Hogan Lovells

Conflict Minerals
What Issuers Should Know

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GENERAL

This memorandum presents a summary of certain provisions of the Dodd-Frank Act and the proposed rules of the Securities and Exchange Commission (SEC) relating to conflict minerals. This summary has been prepared in order to assist companies to better understand the scope of the rules the SEC is required to implement. Because the SEC has not, at the date of this memorandum, adopted its final rules, the guidance set forth herein is subject to the qualification that the SEC's final rules may differ from its proposed rules. We encourage readers to discuss the matters reviewed in this summary with attorneys of Hogan Lovells, both to review the statutory and proposed rulemaking provisions in greater detail and to consider the implications of these provisions to the specific business operations in which the reader is engaged.

At the end of this memorandum is a suggested Company Action Plan that may be helpful in assisting companies preparing to comply with the conflict minerals provisions.

BACKGROUND

- The eastern Congo has been embroiled in violent conflict for more than fifteen years. It has been estimated that the conflict has cost, directly and indirectly, over 5,400,000 lives, more than any other conflict since World War II, and has involved a profound humanitarian crisis with rape as a weapon of war. For a number of years various nongovernmental organizations (NGOs), including notably The Enough Project based in Washington, have made efforts to stem the flow of funds to rebel groups, militias, and criminal networks within the Congolese army arising from the sale of the ores originating in the eastern Congo, the so-called "conflict minerals."

- The conflict minerals produce what are known as the "three T's (tin, tantalum and tungsten) and gold. Technically, the ores are:

    - Cassiterite, the mineral associated with tin and tin alloys, whose uses include solder for electrical circuits and for joining pipes;

    - Columbite-Tantalite (known as Coltan), the mineral associated with tantalum, which is used in electronic components, including mobile telephones, computers, video game consoles and digital cameras, as well as an alloy for carbide tools and jet engine components;

    - Wolframite, the mineral associated with tungsten, which is used in metal wires, electrodes, and contacts in lighting, electronic, electrical, heating and welding applications; and

    - Gold, which is used for jewelry and in electronic, communications and aerospace equipment.

- The efforts by the NGOs have been intended to influence companies at the top of the minerals supply chain to use their buying power to exert pressure downward through the entire supply chain and thereby to influence their suppliers to source only conflict-free minerals.

- The NGOs' efforts to highlight the conflict minerals issues have been reflected in proposed Congressional legislation since 2008. In 2010, a bill introduced by Senator Durbin and Representative McDermott became part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, as Section 1502 of the Act.

SECTION 1502 OF THE DODD-FRANK ACT

Section 1502 of the Dodd-Frank Act added a new Section 13(p) to the Securities Exchange Act of 1934 (Exchange Act). It is important to note that Section 13(p) does not reflect the traditional SEC mission, which is to "protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation." Instead, the purpose is solely humanitarian. As provided in Section 1502:

> "It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b)."

Section 13(p) required the SEC, not later than April 15, 2011, to issue regulations requiring public companies to disclose annually, beginning with their first fiscal year that begins after the regulations are issued, whether conflict minerals that are necessary to the functionality or production of a product they manufacture originated in the Democratic Republic of the Congo (DRC) or an adjoining country (such countries are referred to in this memorandum as the DRC Countries[1]). If they did, such companies are required to submit to the SEC a report (the "conflict minerals report") that includes a description of the measures they took to exercise due diligence on the source and chain of custody of such minerals. The measures must include an independent private sector audit of the company's report conducted in accordance with standards established by the US Comptroller General, in accordance with SEC rules and in consultation with the US Secretary of State.

The conflict minerals report would also need to include a description of the products manufactured or contracted for that are not DRC conflict free, the name of the entity that conducted the audit, the facilities used to process the conflict minerals, the country of origin of the conflict minerals and the efforts made to determine the mine or location of the origin with "the greatest possible specificity." The term "DRC conflict free" refers to products that do not contain conflict minerals that directly or indirectly finance or benefit armed groups in the DRC Countries.

The company submitting the conflict minerals report would need to certify the audit of the report. The information in the report would also be required to be made available to the public on the company's Internet web site. Although the President has the authority to terminate this disclosure obligation by certifying that no armed groups continue to be directly involved and benefiting from commercial activity involving conflict minerals, no termination of the reporting obligation may occur prior to July 22, 2015 (one day after the fifth anniversary of the enactment of the Dodd-Frank Act).

Congress did not establish any *de minimis* criteria with respect to the conflict mineral reporting requirements. Public companies that use conflict minerals are required to provide disclosure regardless of how minimal the use may be, or how small the companies are in terms of revenues or assets. The statute also does not limit itself to domestic companies – it covers foreign companies that report to the SEC as well.

Although the SEC did not meet the April 15, 2011 deadline for issuing its final rules, it is anticipated that the new rules will be adopted prior to June 30, 2012, and thus be applicable to companies having a fiscal year beginning on or after June 30, 2012, unless the SEC's final rules provide for a phase-in period.

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[1] The DRC Countries are not specified in the legislation but appear to be the Democratic Republic of the Congo, the Republic of Angola, the Republic of the Congo, the Republic of Uganda, the Republic of Rwanda, the Republic of Burundi, the United Republic of Tanzania, the Republic of Zambia, the Republic of South Sudan, and the Central African Republic.

Paragraphs (a) and (b) of Section 1502 of the Dodd-Frank Act are set forth at the end of this memorandum.

