CLIENT UPDATE

SEC ISSUES GUIDANCE ON CONFLICT MINERALS WITH ONE YEAR TO GO

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On May 30, 2013, the SEC's Division of Corporation Finance issued responses to 12 frequently asked questions, or FAQs, providing guidance on certain aspects of the SEC's final "conflict minerals" rule. The conflicts minerals rule, which was mandated under the Dodd-Frank Act, requires SEC reporting companies to determine and disclose the use of certain "conflict minerals" in their products. Conflict minerals include tin, tantalum, tungsten and gold which originated in the Democratic Republic of Congo or adjoining countries (referred to as the "DRC"). The FAQs are summarized below.

ACTIONS REQUIRING ATTENTION NOW

Unless the rule (which has been challenged in court) is revised or withdrawn, SEC reporting companies will be required to make initial conflict minerals disclosures and to report on Form SD, for the calendar year commencing January 1, 2013, no later than May 31, 2014. This reporting will be entirely new, and issuers will require plenty of lead time to conduct the necessary due diligence and put together their initial reports. To ensure that they can comply with next year's deadline, reporting companies that may be subject to the conflict minerals rule should begin now (if they have not already begun) to develop compliance programs and to undertake any necessary product and "reasonable country of origin" and supply chain due diligence.

Futhermore, although the conflict minerals disclosure requirements apply only to reporting issuers, non-reporting companies that supply products that may contain conflict minerals to reporting issuers will also need to perform due diligence in order to assist their customers with their inquiries and supply chain due diligence.

KEY GUIDANCE FROM THE FAQS

While the final conflict minerals rule and the SEC's lengthy related adopting release contain guidance on many requirements of the rule, there are important interpretive issues that remain for reporting companies to wrestle with depending upon their specific facts and circumstances. The FAQs provide some additional substantive guidance for issuers that may be subject to the rule. Of particular note, the SEC provides further clarity on whether packaging is subject to the rule and when equipment may not be. However, the FAQs do not on the whole substantially change the interpretive landscape.

A summary of the FAQs is set forth below. The full text of the FAQs is available on the SEC's website at http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm. The SEC's August 2012 release adopting the final rule is available on the SEC's website at http://www.sec.gov/news/press/2012/2012-163.htm.

- **Substantive Guidance Regarding Packaging and Products**
  - Packaging: The FAQs clarify that the packaging or container used to display, transport or sell a product is not considered to be part of the product, even if necessary to preserve the usability of the product up to and following the product's purchase. As a result, packaging and containers that an issuer manufactures or contracts to manufacture are not subject to reporting. However, if the packaging and containers are sold independently of the product, they are considered products in their own right. The FAQs clarify an area of significant uncertainty that was troublesome to companies that produce food and other consumer products where the use of packaging is integral to their ability to provide products to consumers.
  - Generic Components: The FAQs provide that if an issuer manufactures a product, there is no distinction between the components that the issuer manufactures itself and "generic" components that the company purchases for inclusion in the product. Issuers must conduct a reasonable country of origin inquiry with respect to conflict minerals included in both the manufactured and generic components. This guidance is consistent with guidance contained in the adopting release.
  - Equipment Used to Provide Services: The FAQs state that services are not products, and, furthermore, that equipment that an issuer manufactures or

contracts to manufacture to allow it to provide a service is not itself a product if it 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 the service. The FAQs note as an example that a cruise ship used by a cruise line would not be subject to the rule. By analogy, this guidance would apply to many other categories of service providers.

- Logos on Generic Products: Consistent with guidance contained in the adopting release on branding of generic products, the FAQs state that an issuer will not be considered to have "contracted to manufacture" a product merely because it has a logo, serial number or other identifier etched into a generic product manufactured by a third party.
- Sale of Manufacturing Tools and Equipment: The FAQs make clear that tools, machines and other equipment that an issuer manufactures or contracts to manufacture for use in the manufacture of other products are not themselves products. The FAQs clarify that this is true even if the issuer later sells them, *i.e.*, the mere fact that these items are ultimately sold by the issuer does not make them products of the issuer.

- **Application of the Rule and Form SD Filings**
  - Voluntary Filers: The conflict minerals rule applies to all issuers that file reports with the SEC under Exchange Act Sections 13(a) or 15(d), including voluntary filers.
  - Late Filings: Failure to timely file Form SD will not cause an issuer to lose its eligibility to use short-form registration on Form S-3. (By analogy, this should extend to the use by foreign issuers of Form F-3).
- **Conflict Minerals Disclosure – General**
  - Reporting on a Consolidated Basis: The conflict minerals rule applies to an issuer and all of its consolidated subsidiaries.
  - Descriptions of Products: An issuer has flexibility in how it describes in its conflict minerals report any products that have not been found to be "DRC conflict free" or that have been found to be "DRC conflict undeterminable." Such description should be based on the issuer's facts and circumstances and terms commonly understood in its industry.
  - IPO Transition Period: An IPO issuer is not immediately subject to the rule, but instead must begin providing conflict minerals disclosure for the first calendar year

that begins no sooner than eight months after the effective date of the issuer's IPO registration statement.

- **Mining Companies**
  - A company that mines conflict minerals and also engages in activities customarily associated with mining, such as processing and smelting, is not considered to be "manufacturing" the minerals that it mines.

ONE YEAR UNTIL INITIAL REPORTS ARE DUE

The FAQs provide guidance that should be helpful to SEC reporting issuers that are preparing to comply with the conflicts minerals rule. That preparation should include, as a first step, conducting due diligence to determine whether conflict minerals are necessary to the functionality or production of any product that is manufactured or contracted to be manufactured by the issuer. If so, the conflict minerals rule applies and the issuer must perform the diligence required by the rule, including conducting "reasonable country of origin" inquiries to determine whether the conflict minerals originated in the DRC and, if necessary, supply chain due diligence. This diligence will for many reporting companies be a time-consuming and costly process.

In addition, issuers that are subject to the rule are subject to mandated reporting on new Form SD and, potentially, procedures for performing audits of the source and chain of custody of minerals and the preparation of a Conflict Minerals Report to be filed with the Form SD. This reporting and these procedures will be entirely new and issuers will require plenty of lead time to be thorough and thoughtful in putting together their initial reports.

Non-reporting issuers (and their controlling persons, such as private equity funds) should anticipate that, although the conflict mineral disclosure requirements apply only to reporting issuers, non-reporting companies that supply products that may contain conflict minerals to reporting issuers will also need to perform due diligence in order to assist their customers with their inquiries and supply chain due diligence.

With less than one year to go before the conflict minerals rule's initial reporting deadline, it is not too early for reporting companies that may be subject to the rule to develop and implement their compliance programs and due diligence initiatives. Delaying the implementation of conflict mineral plans in the hopes that the U.S. Court of Appeals for the District of Columbia will set aside or modify the rule in whole or in part as a result of the legal challenge filed in October 2012 could result in the inability to comply with the rule in a timely manner should the court uphold the rule. Assuming the rule remains in

place, initial conflict mineral disclosures and reports on Form SD covering the calendar year commencing January 1, 2013, will be due no later than May 31, 2014.

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Please do not hesitate to contact us with any questions.

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