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## HEALTH AND SAFETY, SECURITIES AND MERGERS AND ACQUISITIONS CLIENT ALERT

### SEC ISSUES FINAL RULE ON CONFLICT MINERALS

On August 22, 2012, the Securities and Exchange Commission (“SEC”) adopted a final rule implementing Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act that requires certain disclosures related to the use of “conflict minerals” that originated in the Democratic Republic of the Congo and adjoining countries (together, the “DRC Countries”).

#### Companies Subject to the Final Rule

The final rule adopted by the SEC applies to any company that files reports with the SEC under Section 13(a) or Section 15(d) of the Securities Exchange Act of 1934 (the “Exchange Act”), including U.S. companies and foreign private issuers, for which the use of conflict minerals is *necessary to the functionality or production of a product manufactured or contracted to be manufactured by such company*. Under the final rule, “conflict minerals” are defined as cassiterite (used to make tin), columbite-tantalite (from which tantalum is extracted), gold, wolframite (used to produce tungsten), or their derivatives, or any other minerals (or their derivatives) determined by the U.S. Secretary of State to be financing conflict in the DRC Countries. Conflict minerals are used in electronic components and products including, but not limited to, mobile telephones, computers, videogame consoles, digital cameras and jet engine components. The SEC estimates that almost 6,000 U.S. and foreign companies will need to comply with the conflict minerals rule.

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## Manufacture or Contract to Manufacture Products with Conflict Minerals

Although the final rule applies only to companies that “manufacture” or “contract to manufacture” products for which conflict minerals are “necessary to the functionality or production” of the product, the rule does not define those and many other terms. Instead, those terms are to be applied based on the *facts and circumstances* of each company and product. A company is considered to be “contracting to manufacture” a product if it had some actual influence over the manufacturing of that product based on the facts and circumstances and the degree of influence the company exercised over the product manufacturing. A company will not be considered to “contract to manufacture” a product if it does no more than:

- specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product,
- affixes its brand, marks, logo or label to a generic product manufactured by a third party, or
- services, maintains or repairs a product manufactured by a third party.

The determination of whether a conflict mineral is deemed “necessary to the functionality” or “necessary to the production” of a product also depends on the company’s particular facts and circumstances. However, the final rule does provide some helpful criteria a company should consider in making these determinations.

## Reasonable Country of Origin Inquiry; Form SD

If a company concludes that conflict minerals are necessary to the functionality or production of a product it manufactures or has contracted to manufacture, the company must then conduct a “reasonable country of origin inquiry” regarding the origin of the conflict minerals. To satisfy the reasonable country of origin inquiry requirement, a company must conduct a good faith inquiry regarding the origin of its conflict minerals that is reasonably designed to determine whether any of its conflict minerals (i) originated in the DRC Countries or (ii) are from recycled or scrap sources.

If, based on the reasonable country of origin inquiry, the company concludes that:

- the company *knows* that the minerals *did not* originate in the DRC Countries or *are from* scrap or recycled sources; or
- the company *has no reason to believe* that the minerals may have originated in the DRC Countries or *may not be from* scrap or recycled sources,

then the company must disclose on Form SD its determination, provide a brief description of the inquiry it undertook and the results of the inquiry. Further, the company is required to make the description of its inquiry publicly available on its Internet website and provide the Internet address of that site in the Form SD.

## Due Diligence; Conflict Minerals Report

However, if, based on the reasonable country of origin inquiry, the company concludes that:

- the company *knows or has reason to believe that* the minerals may have originated in the DRC Countries; and
- the company *knows or has reason to believe that* the minerals *may not be from* scrap or recycled sources,

then the company must undertake due diligence on the source and chain of custody of the conflict minerals

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(following a nationally or internationally recognized due diligence framework).

After completing the due diligence, the company must prepare a Conflict Minerals Report and have it audited by an independent private-sector auditing firm. The Conflict Minerals Report, which must include an audit report and applicable certification by the company, must then be filed with the SEC as an exhibit to the Form SD describing the due diligence the company undertook on the source and chain of custody of the conflict minerals. The company must also make publicly available the Conflict Minerals Report on its Internet website and provide the Internet address of that site on Form SD.

## DRC Conflict Free; DRC Conflict Undeterminable

If, based on the above due diligence process, the company concludes that the conflict minerals may have originated from the DRC Countries but that such minerals did not finance or benefit armed groups, then the Conflict Minerals Report must disclose the same and identify the conflict minerals as “DRC conflict free.” Also, if a company concludes that its minerals are derived from recycled or scrap sources (rather than mined sources), the company’s applicable products are considered “DRC conflict free” under the final rule.

If a company concludes that its products are not “DRC conflict free,” then in addition to the audit and other applicable requirements the company must describe in its Conflict Minerals Report:

- the products that are not DRC conflict free,
- the facilities used to process the conflicts minerals in those products,
- the country of origin of the conflict minerals in those products, and
- its efforts to determine the mine or location of origin of the minerals.

The final rule provides for a temporary two-year period (four-year period for smaller reporting companies) for companies that are unable to determine whether the minerals in its products are DRC conflict free. During this period, if a company is unable to determine whether the minerals in its products are DRC conflict free, then it must identify those products as “DRC conflict undeterminable.” Such a company must describe in its Conflict Minerals Report:

- the products that are DRC conflict undeterminable,
- the facilities used to process the conflicts minerals in those products (if known),
- the country of origin of the conflict minerals in those products (if known),
- its efforts to determine the mine or location of origin of the minerals, and
- the steps that the company took or will take to mitigate the risk that its conflict minerals benefit armed groups.

The company is not required to obtain an independent private sector audit of the Conflict Minerals Report for products that are DRC conflict undeterminable.

## Reporting Deadlines

The final rule requires each issuer to provide its conflict minerals information on a calendar year basis regardless of any particular fiscal year end. The rule requires an issuer to provide its annual conflict minerals information in a new specialized disclosure report on Form SD for every calendar year from January 1 to December 31. The Form SD will be due to the SEC on May 31 of the following year. Therefore, the first reporting period for all issuers will be from January 1, 2013 to December 31, 2013, and the first Form SD must be filed on or before May 31, 2014.

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The Form SD, including conflict minerals information and any Conflict Minerals Report submitted as an exhibit to the form, must be “filed” under the Exchange Act and thereby subject to potential Exchange Act Section 18 liability. This is a change from the proposed rule, which only would have required the information to be “furnished.”

The following is a link to the SEC’s final rule implementing Section 1502 of the Act for your reference:  
<http://www.sec.gov/rules/final/2012/34-67716.pdf>.