THE SEC'S PROPOSED CONFLICT MINERALS RULES

On December 15, 2010, the SEC published for public comment its proposed rules relating to conflict minerals. These proposals are available at **http://sec.gov/rules/proposed/2010/34-63547.pdf** . The SEC received a considerable number of comments regarding its proposal, some calling for more stringent rules and others calling for various exceptions and a phased-in implementation. The staff of the SEC also has held meetings with many interested parties regarding the rules. Although the SEC was required by Section 1502 of the Dodd-Frank Act to issue its final rules by April 15, 2011, it was unable to do so by such date, and in its efforts to obtain more information regarding the effect of the rules, held a public roundtable on the rules in October 2011. At the date of this memorandum, the final rules have not as yet been issued, though in Congressional testimony SEC Chairman Mary Schapiro suggested that the final rules will issue prior to June 30, 2012.

The SEC summarizes its proposed rules as follows:

> "The proposed rules would require any issuer for which conflict minerals are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by that issuer to disclose in the body of its annual report whether its conflict minerals originated in the Democratic Republic of the Congo or an adjoining country. If so, that issuer would be required to furnish a separate report as an exhibit to its annual report that includes, among other matters, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals. These due diligence measures would include, but would not be limited to, an independent private sector audit of the issuer's report conducted in accordance with standards established by the Comptroller General of the United States. Further, any issuer furnishing such a report would be required, in that report, to certify that it obtained an independent private sector audit of its report, provide the audit report, and make its reports available to the public on its Internet website. "

The following outline is intended to focus on specific questions companies may have in connection with the conflict minerals provisions as proposed by the SEC. Following this outline is a simplified flow chart summarizing the principal steps associated with an analysis of companies' obligations pursuant to the proposed rules. We caution that the final rules the SEC adopts may differ from the rules as proposed. Among other things, strongly held views have been expressed in the public comments the SEC has received regarding many of elements of the SEC's proposals, which may influence SEC in formulating its final rules. Nonetheless, for the purposes of planning the implementation of their conflict minerals compliance programs, companies are advised to consider the current proposals as a reasonable starting point.

Proposed New Item 104 to SEC Regulation S-K, implementing the conflict minerals requirements, is set forth at the end of this memorandum. The SEC proposal would add similar provisions to Item 16 of Form 20-F and of Form 40-F, and would add a new Item 4 to Part I of Form 10-K instructing companies to furnish the information required by Item 104 of Regulation S-K. In addition, the proposal would amend the exhibit requirements to provide for the Conflict Minerals Report.

IMPORTANT POINTS REGARDING THE PROPOSED CONFLICT MINERALS RULES

- It has been estimated that, in connection with gold alone, the conflict minerals provisions may affect over 5,000 public companies.
- Although the SEC's rulemaking has been delayed, public companies that may be subject to the conflict minerals rules should begin immediately to take steps to ascertain if conflict minerals are necessary to the functionality or production of their products (as described below). If they are, efforts should be made to identify the supply chains relating to the conflict minerals, and to determine whether or not the minerals are "DRC conflict free." This information should be available to companies prior to the time that the reporting obligation will commence under Section 1502 (the first fiscal year beginning after the date the SEC promulgates its final rules, unless the SEC permits a phase-in). Companies seeking to report that the conflict minerals in their products are DRC conflict free may need to require their suppliers to represent that the minerals, components or other products the suppliers are supplying to the companies are DRC conflict free and to agree both to provide substantiation of such representations and to be subject to supply chain audits. Alternatively, companies may determine to change their sourcing to DRC conflict free providers.
- The reach of the proposed conflict minerals provisions is very broad:
  - The proposed rules would cover not only companies that are manufacturers, but also retail companies that may sell private label goods over which they have any influence regarding their manufacturing. Under the proposed SEC rules, retailers that have products manufactured to their specifications would be brought within the scope of the rules.
  - The proposed rules do not provide for any exemptions base on a *de minimis* standard, either with respect to the size of the public company that would be subject to the disclosure requirements, or with respect to the quantity of conflict minerals that would trigger the reporting obligation.
  - The proposed rules do not differentiate between domestic and foreign companies. Accordingly, all public companies, foreign and domestic, would be subject to the disclosure requirements if their products involve conflict minerals.
  - Although only public companies will be subject to the public disclosure requirements under the proposed SEC rules, the rules will likely have a significant impact on private companies that may be part of the conflict minerals supply chain. Because public companies will need to "look back" through their sources, suppliers, even if they are private, will be obligated to ascertain information regarding their use of conflict minerals and the origin of such minerals. The inquiry made to such suppliers should be sufficiently robust to permit the ultimate public company manufacturer to make all mandated disclosures. This will be a complex process, because in many instances the supply chain may be greater than 10 layers deep, and each individual company in the supply chain may have its own series of sources of items that may contain conflict minerals.
  - The inquiry will need to review not only the existence of conflict minerals in products and components, but also whether conflict minerals are necessary to the manufacturing process. Therefore it will be necessary for public companies to ascertain all the conflict minerals that they or their suppliers use in the manufacturing processes, even if those conflict minerals are not included in the final products.
  - Finally, even public companies that do not believe that any of their products contain conflict minerals (or that conflict minerals are not required for the manufacture of their products) may be required to undertake diligence to confirm this.

- Companies whose products are not DRC conflict free, or that are unable to confirm that their products are DRC conflict free, will be required to list those products in their conflict minerals reports. It is possible that the NGO sponsors of the conflict minerals provisions may exert pressure on consumers not to purchase products that are not DRC conflict free, or other products from companies unable to make this certification. In addition, NGOs and other organizations are exerting pressure to cause governments and universities not to do business with companies whose products are not DRC conflict free. In 2011, California enacted legislation prohibiting state agencies from signing contracts with companies that fail to comply with federal regulations aimed at deterring business with armed groups in eastern Congo. http://www.enoughproject.org/blogs/gov-brown-signs-ca-conflict-minerals-bill

THREE STEP PROCESS

In its proposing release, the SEC has referred to three principal steps companies will need to follow:

Step One **- Determining Issuers Covered by the Conflict Minerals Provision**
Step Two **- Determining Whether Conflict Minerals Originated in the DRC Countries and Resulting Disclosure**
Step Three **- Conflict Minerals Report's Content and Supply Chain Due Diligence**

A very brief summary of the questions a company will need to ask with respect to the conflict minerals provisions is as follows. These matters are discussed in greater detail below.

