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SEC Staff Issues Guidance on Conflict Minerals

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On May 30, 2013, the SEC Division of Corporation Finance (the Division) issued responses to frequently asked questions (FAQs) on various aspects of the reporting requirements regarding conflict minerals originating in the Democratic Republic of the Congo and adjoining countries (Conflict Minerals Rules).¹

The SEC Staff provided responses to 12 FAQs ranging from substantive interpretations, such as whether packaging is covered – it is not – to procedural applications of the Conflict Minerals Rules. A myriad of other issues will continue to be debated. For the upcoming first reporting deadline of May 31, 2014 for the 2013 calendar year, and in the likely absence of further SEC Staff guidance, each issuer will ultimately need to make judgments on how best to comply with the Conflict Minerals Rules based on its specific facts and circumstances and in consultation with its advisors and relevant industry association. Accordingly, we would urge all SEC reporting issuers to proceed apace with their conflict minerals compliance programs and due diligence inquiries to satisfy this new reporting obligation.

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¹ The FAQs can be found at <http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm>. The Conflict Minerals Rules were adopted in SEC Release No. 34-67716 (August 22, 2012). For more information and analysis of the Conflict Minerals Rules generally, see our previous client publications at <http://www.shearman.com/sec-adopts-dodd-frank-conflict-minerals-and-government-payments-rules-08-27-2012/> and <http://www.shearman.com/all-that-glitters-may-be-a-reportable-conflict-mineral-12-19-2012/>.

The following is a summary of significant guidance in the FAQs:

Substantive Interpretations

Packaging

Conflict minerals included in the packaging or container sold with a product is not considered to be part of the product. Therefore, even if an issuer manufactures or contracts to manufacture packaging associated with the products it sells, the packaging itself is not subject to the Conflict Minerals Rules. This is true even if the packaging is necessary to preserve the usability of the product up to and following purchase.

Equipment Used to Provide a Service

The Division indicated it would not object if issuers did not file reports with respect to conflict minerals in equipment they manufacture or contract to manufacture if the equipment is used for a service they provide and the equipment is retained by the service provider, required to be returned to the service provider or intended to be abandoned by the customer following the terms of service. The example given in the FAQs is conflict minerals used in cruise ships used by cruise lines.

Branding or Labeling Generic Products

An issuer that specifies that a generic product manufactured by a third party be etched or marked with a logo, serial number or other identifier is not considered to be “contracting to manufacture” the product.

Generic Components of Manufactured Products

The Division makes no distinction between the components of a product that an issuer directly manufactures or contracts to manufacture and the generic components it purchases to include in a product. As a result, an issuer must conduct a reasonable country of origin inquiry with respect to conflict minerals included even in such generic components.

Tools and Production Equipment

Tools, machines or other equipment used to manufacture an issuer’s products are not products themselves. Even if the issuer subsequently sells such equipment, it is not required to file reports relating to such equipment under the Conflict Minerals Rules.

Activities Customarily Associated with Mining

The Division confirmed that an issuer that only engages in activities customarily associated with mining, including gold mining of lower grade ore, is not considered to be manufacturing those minerals. Such activities include transporting, crushing, milling, leaching and smelting prior to transportation to a refinery.

Procedural Applications

Voluntary Filers

The Division confirmed that the rule applies to all issuers that file reports with the SEC under Exchange Act Sections 13(a) or 15(d), whether or not the issuer is required to file such reports. Issuers who voluntarily file pursuant to covenant requirements or otherwise are therefore subject to the Conflict Minerals Rules.

Activities of Consolidated Subsidiaries

An issuer must determine the origin of conflict minerals and make required disclosure for itself and its consolidated subsidiaries. The fact that the product incorporating conflict minerals is manufactured by a consolidated subsidiary rather than the issuer directly does not obviate the need to report.

Detail in Reports on Form SD

An issuer reporting products that have not been found to be “DRC conflict free” or that are “DRC conflict undeterminable” may describe the products based on its own facts and circumstances in terms commonly understood within its industry. Such descriptions need not include model numbers.

Filings Related to “DRC Conflict Free” Products

An issuer that determines that the products it manufactures or contracts to manufacture contain conflict minerals from the DRC or an adjoining country but are “DRC conflict free” must nevertheless file a Form SD with a Conflict Minerals Report and obtain an independent private sector audit of the Conflict Minerals Report, but is not required to disclose the products containing the conflict minerals or make certain other disclosures.

Transition Period for IPO Companies

The Division will not object if a newly public issuer starts reporting under the rules for the first reporting calendar year that begins no later than eight months after the effective date of its initial public offering registration statement.

S-3 Eligibility

Failure to timely file a Form SD regarding conflict minerals does not impact an issuer’s eligibility to use Form S-3.
