



Securities Law ALERT ■

APRIL 14, 2014

SEC Issues Additional Conflict Minerals FAQs – Focus on Audit Requirements, Content of the Form SD and Conflict Minerals Report

On April 7, 2014, the U.S. Securities and Exchange Commission published nine additional Frequently Asked Questions (FAQs) relating to the new disclosure requirements regarding the use of conflict minerals from the Democratic Republic of the Congo (DRC) or adjoining countries (the “Conflict Minerals Rules”).¹ These FAQs provide additional insight and guidance at a time when most companies have started, or are starting, to prepare their initial Form SD filings, which cover the 2013 calendar year and are due June 2, 2014.²

The additional FAQs primarily relate to the specific disclosure requirements of Form SD and the Conflict Minerals Report to be attached thereto (the CMR) and the independent private sector audit (IPSA). Below is a summary of each of the newly issued FAQs:

Content of the Form SD and CMR

- **If a product contains conflict minerals from several sources, and an issuer cannot determine that all conflict minerals contained in the product are “DRC conflict free,” then the issuer cannot describe the product as “DRC conflict free.”**

If an issuer’s products that are covered by the Conflict Minerals Rules are composed of a number of conflict minerals from different sources, and a product that would qualify as “DRC conflict free” except that the product contains a conflict mineral that the issuer is unable to determine is conflict

¹ The full text of all of the FAQs related to the Conflict Minerals Rules is available at <http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm>.

² For more information about the adoption and requirements of the Conflict Minerals Rules generally, see our earlier alert available at <http://www.alston.com/advisories/securities-law-conflicts-minerals>.

free, the issuer may not describe that product as “DRC conflict free.” However, both during and after the temporary transition period, if an issuer determines that a product contains a conflict mineral that **did** finance or benefit armed groups in the DRC or an adjoining country, it must describe that product as “having not been found to be ‘DRC conflict free.’”

- **If any conflict minerals in an issuer’s product came from recycled or scrap sources, the required disclosures for those conflict minerals must be included in the body of the issuer’s Form SD.**

If the product also includes conflict minerals that are **not** from recycled or scrap sources, the issuer must also file a CMR as an exhibit to the Form SD that includes a description of the due diligence it performed and any other required disclosures about its conflict minerals that are not from recycled or scrap sources. These are two separate and distinct reporting obligations. The CMR would not need to include the disclosures for the conflict minerals from recycled or scrap sources. Note, the IPSA only applies to the CMR (not the disclosures contained in the body of the Form SD).

When an Audit Is Required; Use of “DRC Conflict Free”

- **If an issuer determines that at least one of its products may be described as “DRC conflict undeterminable,” the issuer is not required to obtain an IPSA of its CMR during the temporary transition period (four years for smaller reporting companies and two years for all other issuers).**

Note, if **any** of an issuer’s products are “DRC conflict undeterminable” during this period, the issuer is not required to obtain an IPSA of its CMR.

- **If an issuer does not obtain an IPSA of its CMR because at least one of its products is “DRC conflict undeterminable,” it may not describe any of its other products as “DRC conflict free” in its CMR.**

The rule defines due diligence as including an IPSA of the CMR. Therefore, in order to be able to describe any product as “DRC conflict free” in its CMR, an issuer must have obtained an IPSA. Note, the rules do not require an issuer to describe any qualifying products as “DRC conflict free” in its CMR—the rules permit issuers to omit products that are “DRC conflict free” from the CMR. However, the rules also allow an issuer to **choose** to include DRC conflict free products in the CMR if the issuer is able to determine that the conflict minerals in those products are in fact “DRC conflict free” based on its due diligence (but only if the issuer obtains an IPSA).

Requirements as to Auditors for IPSA

- **An auditor that is not a CPA can perform a Performance Audit that will satisfy the IPSA requirement.**

Any Performance Audit must satisfy the provisions in the U.S. Government Accountability Office's (GAO) Government Auditing Standards ("Yellow Book"), since Section 1502 of the Dodd-Frank Act requires the IPSA of an issuer's CMR to be conducted in accordance with standards established by the GAO. Auditors are permitted to use either the provisions for Attestation Engagements or Performance Audits. Although Attestation Engagements require that auditors be licensed certified public accountants, Performance Audits allow auditors (including non-CPAs) to perform audits if they meet the applicable requirements under the Yellow Book. The Yellow Book can be found at www.gao.gov/yellowbook.

Scope of the IPSA

- **The scope of the IPSA is limited—the IPSA does not include an evaluation of the completeness or reasonableness of the issuer's due diligence or which suppliers are covered by the due diligence measures.**

The IPSA objective is to express an opinion or conclusion as to (1) whether the design of the issuer's due diligence measures as set forth in the issuer's CMR is (materially) in conformity with the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and (2) whether the issuer's description of the due diligence measures it performed contained in the CMR is consistent with the due diligence process that the issuer undertook. The IPSA is not required to cover any matter beyond that objective, including the completeness or reasonableness of the due diligence measures actually performed.

- **Although some due diligence frameworks encompass the reasonable country of origin inquiry requirement under the rule, the IPSA does not apply to the issuer's reasonable country of origin inquiry.**

Under the rule, the reasonable country of origin inquiry is a distinct step separate from the due diligence process, and the auditor only needs to opine on the steps mentioned above and may limit the first step to whether the design of the issuer's due diligence framework is in accordance with the portion of the relevant due diligence framework that begins after the country of origin determination. Additionally, the auditor only needs to opine on whether the issuer actually performed the due diligence measures described in the report after the issuer determined it had reason to believe its conflict minerals may have originated in a covered country.

- **An issuer's due diligence measures must apply to the conflict minerals in products manufactured during the calendar year, regardless of when such due diligence measures actually take place.**

Similarly, the IPSA, which evaluates whether the diligence measures an issuer performed "with respect to the period covered by the report" will evaluate the due diligence measures conducted with regard to products manufactured during the calendar year. This requirement does not imply that due diligence measures must be carried out constantly throughout the calendar year—the issuer's due diligence measures may begin before or extend beyond the calendar year.

- **Although the first objective of the IPSA includes an evaluation of whether the design of the issuer's due diligence measures conforms to a nationally or internationally recognized due diligence framework, the rule does not require an issuer to include a full description of the design of its due diligence in the CMR.**

However, with regard to the second audit objective, the due diligence measures undertaken must be described in the CMR, and the description must be in sufficient detail for the auditor to be able to form an opinion or conclusion about whether the description in the CMR is consistent with the process the issuer actually performed.

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