(a) Is the company subject to the conflict minerals rules?

(i) Does the company file reports under the Exchange Act?

(ii) Are conflict minerals necessary to the functionality or production of a product manufactured by the company or a product contracted to be manufactured by that company?

If the answer to (i) or (ii) is "no," the company is not subject to the conflict minerals rules.

(b) Did any of the company's conflict minerals originate in the DRC Countries? This question requires the company to undertake a reasonable country of origin inquiry.

(i) If the answer is "no," the company is required to disclose that fact and certain additional information in its annual report and on its Internet website, and to describe in its annual report the reasonable country of origin inquiry it undertook.

(ii) If the answer is "yes", or the company is unable to make a determination after a reasonable country of origin inquiry, the company is required to disclose that fact and certain additional information in its annual report, to furnish a Conflict Minerals Report as an exhibit to the annual report and to make the report available on its Internet website.

QUESTIONS AND ANSWERS

- **What companies will be subject to the conflict minerals rules?**

(a) The SEC's conflict minerals rules would apply only to publicly reporting companies, which are companies having a class of securities registered pursuant to Section 12 of the Exchange Act (and thereby a reporting obligation under Section 13(a) of the Exchange Act), and companies having a reporting obligation under Section 15(d) of the Exchange Act. As proposed, the provisions will not apply to private (*i.e.*, non-reporting) companies.

(b) The conflict minerals provisions would apply to any publicly reporting company for which conflict minerals are necessary to the functionality or production of a product manufactured by that company or a product contracted to be manufactured by that company.

(i) The SEC does not define the term "manufacture," because it believes the term to be generally understood.

(ii) By "contracted to be manufactured," the SEC has indicated that its proposed rules would apply to companies that contract for the manufacturing of products over which they have any influence regarding the manufacturing. The rules would also apply to companies selling products under their own brand name or a separate brand name that they have established, regardless of whether such companies have any influence over the manufacturing specifications of those products, as long as the company has contracted with another party to have the products manufactured specifically for that company.

The rules would not apply to retail companies that sell only the products of third parties if those retailers have no contract or other involvement regarding the manufacturing of those products, or if those retailers do not sell products under their brand name or a separate brand they have established and do not have products manufactured specifically for them.

(iii) Mining companies would be considered to be manufacturing conflict minerals when they extract conflict minerals.

- **When are conflict minerals "necessary" to a product?**

(a) The SEC is not proposing to define when a conflict mineral is necessary to the functionality or production of a product.

(b) The SEC does note that if a mineral is necessary, the product is covered without regard to the amount of the mineral involved. That is, there is no *de minimis* exemption.

(c) The SEC states that it intends the rules to cover products if the conflict mineral is intentionally included in the production process, even if that mineral is not ultimately included in the product.

(d) Conflict minerals necessary to the functionality or production of a physical tool or machine used to produce a product would not be considered necessary to the production of a product even if that tool

or machine is necessary to producing the product. The SEC gives the example of a wrench containing conflict minerals being used to produce an automobile. Even though conflict minerals may be necessary to the functionality or production of that wrench, the SEC would not consider the conflict minerals in the wrench to be necessary to the production of the automobile. On the other hand, on February 28, 2011, Senator Durbin and Representative McDermott, the authors of Section 1502 of the Dodd-Frank Act, wrote to the SEC and stated that they intended the term "necessary" to the functionality or production of a product to cover practically all uses of conflict minerals, except those that are naturally occurring or unintentionally included in a product. They state that "In the example of a car whose only conflict minerals are contained in the radio, we would argue that the car manufacturer would, in fact, be covered by Section 1502."

(e) The absence of a definition of "necessary to the functionality or production" by the SEC leaves open significant issues regarding the scope of the proposed rules.

- **What does a company need to do if it is a reporting company and conflict minerals are necessary to the functionality or production of a product it manufactures or contracts to manufacture?**

(a) The company is required to perform "a reasonable country of origin inquiry" to determine whether the conflict minerals originated in the DRC Countries.

(b) The proposed SEC rules do not specify what constitutes a reasonable country of origin inquiry. The SEC notes that the inquiry is not meant to require companies to make a determination with absolute certainty, but that a reasonableness standard would be applicable. It further notes that the steps necessary to conduct a reasonable country of origin inquiry will depend on the available infrastructure at any given point in time, and that presently there may not be any single or exclusive manner for companies to conduct this inquiry. The SEC states that one way it would view a company as satisfying the requirement is if it received reasonably reliable representations from the facility at which the conflict minerals were processed (either directly or indirectly through suppliers) that those conflict minerals did or did not originate in the DRC Countries. The company would need to reasonably believe that the representations are true based on facts and circumstances.

(c) In the SEC's view, one way a company could, in the current environment, reasonably rely on a facility's representations regarding the source of its conflict minerals is if the smelter is identified as one that processes only "DRC conflict free" minerals under recognized standards after receiving an independent third party audit of the source and chain of custody of the conflict minerals it processes.

(d) The SEC notes that the reliability of any inquiry would be based solely on whether the information used provides a reasonable basis for a company to be able to trace the origin of any particular conflict mineral it uses. It would not be sufficient for a company to conclude that it is unreasonable for it to attempt to determine the origin of the conflict minerals solely because of the large amount of conflict minerals it uses or the large number of its products that include conflict minerals. Nor does the SEC believe that it would be appropriate for companies to satisfy their country of origin disclosure requirement by concluding that there is "no evidence" that their conflict minerals originated in the DRC Countries. In those instances, a company would be required to furnish a Conflict Minerals Report.

