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SEC Issues Proposed Rules Regarding Conflict Minerals Disclosure

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On December 15, the Securities and Exchange Commission issued proposed rules implementing disclosure and reporting requirements regarding the use by issuers of conflict minerals from the Democratic Republic of the Congo and adjoining countries (DRC countries) added as Section 13(p) to the Securities Exchange Act of 1934 by Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1502(e)(4) of the Dodd-Frank Act defines "conflict mineral" as cassiterite, columbite-tantalite, gold, wolframite, or their derivatives, or any other minerals or their derivatives determined by the Secretary of State to be financing conflict in the DRC countries. The proposed rules are expected to apply to many more issuers than might have first been expected due to the various uses of conflict minerals and their derivatives and the SEC's broad definition of "manufacture."

The proposed rules would apply to issuers who file reports with the SEC under Sections 13(a) or 15(d) of the Exchange Act and for which conflict minerals are "necessary to the functionality or production of a product manufactured" or contracted to be manufactured by that issuer. The proposed rules would apply to domestic companies, foreign private issuers and smaller reporting companies. If an issuer determines it does not utilize conflict minerals or their derivatives in any production or manufacturing process (which includes components used in assembling a product as well as products manufactured for the issuer under contract), that issuer would not be required to take any action or make any disclosures with respect to conflict minerals.

Issuers that do utilize conflict minerals would be required to determine, after a reasonable country of origin inquiry, whether their conflict minerals originated in the DRC countries. The proposed rules do not provide any guidance as to what constitutes a reasonable country of origin inquiry by an issuer and rely on the issuer to undertake a "reasonable inquiry" at its discretion. If the issuer determines that its conflict minerals did not originate in the DRC countries, the issuer would disclose this determination and the reasonable country of origin inquiry it used in reaching this determination in the body of its annual report on Form 10-K, Form 20-F or Form 40-F, as applicable, under a separate heading entitled "Conflict Minerals Disclosure." The issuer also would be required to make available this disclosure on its website, disclose in its annual report that the disclosure is posted on its website, disclose the Internet address on which this disclosure is posted and maintain records demonstrating that its conflict minerals did not originate in the DRC countries.

If the issuer determines that its conflict minerals did originate in the DRC countries, or if it is unable to conclude that its conflict minerals did not originate in the DRC countries, the issuer would disclose this conclusion in its annual report on Form 10-K and furnish a Conflict Minerals Report as an exhibit to its annual report. The Conflict Minerals Report would be required to provide, among other information, a description (1) of the measures the issuer had taken to exercise due diligence on the source and chain of custody of its conflict minerals which shall include a certified independent private sector audit of its Conflict Minerals Report as well as the identity of the auditor and (2) of any of the issuer's products that contain conflict minerals that it is unable to determine did not "directly or indirectly finance or benefit armed groups" in the DRC countries. "Armed groups" is defined in Section 1502(e)(3) of the Dodd-Frank Act. The issuer would identify such products by describing them as not "DRC conflict free." If any of its products contain conflict minerals that do not "directly or indirectly finance or benefit" these armed groups, the issuer may describe such products as "DRC conflict free." The issuer also would be required to make its Conflict Minerals Report available to the public on its website and disclose in its annual report on Form 10-K that the Conflict Minerals Report is posted on its website and the Internet address on which the Conflict Minerals Report is posted.

Section 1502 of the Dodd-Frank Act requires issuers to provide their initial conflict minerals disclosure and, if necessary, their initial Conflict Minerals Report after their first full fiscal year following the promulgation of the final rules. Assuming the SEC adopts final rules in April 2011, as required by Section 1502 of the Dodd-Frank Act, a December 31 fiscal year-end issuer would first have to provide conflict minerals disclosure or a Conflict Minerals Report after the end of its December 31, 2012, fiscal year.

Comments on the proposed rules should be submitted to the SEC on or before January 31.

Read more.

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