SEC staff answers FAQs about the conflict minerals rule

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The US Securities and Exchange Commission (**SEC**) has published answers by its staff to a dozen frequently asked questions (**FAQs**) relating to its rule requiring reporting companies under the US Securities and Exchange Act of 1934 (**Exchange Act**) to provide annual disclosures regarding conflict minerals. The disclosures are required by companies that determine that conflict minerals are necessary to the functionality or production of products it manufactures or contracts to manufacture. Exchange Act Rule 13p-1 and Form SD set forth the disclosure requirements implementing Section 13(p) of the Exchange Act.

Companies subject to the disclosure requirements must report on Form SD whether the conflict minerals utilized by them originated in the Democratic Republic of the Congo (**DRC**) or an adjoining country, and the due diligence they undertook on the source and chain of custody of the conflict minerals. The disclosure requirements became effective on 13 November 2012 and first apply for the 2013 calendar year, with the report on Form SD for 2013 due by 31 May 2014.

The FAQs can be viewed at: *http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm*

Companies subject to the conflict minerals rule

Rule 13p-1 states that the conflict mineral disclosure requirements apply to every "registrant" that files reports with the SEC under Section 13(a) or 15(d) of the Exchange Act and that has conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that registrant to be manufactured. The staff confirms in its FAQs the following applications of the rule.

- **Voluntary filers included**. Voluntary filers are subject to the conflict minerals disclosure requirements. A voluntary filer is a company that files periodic reports with the SEC, even though it is not required to do so under Section 13(a) or 15(d) of the Exchange Act. (FAQ 1)

- **Consolidated subsidiaries included**. Although Rule 13p-1 applies specifically to the “registrant,” the staff advises that if a consolidated subsidiary of a reporting issuer manufactures a product containing conflict minerals necessary to its functionality or production, the issuer must file a report on Form SD. (FAQ 3)

Scope of terms “manufactured” and “contracted to be manufactured”

The disclosure requirements of Rule 13p-1 apply only if conflict minerals are necessary to the functionality or production of products which the issuer “manufactured” or which it has “contracted to be manufactured.” In its adopting

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release, the SEC did not define the term “manufacture” because it considers the term to be generally understood, but clarified that it would not consider an issuer that only services, maintains or repairs a product containing conflict minerals to be manufacturing the product. The SEC also stated that the question of whether an issuer contracts to manufacture a product will depend on the degree of influence exercised by the issuer on the manufacturing of the product based on the individual facts and circumstances surrounding the issuer’s business and industry. In the FAQs, the staff supplements this guidance by confirming that the following activities are not deemed to constitute manufacturing or contracting to manufacture.

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- **Activities associated with mining.** Instruction 1 to Item 1.01 of Form SD provides that an issuer engaged solely in mining conflict minerals is not considered to be manufacturing the minerals for purposes of Rule 13p-1. The staff advises that issuers that engage only in activities “customarily associated” with mining, such as transporting mined ore to a processing facility and crushing, milling, and smelting, are not subject to the disclosure requirements. (FAQ 2)

- **Marking with a brand or logo.** Simply etching or otherwise marking a generic product manufactured by a third party with a logo, serial number, or other identifier is not considered “contracting to manufacture” the product and therefore does not subject an issuer to the rule’s disclosure requirements. (FAQ 4)

Scope of term “product”

As noted, the disclosure requirements of Rule 13p-1 apply only if conflict minerals are necessary to the functionality or production of a “product.” The staff provides the following guidance with respect to identifying “products” for purposes of the rule.

- **Equipment used to provide a service not covered.** The staff advises that “product” does not include equipment (such as a cruise ship) that an issuer (such as a cruise line company) manufactures or contracts to have manufactured for use in providing a service that the issuer sells to others (such as cruise travel). No disclosure under the rule is required if the equipment is retained by the service provider, is required to be returned to the service provider, or is intended to be abandoned by the customer following the term of the service. (FAQ 7)

- **Tools and machines used for manufacturing not covered.** Tools, machines, or equipment containing conflict minerals that are used to manufacture products of the issuer are not considered products for purposes of Rule 13p-1, even if the issuer decides later to sell or dispose of the tools, machines, or equipment. (FAQ 8)

- **Packaging and containers not covered.** A package or container for a product is not considered part of the product, because the packaging generally is discarded when the consumer begins to use the product. This is the case even if the package or container is necessary to preserve the usability of the product. If, however, the issuer manufactures or sells packaging or containers independently of the products they house, the packaging or containers would be considered covered products if a conflict mineral is necessary to their functionality or production. (FAQ 6)

- **Generic components of products are covered.** The staff advises that “there is no distinction between the components of a product that an issuer directly manufactures or contracts to

manufacture and the 'generic' ones it purchases to include in a product." The inclusion of conflict minerals solely in a product's "generic" components will require the issuer to conduct a reasonable country of origin inquiry with respect to the minerals. (FAQ 5)

Form SD disclosure

Form SD states that when an issuer determines that one of its products is not "DRC conflict free" or is "DRC conflict undeterminable," it must provide a description of the product in the report. "DRC conflict free" means that a product does not contain conflict minerals necessary to the functionality or production of the product that directly or indirectly finance or benefit armed groups in the DRC or an adjoining country. "DRC conflict undeterminable" means that the issuer is unable to determine, after exercising the required due diligence, whether or not the product is DRC conflict free.

- **Content of product description.** The SEC indicated in the adopting release that an issuer may describe its products based on its own facts and circumstances since the issuer is generally in the best position to know its own products. The staff advises in the FAQs that the product description need not include model numbers for the products, but must be in terms commonly understood within the issuer's industry and must state clearly that the products have not been found to be "DRC conflict free" or are "DRC conflict undeterminable." (FAQ 9)

Form SD filing requirements and late filings

The staff also provides guidance concerning Form SD filing requirements and late filings of the report.

- **Products that are "DRC conflict free" are covered.** The staff confirms that an issuer is required to file Form SD for products it manufactures or contracts to manufacture that contain conflict minerals from covered countries, even if the products are found to be "DRC conflict free." (FAQ 10)

- **Filing grace period for IPO companies.** The staff advises that it will extend to IPO companies the same grace period for filing Form SD afforded to issuers acquiring a company that manufactures or contracts to manufacture products with conflict minerals necessary to the functionality or production of the products. The issuer is permitted by Instruction 3 to Item 1.01 of Form SD to report on the acquired company's products beginning with the first reporting calendar year that begins no sooner than eight months after the effective date of the acquisition. The staff indicates that it will not object if an IPO company starts reporting for the first calendar year that begins no sooner than eight months after the effective date of the registration statement for the IPO. For example, if the IPO registration statement becomes effective on any date during the period from 1 May 2014 through 31 December 2014, the newly public issuer would first have to provide conflict minerals disclosure for the 2016 calendar year. (FAQ 11)

- **Late filing does not affect Form S-3 eligibility.** The staff confirms that failure to file the Form SD by the filing deadline will not cause an issuer to lose eligibility to use the Form S-3 short-form registration statement for securities offerings. The requirement in Form S-3 that the issuer file in a timely manner all reports and materials during the prior twelve calendar months applies only to reports required to be filed under Section 13(a) or 15(d) of the Exchange Act and information required to be filed under Section 14(a) or 14(c) of the Exchange Act. Because the conflict minerals disclosures in Form SD are required by Section 13(p) of the Exchange Act, a late Form SD filing will not affect an issuer's ability to use Form S-3. Although the staff does not address this question to the use of Form F-3, the short-form registration statement used by non-US companies, it is likely that the interpretation would be the same. (FAQ 12)

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