(e) The SEC would permit companies that cannot determine the origins of their conflict minerals, based on a reasonable country of origin inquiry, to disclose that they are unable to determine that their conflict

minerals did not originate in the DRC Countries. In this instance as well, a company would be required to furnish a Conflict Minerals Report.

(f) If, following the inquiry, the company concludes that its conflict minerals did not originate in the DRC Countries, the company would be required to disclose this in the body of its annual report and on its Internet website. The annual report referred to is Form 10-K for domestic issuers, Form 20-F for foreign private issuers, and Form 40-F for eligible Canadian issuers. The company would also be required to disclose in the body of its annual report the reasonable country of origin inquiry it undertook. Aside from these disclosures, and a recordkeeping requirement, the company would not be required to make any other disclosures with regard to conflict minerals.

(g) If, following the inquiry, the company concludes that any of its conflict minerals originated in the DRC Countries, or if the company is unable to determine after a reasonable country of origin inquiry that none of its conflict minerals originated in the DRC Countries, the company would be required to disclose this in the body of its annual report and on its Internet website. The company will also be required to furnish a Conflict Minerals Report as an exhibit to its annual report and make the Report available on its Internet website. None of the disclosure in the Conflict Minerals Report would need to be set forth in the body of the annual report.

- **What is in a Conflict Minerals Report?**

(a) The principal contents of the Conflict Minerals Report are as follows:

(i) a description of the measures taken by the company to exercise due diligence on the source and chain of custody of the company's conflict minerals;

(ii) a description of any of the company's products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free," the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity (the term "facilities" refers to the smelter or the refinery through which the company's minerals passed);

(iii) an independent private sector audit of the due diligence and chain of custody disclosures in the report; and

(iv) a certification by the company that it obtained the independent private sector audit of the report. The company would be required to furnish the audit report as part of its Conflict Minerals Report.

(b) In order to prepare a Conflict Minerals Report, a company is required to exercise due diligence on the source and chain of custody of its conflict minerals and to describe the due diligence exercised.

(c) The Conflict Minerals Report would be furnished, rather than filed, with the SEC, and would therefore not be subject to liability under Section 18 of the Exchange Act. The Report would not be deemed to be incorporated into any Securities Act or Exchange Act document unless the company specifically incorporates it by reference.

- **What is a product that is "DRC conflict free"?**

  (a) The term "DRC conflict free" is defined in Section 13(p)(1)(A)(ii) of the Exchange Act as products that do not contain conflict minerals that "directly or indirectly finance or benefit armed groups" in the DRC Countries.

  (b) If a product contains conflict minerals that do not "directly or indirectly finance or benefit" these armed groups, the company may describe such products as "DRC conflict free," whether or not the minerals originated in the DRC Countries.

  (c) The term "armed group" is defined to be an armed group that is identified as perpetrators of serious human rights violations in the annual Country Reports on Human Rights Practices under the US Foreign Assistance Act of 1961 as it relates to the DRC Countries. The reports are available through http://www.state.gov/g/drl/rls/hrrpt/index.htm

- **How should products that are not DRC conflict free be described in the Conflict Minerals Report?**

  (a) If a company is unable to determine with certainty that its products are DRC conflict free, it would be required to describe all its products that contain conflict minerals and to identify these products as not "DRC conflict free."

  (b) The description of any products that are not "DRC conflict free" should be based on individual facts and circumstances, so that the description sufficiently identifies the product or category of products.

  (c) A company may describe its products that are not DRC conflict free by describing each model of a product containing conflict minerals that is not DRC conflict free, each category of a product containing conflict minerals that is not DRC conflict free, the specific products containing conflict minerals that are not DRC conflict free that were produced during a specific time period, by stating that all its products contain conflict minerals that are not DRC conflict free, or any other appropriate description.

  (d) If any products contain conflict minerals that did not originate in the DRC Countries and also conflict minerals that the company is unable to determine did not originate in the DRC Countries, the company would be required to classify those products as not "DRC conflict free;" similarly, if any of a company's products contain conflict minerals (i) that did not originate in the DRC Countries, (ii) that the company is unable to determine did not originate in the DRC Countries, or (iii) that originated in the DRC Countries but did not directly or indirectly finance or benefit armed groups in the DRC Countries, and also contain conflict minerals that originated in the DRC Countries and that directly or indirectly financed or benefited armed groups in the DRC Countries, the company must classify those products as not DRC conflict free.

  (e) Assuming that a company has undertaken an appropriate due diligence review on the source and chain of custody of its conflict minerals, a company may explain in the report that although products may be labeled as not "DRC conflict free," the company has been unable to determine the source of the conflict minerals.

- **What is the due diligence standard for a Conflict Minerals Report?**

  (a) The SEC is not proposing any specific due diligence standard. However, the rules would require reliable due diligence processes. In its proposing release, the SEC suggests that the applicable standard is that of a "reasonably prudent person" and that the standard may evolve over time. Companies will, however, need to disclose in the report the due diligence used in making their determinations.

  (b) The SEC notes that a company whose conduct conformed to a nationally or internationally recognized set of standards of, or guidance for, due diligence regarding the conflict minerals supply chains would provide evidence that the company used due diligence in making its supply chain determinations, and cites to OECD, diligence guidelines. The current guidelines, entitled Due Diligence Guidelines for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2011), are available at http://www.oecd.org/dataoecd/62/30/46740847.pdf

- **When is the initial disclosure and Conflict Minerals Report due?**

  (a) Unless the final SEC rules provide for a phase-in period, a company will be required to provide its initial conflict minerals disclosures and if required to furnish the initial Conflict Minerals Report in its annual report for the full fiscal year following the year in which the SEC adopts its final rules. Assuming that the SEC adopts its final rules before June 30, 2012, company with a fiscal year ending on June 30, 2012 will need to provide the disclosures in its annual report for the July 1, 2012 to June 30, 2013 period, and each calendar year company will be required to include the disclosure in its annual report for the period ending December 31, 2013.

