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Under the rule, affected companies will face significant new obligations with regard to disclosure and costs of due diligence and audit, as well as the likelihood of shareholder activism.

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SEC Adopts Final Rule on Disclosure of Use of Conflict Minerals

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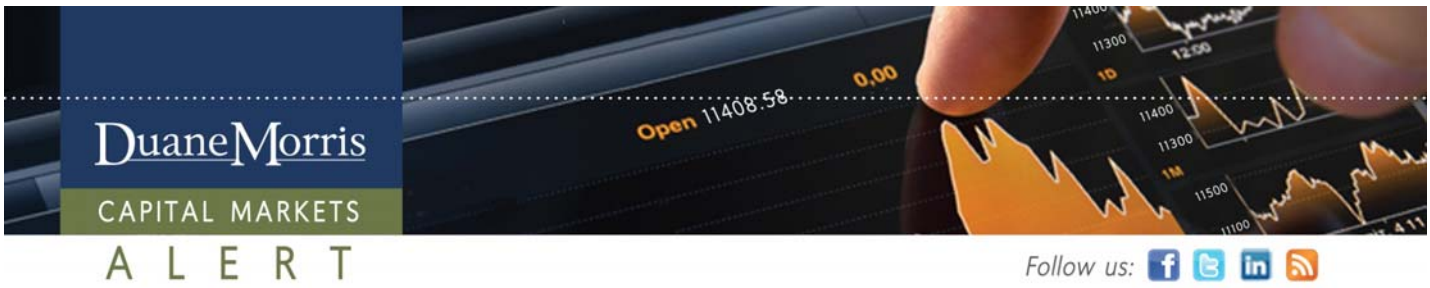
At an open meeting on August 22, 2012, the U.S. Securities and Exchange Commission (SEC) adopted a final rule on disclosure of the use of conflict minerals originating in the Democratic Republic of the Congo (DRC) or an adjoining country, implementing Section 13(p) of the Securities Exchange Act of 1934 and Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Issuers subject to the new rule should expect substantial compliance costs, including potential due diligence and independent audit expenses, potential liability under the Exchange Act and the likelihood of shareholder activism as a result of the issuers' involvement in conflict minerals.

Section 13(p), new Rule 13p-1 and new Form SD require issuers to provide information on conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the issuer that originated in the DRC or an adjoining country. The adjoining countries currently include Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda and Zambia.

Conflict minerals are columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives, which are currently limited to tantalum, tin and tungsten, and any other mineral or its derivatives determined by the Secretary of State to be financing conflict in these countries.

The SEC stated that Congress' intent in adopting Section 13(p) was to further the humanitarian goal of ending the extremely violent conflict in the DRC and the human rights abuses caused by the conflict through reducing use of conflict minerals and funding for armed groups contributing to the conflict.



Compliance Dates

Issuers must comply with the new rule for the calendar year beginning January 1, 2013, with their first reports due May 31, 2014. The calendar-year reporting requirement applies to all issuers no matter what their fiscal year may be.

Potential Liability and Costs

In a change from the proposed rule, the new disclosure on Form SD will be filed with rather than furnished to the SEC. As a result, issuers will be subject to potential liability under Exchange Act Section 18. Section 18(a) provides that a person will be liable for false or misleading statements of a material fact in documents filed under the Exchange Act under certain circumstances, unless the person can establish that he acted in good faith and had no knowledge the statement was false or misleading. In addition, issuers that fail to comply with the new rule could also be liable for violations of Sections 10(b), 13(a), 13(p) and 15(d) of the Exchange Act.

The information in Form SD, however, will not be deemed incorporated by reference into Securities Act or Exchange Act filings, unless the issuer specifically incorporates it by reference, and will not be subject to the Exchange Act CEO and CFO certifications.

The SEC recognized that the rule will impose significant compliance costs on companies, estimating initial aggregate costs of $3 billion to $4 billion and annual costs thereafter of $207 million to $609 million. The SEC reached this dollar range by using a combination of the cost analyses provided by commentators and its own analysis and assumptions, with the first year cost for large issuers approaching $500,000. We expect there will be vigorous challenges to the rule on the basis of the cost-benefit analysis, in light of the quantitative huge costs and the qualitative subjective benefits.

In addition to potential liability and costs, issuers should be mindful that some investors have expressed concern over prudent management of risk in a company's global supply chain and the use of certain minerals to fund the conflict in the DRC. Issuers should anticipate more shareholder activism after they begin filing the Form SD, requiring further executive attention.

Applicability and First Step

The final rule applies to all issuers, including smaller reporting companies and foreign private issuers, that:

- file reports with the SEC under Sections 13(a) or 15(d) of the Exchange Act
- manufacture or contract to manufacture products and
- have conflict minerals necessary to the functionality or production of these products.

Issuers that do not meet these requirements do not have to take any further action or file any reports.

