports regarding the conflict minerals in the cruise ships themselves. This particular guidance will significantly impact issuers in the transportation and equipment rental industries, potentially relieving them of reporting obligations under the Conflict Minerals Rule.

Sale of Used Manufacturing Tools Does Not Trigger Reporting Obligations

According to the FAQs, an issuer that sells tools, machines or other equipment containing conflict minerals that have been used for the creation of the issuer's products is not subject to the conflict mineral disclosure obligations by virtue of such equipment's later entry into the stream of commerce.

Issuers Subject to the Conflict Minerals Rule

Voluntary Filers Must Comply With the Conflict Minerals Rule

The reporting requirements of the Conflict Minerals Rule apply to all issuers that file reports under Exchange Act Sections 13(a) or 15(d), regardless of whether the issuer is required to file such reports or does so voluntarily. As a result, high-yield issuers that are subject to Exchange Act reporting solely because of a covenant in an indenture will be subject to the Conflict Minerals Rule. However, registered investment companies required to file reports under Rule 30d-1 of the Investment Company Act are not subject to the Conflict Minerals Rule.

Production by a Consolidated Subsidiary Triggers the Same Reporting Obligations for the Issuer

An issuer is responsible for reporting products falling within the scope of the Conflict Minerals Rule for itself and all of its consolidated subsidiaries.

Activities Customarily Associated With Mining Are Not Considered "Manufacturing"

Under the Conflict Minerals Rule, an issuer that mines conflict minerals is deemed not to be manufacturing those minerals, and therefore not subject to conflict mineral disclosure obligations, unless the issuer also engages in manufacturing in addition to mining. The guidance clarifies that the Staff does not consider activities customarily associated with mining to be "manufacturing" for the purposes of the Conflict Minerals Rule, and therefore such activities do not trigger conflict mineral disclosure obligations. In the context of gold mining of lower-grade ore, for example, the processing, crushing, leaching, smelting and transportation of ore, in addition to the mining of ore, is not considered manufacturing gold.

Affixing a Logo to a Generic Product Is Not "Contracting to Manufacture"

An issuer doing no more than "affixing its brand, marks, logo or label to a generic product manufactured by a third party" is not considered to be "contracting to manufacture" under the Conflict Minerals Rule. Accordingly, etching or marking a third-party generic product with a logo, serial number or other identification will not cause an issuer to have conflict mineral disclosure obligations.

Allowance of a Post-IPO Transition Period

An issuer not previously obligated to file Form SD for conflict minerals that becomes subject to the Conflict Minerals Rule following an initial public offering ("IPO"), may delay reporting on its use of conflict minerals until the end of the first calendar year that begins no sooner than eight months after the effective date of its IPO. The same transition period is granted to issuers reporting for previously non-reporting companies they acquire.

Guidance on Form SD Disclosure

Issuer Should Use Own Product Description for Item 1.01(c)(2)

If an issuer has triggered an obligation to file a Form SD, Item 1.01(c)(2) of Form SD allows the issuer to describe its products in a way that accurately identifies them using terms understood in the industry. The FAQs provide that an issuer need not identify each of its products listed in Item 1.01(c)(2) by model number. The Staff acknowledges that the issuer is in the best position to describe its products based on the issuer's analysis of its facts and circumstances. However, an issuer is strictly required to state whether its products are "DRC conflict-free", "DRC conflict-undeterminable" or "have not been found to be 'DRC conflict-free'", as applicable.

"DRC Conflict-Free" Products Still Subject to Reporting

If an issuer determines during the course of due diligence that its products are "DRC conflict-free," that issuer must nonetheless file a Form SD and obtain an independent private sector audit of its Conflict Minerals Report. The issuer does not, however, need to disclose the products containing such conflict minerals in its Conflict Minerals Report or provide product descriptions under Item 1.01(c)(2) of Form SD.

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