  (b) The disclosure would cover the year for which reporting is required. The SEC has proposed that the date a company takes possession of a conflict mineral would determine the reporting year the company would be required to provide disclosure. Accordingly, a calendar year company that takes possession of a conflict mineral during a specific year *(i.e.*, on or prior to December 31) would be required to include the disclosures in its annual report for that year. If a company did not take possession of the conflict mineral until January 1 of the following year, it would be obligated to make the disclosure regarding the conflict mineral in its annual report for that following year.

  (c) If a company contracts for the manufacturing of a product in which a conflict mineral is necessary for the production, it may use the date it takes possession of the product to determine in which reporting year it would be required to provide the required disclosure.

  (d) Following the initial disclosure, the company would need to include such information annually for so long as conflict minerals that are necessary to the functionality or manufacture of its products are used during the applicable fiscal year.

  (e) Some commenters have requested that the SEC provide accommodation in tis final rules with respect to the disclosure obligations in connection with businesses acquired during a fiscal year.

- **What if a product the company manufactures uses recycled or scrap minerals?**

  (a) The proposed SEC rules provide for a different treatment of conflict minerals obtained from recycled or scrap sources, due to the difficulty of looking through the recycling or scrap process to determine the origin of the minerals. Minerals in this category would include reclaimed end-user or post-consumer products, but not minerals that are partially processed, unprocessed or a byproduct from another ore.

  (b) The proposed SEC rules do not define when a conflict mineral is recycled or scrap.

  (c) Companies would be required to furnish a Conflict Minerals Report with respect to recycled or scrap minerals, subject to special rules. If companies obtain conflict minerals from a recycling or scrap source, they may consider those materials to be DRC conflict free. Such companies would need to describe the measures taken to exercise due diligence in determining that their conflict minerals were recycled or scrap.

  (d) If recycled or scrap minerals are mixed with new minerals, the recycled and scrap approach would apply only to those portions of the minerals that are recycled or scrap. The company would be required to furnish a Conflict Minerals Report regarding at least the recycled or scrap minerals.

- **What are companies doing to prepare for the conflict minerals rules?**

  (a) A number of industry groups have organized efforts to anticipate and respond to the impending disclosure requirements. Perhaps most prominent is a consortium organized by the electronics industry, consisting of the Electronics Industry Citizenship Coalition (EICC) and the Global eSustainability Initiative (GeSI). These groups include many of the world's largest companies in the electronics industry.

  (b) In December 2010, EICC-GeSI announced the launch of a conflict-free smelter program and completed its first tantalum smelter assessment. Pursuant to this program, smelters can apply to be certified as conflict-free, and the results of the certification process will be publicly disseminated, permitting companies obtaining metals from these smelters to be able to certify that they are DRC conflict free. Information regarding the conflict-free smelter program is available at http://www.conflictfreesmelter.org/cfshome.htm

  Also, in August 2011, EICC-GeSI launched a conflict minerals reporting template and Dashboard tool. The conflict minerals reporting template was developed to facilitate disclosure and communication of information regarding smelters that provide material to a company's supply chain. The template includes questions regarding a company's conflict-free policy, engagement with its direct suppliers, and a listing of smelters the company and its suppliers use. In addition, the Dashboard tool can be used to automatically aggregate multiple completed templates from suppliers, and enables data analysis. EICC-GESI has also prepared an introduction letter and other materials relating to conflict minerals reporting. These materials are available at http://www.conflictfreesmelter.org/ConflictMineralsReportingTemplateDashboard.htm. A series of frequently-asked questions is available at http://eicc.info/documents/Conflict-FreeSmelterFAQ.pdf

At the date of this memorandum, the EICC-GeSI initiative is one of the most advanced, although it is still at an early stage of implementation. EICC-GeSI has also released an audit protocol for gold refiners. http://www.oecd.org/dataoecd/42/38/49051025.pdf

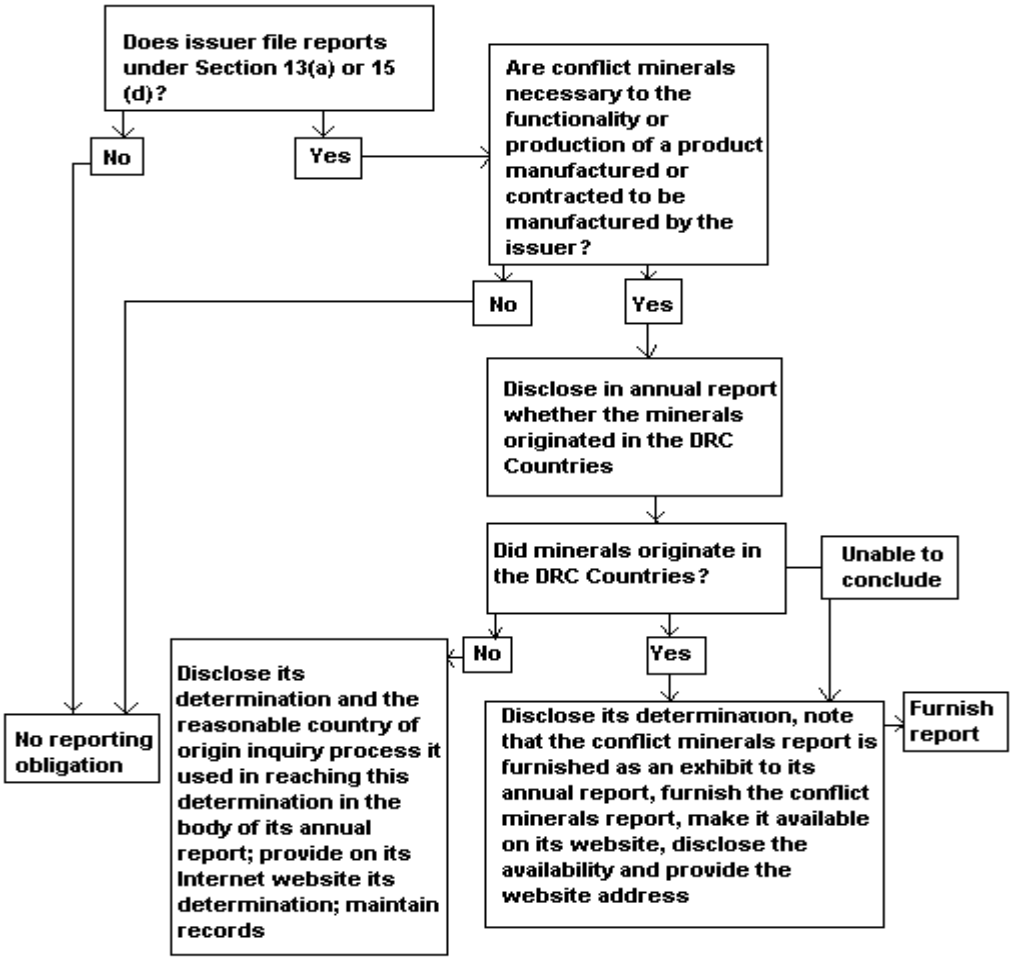
Hogan Lovells can assist readers in communicating directly with representatives of the EICC-GeSI coalition.