In the adopting release, the SEC provided guidance on some of the phrases used in the applicability requirement. Issuers will "contract to manufacture" a product depending on the degree of influence they exercise over the materials included in any product containing conflict minerals. The guidance includes a safe-harbor for an issuer that does no more than:

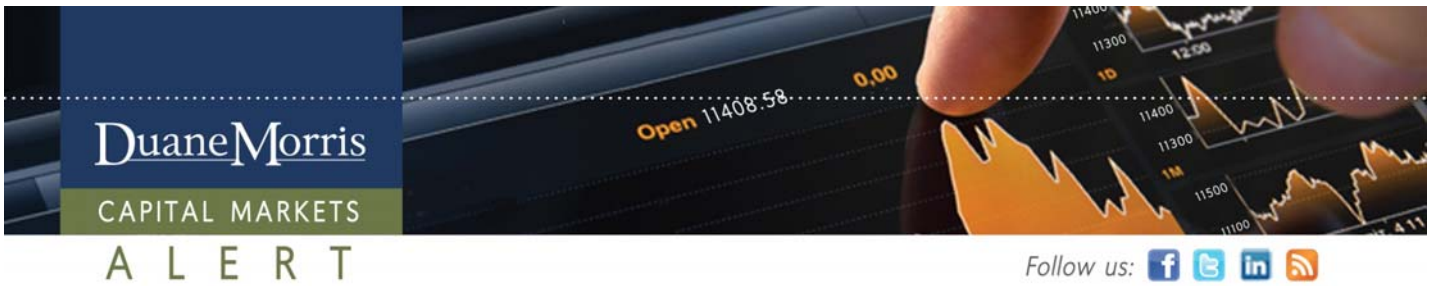
- specify or negotiate contractual terms with a manufacturer that do not directly relate to the manufacturing of the product, unless the issuer's influence is practically equivalent to contracting on terms that directly relate to the product's manufacture
- affix its brand, logo or label to a generic product manufactured by a third party or
- service, maintain or repair a product manufactured by a third party.

As indicated above, a conflict mineral must be necessary to the functionality or necessary to the production of a product. In determining whether a conflict mineral is necessary to the functionality of a product, issuers 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 any of the product's generally expected functions, uses or purposes and
- if the conflict mineral is incorporated for purposes of ornamentation or decoration, whether the primary purpose of the product is ornamentation or decoration.

In determining necessary to the production of a product, issuers should consider:

- whether the conflict mineral is intentionally included in the production process, except for inclusion in equipment used to produce the product, such as computers or power lines
- whether the conflict mineral is contained in the product and
- whether the conflict mineral is necessary to produce the product.



The SEC modified its proposed guidance in the final release, stating that the conflict mineral must be both contained in the product and necessary to the product's production in order to fall within the phrase "necessary to the production."

Issuers that mine conflict minerals do not fall under the rule unless they also directly or indirectly manufacture products. In addition, issuers do not have to provide any information on conflict minerals that, prior to January 31, 2013, are "outside the supply chain", which means minerals that have been smelted or fully refined, or, if not, are located outside the applicable countries.

Form SD and Steps Two and Three

Form SD

Disclosure under the new rule will be made in the new specialized disclosure report, Form SD, and an exhibit to that report, instead of in the issuer's existing Exchange Act annual report. The new report will be signed by the issuer by an executive officer. The information disclosed in Form SD must also be disclosed on the issuer's website, with a link to the website included in the Form SD.

Step Two

If an issuer determines that any conflict minerals are necessary to the functionality or production of a product, it must then conduct a reasonable country of origin inquiry. This inquiry must be conducted in good faith and be reasonably designed to determine whether any conflict minerals originated in the applicable countries or are from recycled or scrap sources.

An issuer that:

- determines its conflict minerals did not originate in the applicable countries or did come from recycled or scrap sources
- has no reason to believe its conflict minerals may have originated in the applicable countries or
- reasonably believes its conflict minerals are from recycled or scrap sources

must report this determination and briefly describe the inquiry used to reach this determination in the Form SD. However, the issuer does not need to exercise due diligence on the conflict minerals' source or file a Conflict Minerals Report.

Step Three and Conflict Minerals Report

If an issuer:

- knows its conflict minerals originated in the applicable countries and are not from recycled or scrap sources or
- has reason to believe the conflict minerals may have originated in the applicable countries and may not have come from recycled or scrap sources,

the issuer must exercise due diligence, as described in Form SD, on the source and chain of custody of the minerals and must prepare and file a Conflict Minerals Report as an exhibit to Form SD, if as a result of its due diligence the issuer:

- determines that the conflict minerals originated in the applicable countries and did not come from recycled or scrap sources or
- cannot determine the source of its conflict minerals.

The Conflict Minerals Report will include information on:

- the due diligence, which must
    - describe the due diligence measures taken by the issuer on the source and chain of custody of the conflict minerals
    - conform to a nationally or internationally recognized due diligence framework if one exists for the conflict mineral
    - include an independent private sector audit of the Conflict Minerals Report conducted in accordance with standards established by the Comptroller General of the US and
    - for products that are "DRC conflict undeterminable," describe steps taken or to be taken to mitigate risk that the minerals benefited armed groups
- product description
    - for products that are not "DRC conflict free,"
        - a description of the products
        - the facilities used to process the conflict minerals
        - the country of origin and
        - efforts to determine the mine or location of origin

- "DRC conflict free" means a product that does not contain conflict minerals necessary to the functionality or production of that product that directly or indirectly finance or benefit armed groups in the applicable countries and
- conflict minerals solely from recycled or scrap sources are considered "DRC conflict free" and no product description is required.

In the adopting release, the SEC provided a very helpful flowchart summary, which can be found on page 33 of the Release.

For Further Information

If you would like more information about the topics discussed in this *Alert*, please contact Elizabeth W. Powers, Richard A. Silfen, Laurence S. Lese, any of the members in our Capital Markets Group or the attorney in the firm with whom you are regularly in contact.