(c) Other industry groups are also currently in the process of determining appropriate methods of compliance with the rules the SEC is required to issue. For example, the World Gold Council has developed a conflict-free standard and is developing an Assurance Framework to providing guidance and recommendations regarding the implementation of the Standard, which is expected to be published for consultation in early May 2012. http://www.gold.org/about_gold/sustainability/conflict_free_standard/ Companies engaged in specific industries are encouraged to consult with their industry organizations for more specific information.

(d) A December 2010 report by The Enough Project discussing corporate actions taken by companies in the electronics industry with respect to conflict minerals is available at http://www.enoughproject.org/publications/getting-conflict-free

(e) Certain additional resources are available at http://www.eicc.info/Extractives.shtml

SUMMARY CONFLICT MINERALS FLOW CHART



The Conflict Minerals Report would need to include:

1. A description of the measures the company has taken to exercise due diligence on the source and chain of custody of its conflict minerals (including a certified independent private sector audit of the Report that identifies the auditor and is furnished as part of the Report); and

2. A description of the products manufactured or contracted to be manufactured by the company containing conflict minerals that are not DRC conflict free, the facilities used to process those conflict minerals, those conflict minerals' country of origin and the efforts the company has made to determine the mine or location of origin with the greatest possible specificity. Note: "DRC conflict free" requires a determination that the conflict minerals did not directly or indirectly finance or benefit armed groups in the DRC Countries. If any products

containing conflict minerals do not directly or indirectly finance or benefit these armed groups, the company may describe the products as DRC conflict free whether or not the minerals originated in the DRC Countries.

Note: The foregoing is only a summary of the SEC conflict minerals rulemaking proposals. Please refer to the full SEC rule proposal at **http://sec.gov/rules/proposed/2010/34-63547.pdf** for the complete proposed rulemaking release.

PARAGRAPHS (A) AND (B) OF SECTION 1502 OF THE DODD-FRANK ACT

(a) SENSE OF CONGRESS ON EXPLOITATION AND TRADE OF CONFLICT MINERALS ORIGINATING IN THE DEMOCRATIC REPUBLIC OF THE CONGO.—It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).

(b) DISCLOSURE RELATING TO CONFLICT MINERALS ORIGINATING IN THE DEMOCRATIC REPUBLIC OF THE CONGO.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following new subsection:

‘‘(p) DISCLOSURES RELATING TO CONFLICT MINERALS ORIGINATING IN THE DEMOCRATIC REPUBLIC OF THE CONGO.—

‘‘(1) REGULATIONS.—

‘‘(A) IN GENERAL.—Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person’s first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report—

‘‘(i) a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and

‘‘(ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free (‘DRC conflict free’ is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

‘‘(B) CERTIFICATION.—The person submitting a report under subparagraph (A) shall certify the audit described in clause (i) of such subparagraph that is included in such report. Such a certified audit shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals.

‘‘(C) UNRELIABLE DETERMINATION.—If a report required to be submitted by a person under subparagraph (A) relies on a determination of an independent private sector audit, as described under subparagraph (A)(i), or other due diligence processes previously determined by the Commission to be unreliable, the report shall not satisfy the requirements of the regulations promulgated under subparagraph (A)(i).

‘‘(D) DRC CONFLICT FREE.—For purposes of this paragraph, a product may be labeled as ‘DRC conflict free’ if the product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.

''(E) INFORMATION AVAILABLE TO THE PUBLIC.— Each person described under paragraph (2) shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A).

''(2) PERSON DESCRIBED.—A person is described in this paragraph if—

''(A) the person is required to file reports with the Commission pursuant to paragraph (1)(A); and

''(B) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

''(3) REVISIONS AND WAIVERS.—The Commission shall revise or temporarily waive the requirements described in paragraph (1) if the President transmits to the Commission a determination that—

''(A) such revision or waiver is in the national security interest of the United States and the President includes the reasons therefor; and ''(B) establishes a date, not later than 2 years after the initial publication of such exemption, on which such exemption shall expire.

''(4) TERMINATION OF DISCLOSURE REQUIREMENTS.—The requirements of paragraph (1) shall terminate on the date on which the President determines and certifies to the appropriate congressional committees, but in no case earlier than the date that is one day after the end of the 5-year period beginning on the date of the enactment of this subsection, that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.

''(5) DEFINITIONS.—For purposes of this subsection, the terms 'adjoining country', 'appropriate congressional committees', 'armed group', and 'conflict mineral' have the meaning given those terms under section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.''

PROPOSED SEC RULEMAKING ITEM 104 TO REGULATION S-K

§229.104 (Item 104) Conflict minerals disclosure.

(a) If any conflict minerals, as defined by paragraph (c)(3) of this section, are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant in the year covered by the annual report, the registrant must disclose in its annual report under a separate heading entitled "Conflict Minerals Disclosure" whether any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, as defined by paragraph (c)(1) of this section or that the registrant is not able to determine that its conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country. The registrant's determination of whether or not any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, or its inability to determine that these conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, must be based on its reasonable country of origin inquiry. If the registrant determines that its conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by it did not originate in the Democratic Republic of the Congo or an adjoining country, the registrant must make that disclosure available on its Internet website and must also disclose this determination in its annual report under the separate "Conflict Minerals Disclosure" heading along with the reasonable country of origin inquiry it undertook to make its determination, that its disclosure is located on its Internet website, and the address of that Internet website. The disclosure must remain on the registrant's Internet website at least until the registrant files its subsequent annual report. Also, the registrant must maintain reviewable business records to support any such negative determination.

(b) If any conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant originated in the Democratic Republic of the Congo or an adjoining country, if the registrant is unable to determine that such conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, or if such conflict minerals came from recycled or scrap sources, the registrant must:

(1) Furnish a Conflict Minerals Report as an exhibit to its annual report with the following information:

(i) A description of the measures taken by the registrant to exercise due diligence on the source and chain of custody of the conflict minerals or to exercise due diligence in determining that the conflict minerals came from recycled or scrap sources, which shall include but not be limited to a certified independent private sector audit of the Conflict Minerals Report, conducted in accordance with standards established by the Comptroller General of the United States, that shall constitute a critical component of the registrant's due diligence in establishing the source and chain of custody of the conflict minerals or that the conflict minerals came from recycled or scrap sources;

(ii) A certification by the registrant that it obtained such an independent private sector audit;

(iii) A description of any of the registrant's products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free," as defined in paragraph (c)(4) of this section, the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity; and

(iv) The audit report prepared by the independent private sector auditor, which identifies the entity that conducted the audit.

(2) In addition to the disclosures required by paragraph (a) of this section, disclose under the separate "Conflict Minerals Disclosure" heading in the annual report that the registrant has furnished a Conflict Minerals Report as an exhibit to the annual report; that the Conflict Minerals Report and the certified independent private sector audit report are available on its Internet website; and the Internet address of its Internet website where the Conflict Minerals Report and audit report are located.

(3) Make the Conflict Minerals Report, including the certified audit report, available to the public by posting the text of the report on its Internet website. The text of the Conflict Minerals Report must remain on the registrant's Internet website at least until the registrant files its subsequent annual report.

(c) For the purposes of this section, the following definitions apply:

(1) Adjoining country. The term adjoining country means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) Armed group. The term armed group means an armed group that is identified as a perpetrator of serious human rights abuses in the most recently issued annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country for the year the annual report is due.

(3) Conflict mineral. The term conflict mineral means:

(i) Columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(ii) Any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(4) DRC conflict free. The term DRC conflict free means that a product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Conflict minerals that a registrant is unable to determine did not originate in the Democratic Republic of the Congo or an adjoining country are not "DRC conflict free." Conflict minerals that a registrant obtains from recycled or scrap sources are considered DRC conflict free.

Instructions to Item 104

(1) A registrant that files reports with the Commission under Sections 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act, for whom conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that registrant, shall provide the information required by this item. A registrant that mines conflict minerals would be considered to be manufacturing those minerals for the purpose of this item.

(2) The information required by this Item shall not be deemed to be "filed" with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Item need not be provided in any filings other than an annual report on Form 10-K (§249.310 of this chapter). Such information will not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the registrant specifically incorporates it by reference.

Suggested Company Action Plan

Many companies have asked what they should be doing now, prior to the issuance of the final SEC rules, in connection with conflict minerals provisions. The following action plan sets forth some suggestions. Each company should consider the implications of the conflict minerals provisions to its own business and supply chain, and adopt an action plan consistent with its circumstances.

- The company may want to create an internal conflict minerals supply chain group ("Conflict Minerals Group") , consisting of representatives of its manufacturing operations, its procurement or supply chain operations and its SEC compliance group to coordinate the company's implementation of the conflict minerals provisions.

- The company should identify each of the products it manufactures or which it contracts with third parties to manufacture.

- The company should then determine whether any of the products it manufactures uses any conflict minerals or whether any conflict minerals are necessary to the production of products the company manufactures.[2]

- If the company determines that it uses conflict minerals, it should undertake efforts to map the supply chains relating to such conflict minerals through to the original source of the conflict minerals (the mine, smelter or, in the case of recycled or scrap materials, the supplier of such recycled or scrap materials)[3]. If the conflict minerals originated in the Democratic Republic of the Congo or an adjoining country (the "DRC Countries")[4], the

[2] Note the following sentence from the SEC's proposing release: ""While we are not proposing to define "necessary to the functionality or production," we note that if a mineral is necessary, the product is covered without regard to the amount of the mineral involved. Further, we intend our proposed rules to include products if the conflict mineral is intentionally included in a product's production process and is necessary to that process, even if that conflict mineral is not ultimately included anywhere in the final product. On the other hand, conflict minerals necessary to the functionality or production of a physical tool or machine used to produce a product would not be considered necessary to the production of the product even if that tool or machine is necessary to producing the product. For example, if an automobile containing no conflict minerals is produced using a wrench that contains conflict minerals necessary to the functionality or production of that wrench, we would not consider the conflict minerals in that wrench necessary to the production of the automobile." (footnotes omitted"

[3] Certain of the conflict minerals currently in the manufacturing stream were mined prior to the enactment of the Dodd-Frank Act (July 21, 2010). A number of commenters have suggested that the SEC treat these "legacy" minerals as a separate category not requiring the same origin diligence as minerals mined after the Dodd-Frank Act. To the extent that companies or suppliers have in their possession conflict minerals mined prior to the Dodd-Frank Act (or goods including only such legacy minerals), consideration should be given to segregating them from minerals (or goods containing minerals) mined after the Dodd-Frank Act, or otherwise identifying them as being pre-Dodd-Frank...

[4] The DRC Countries are the Democratic Republic of the Congo, the Republic of Angola, the Republic of the Congo, the Republic of Uganda, the Republic of Rwanda, the Republic of Burundi, the United Republic of Tanzania, the Republic of Zambia, the Republic of South Sudan, and the Central African Republic.

company should seek to determine if the conflict minerals directly or indirectly finance or benefit armed groups in the DRC Countries.

- If any of the products sold by the company are manufactured for the company by third parties, or if the company purchases components or other items from third parties that become part of the company's products, the company should consider sending a letter to each of these third parties (a "Dear Supplier" letter) advising the suppliers that the company will likely be subject to the SEC's conflict minerals provisions, and requesting the suppliers:

    - to determine whether any of the products they provide to the company include conflict minerals, or if conflict minerals are necessary to their production;

    - to identify with specificity the products they provide to the company that include conflict minerals, or that are produced using conflict minerals;

    - to map their supply chains relating to conflict minerals through to original source of the conflict minerals (the mine, smelter or, in the case of recycled or scrap materials, the supplier of such recycled or scrap materials),[5] and if the conflict minerals were mined in the DRC Countries, to make similar inquiries with respect to armed groups discussed above; and
      .
    - to request the suppliers to communicate with their sub-suppliers throughout the supply chain to advise them of the public company's obligation to make inquiry regarding the conflict minerals supply chain, and in certain instances to audit the supply chain information; the sub-suppliers should be requested to provide the same information as the suppliers are requested to provide.[6]

- In the Dear Supplier letter, the company may want to encourage the operations or procurement personnel of the supplier to work with the company's Conflict Minerals Group to coordinate their efforts. The company may also want to request a response from the supplier indicating its agreement to cooperate with the company's effort.

- The Dear Supplier letter would ideally be distributed prior to the time the SEC adopts its final rules. The earlier that supply chain entities begin to identify and map the use of conflict minerals, the easier it will be for public companies to meet their reporting obligations.

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[5] The Company may also want to suggest segregation of pre- and post Dodd-Frank conflict minerals as described in note 2.

6 An example of a "Dear Supplier" letter is the letter prepared by the Automotive Industry Action Group and available at http://www.nema.org/gov/upload/AIAG_ConMin_VP_Letter_wSig_4-18-111.pdf

- Because companies may be unable to obtain the requested information from all the entities within their current supply chains, the company may want to consider identifying potential alternative sources of conflict minerals, or of products obtained from suppliers that use conflict minerals.

- The company may want to consider including in its procurement contracts and other arrangements provisions that would (i) prohibit the supplier from providing to the company any items that use conflict minerals that directly or indirectly finance or benefit armed groups in the DRC Countries, and (ii) require the supplier to cooperate with the company's efforts to meet its conflict minerals reporting obligations, including providing to the company such information as the company may request on a timely basis, and cooperating, and using its reasonable efforts to cause its suppliers to cooperate, with any inquiry or audit by the company with respect to the conflict minerals supply chain.

- The company should communicate with its industry trade organizations to determine what these organizations, as well as other companies in its industry, are doing in connection with the conflict minerals provisions. Industry groups may have available to them information regarding the use of conflict minerals within the industry. In addition, industry-wide initiatives may help to reduce the compliance burdens on individual companies by assisting in the identification and mapping of supply chains.

- In addition, manufacturers should be aware of the efforts of groups such as the Electronics Industry Citizenship Coalition (EICC) and Global e-Sustainability Initiative (GeSI) with respect to conflict minerals reporting and compliance. As discussed above, EICC-GeSI has implemented a conflict-free smelter program to certify smelters that provide conflict-free minerals. Also, EICC-GeSI has developed a reporting template and integration tool that are intended to assist companies in their diligence and reporting processes. The materials are available at http://www.conflictfreesmelter.org/ConflictMineralsReportingTemplateDashboard.htm these materials can be used in addition to, or in lieu of elements of the action plan set forth above.

  The foregoing is a suggestion only. The particular facts and circumstances of each manufacturer's business operations will determine the optimal means for such company to meet its conflict minerals reporting obligations. The attorneys at Hogan Lovells US LLP would be pleased to assist with the review and implementation processes.

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Jeffrey Rubin's practice focuses on domestic and international securities transactions, corporate finance transactions, and mergers and acquisitions. In addition, Jeffrey is currently Chair of the Federal Regulation of Securities Committee in the Business Law Section of the American Bar Association. This Committee, with over 2,600 members, is the primary liaison between the securities bar and the Securities and Exchange Commission.

In the securities area, Jeffrey has represented issuers and underwriters in public offerings and private placement transactions, with an emphasis on international transactions. Jeffrey has also represented private equity funds in connection with technology and other portfolio investments.

Among the numerous acquisitions in which Jeffrey has been involved are the acquisitions of a movie studio, television network, and publishing house on behalf of an international media and entertainment company. He has assisted clients in the disposition of a wide range of businesses, including technology companies, commercial printing companies, and businesses in the trade show, radio, and publishing industries. Many of the transactions in which he has been involved have required extensive international coordination.