

June 5, 2013

SEC Staff Issues FAQs on Conflict Minerals Reporting

FAQs address issues pertaining to the scope and application of the conflict minerals reporting requirement.

On May 30, the staff of the U.S. Securities and Exchange Commission (SEC) issued interpretive guidance on the SEC's conflict minerals rule. The rule, which was adopted in August 2012, applies to reporting companies that use conflict minerals in a manner that is necessary to the functionality or production of a product that is manufactured or contracted to be manufactured by such companies. Generally, the term "conflict minerals" refers to tin, tantalum, tungsten, gold, and any other minerals or derivatives that the Secretary of State identifies as financing conflict in the Democratic Republic of the Congo or an adjoining country (collectively, the DRC). The SEC staff's FAQs address issues pertaining to the scope and application of the conflict minerals reporting requirement.¹

The FAQs explain that the conflict minerals rule *applies to* the following:

- **Voluntary filers.** The requirement to file a report on Form SD with respect to the use of conflict minerals applies to any issuer that files reports under section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended (the Exchange Act), whether such issuer is required to file reports or is a voluntary filer. Investment companies that must file reports pursuant to Investment Company Act Rule 30d-1 are exempt from the conflict minerals reporting requirement.
- **Products manufactured by or for a subsidiary.** An issuer must comply with the conflict minerals rule with respect to products manufactured by or for any of its consolidated subsidiaries.
- **Generic product components that contain conflict minerals.** An issuer must conduct a "reasonable country of origin inquiry" with respect to conflict minerals in generic components contained in products that the issuer manufactures or contracts to be manufactured.

The FAQs also explain that the conflict minerals rule *does not apply to* the following:

- **Mining-related activities.** An issuer that engages only in mining and activities "customarily associated" with the mining of conflict minerals, including transporting the mineral to a refinery, will not be considered to be "manufacturing" products under the conflict minerals rule.
- **Generic products to which identifying marks are added.** An issuer is not considered to be contracting to manufacture a product if the issuer only adds an identifying mark, such as a logo or serial number, to a generic product manufactured by a third party.
- **Packaging or containers, unless the packaging or containers are sold as products.** Packages or containers that an issuer manufactures or contracts to be manufactured and uses with respect to its products, including to transport or preserve such products, are not considered to be part of the products or necessary to the functionality or production of the products and, thus, are not subject to the conflict minerals rule. If an issuer, however, manufactures and sells packaging or containers separate from its products, the packaging or containers will be considered products subject to the conflict minerals rule.

1. View the FAQs at <http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm>.

- **Equipment used to provide a service.** Equipment manufactured by or for an issuer that is used by the issuer to provide a service is not subject to the conflict minerals rule if the equipment is retained by the service provider, must be returned to the service provider, or will be abandoned by the customer after the service is provided.
- **Equipment containing conflict minerals that is sold after being used to manufacture products.** If tools, machines, or other equipment manufactured by or for an issuer for use in the manufacture of its products are later sold by the issuer, any conflict minerals in such tools, machines, or equipment will not be subject to the conflict minerals rule.

Additionally, the FAQs provide the following guidance:

- **An issuer has discretion to describe its products in Form SD but must state the conflict status of its products.** An issuer may determine, based on its facts and circumstances, how to describe its products on Form SD but must state clearly, when applicable, that its products “have not been found to be ‘DRC conflict free’” or are “DRC conflict undeterminable.”
- **“DRC conflict free” products need not be described in Form SD, but the form and audit must be filed.** If an issuer determines that its products contain conflict minerals from the DRC but that such products are “DRC conflict free,” the issuer must still file a Form SD and obtain an independent private sector audit of its Conflict Minerals Report. The issuer, however, is not required to identify the products containing the conflict minerals or provide the product description specified in Item 1.01(c)(2) of Form SD.
- **Compliance after an initial public offering (IPO) may begin as late as eight months after the effective date of the IPO.** An issuer is permitted to start complying with the conflict minerals rule for the first reporting calendar year that begins no earlier than eight months after the effective date of the issuer’s IPO registration statement.
- **Form S-3 eligibility is not affected by late Form SD filing.** The failure to timely file a Form SD will not impact an issuer’s eligibility to use Form S-3. The use of Form S-3, however, is conditioned on the filing of all materials required to be filed pursuant to section 13, 14, or 15(d) of the Exchange Act, including Form SD, for the 12-month period preceding the filing of a Form S-3.

Additional Information

For more information on the SEC’s conflict minerals reporting requirement, see our September 2012 White Paper, “SEC Adopts Rules Implementing the Dodd-Frank Requirement for Conflict Minerals Reporting,” available at http://www.morganlewis.com/pubs/Securities_WhitePaper_ConflictMineralsReporting_Sep2012. In that White Paper, we describe, among other things, the following steps that issuers should take in connection with compliance with the reporting requirement:

- Determine whether the registrant manufactures or contracts to manufacture any products—including components—containing tin, tantalum, tungsten, or gold.
- For those products containing conflict minerals, do the following:
 - Determine whether any of those minerals are necessary to the functionality or production of the products.
 - Determine whether any of those minerals are from recycled or scrap sources and, therefore, the related products are not subject to the conflict minerals rule.
 - Determine whether any of those minerals might meet the exclusion for minerals “outside the supply chain” prior to January 31, 2013.
- Review the Organisation for Economic Co-operation and Development’s guidance and any other applicable nationally or internationally recognized due diligence framework to determine appropriate steps to take to comply with the “reasonable country of origin inquiry” and due diligence requirements, including inquiries to be made to suppliers.

Morgan Lewis

- Examine the supply contracts for tin, tantalum, tungsten, and gold and for the manufacturing of products containing those minerals to determine whether the contractual terms can be revised to include representations with respect to the origin of the minerals.

Compliance with the conflict minerals rule will be required beginning with the 2013 calendar year. Thus, filings on new Form SD, when applicable, will be due on May 31, 2014 and on May 31 every year thereafter.

We will provide an update if the outcome of pending litigation concerning the rule impacts the reporting requirement.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

For information regarding supply chain due diligence and/or supply chain security and other supply chain-related issues:

Washington, D.C.

Margaret M. Gatti	202.739.5409	mgatti@morganlewis.com
Louis K. Rothberg	202.739.5281	lrothberg@morganlewis.com
Timothy M. Rolland	202.739.5829	trolland@morganlewis.com

For information regarding the SEC's conflict minerals reporting requirement:

Washington, D.C.

Linda L. Griggs	202.739.5245	lgriggs@morganlewis.com
Gail A. Pierce	202.739.5636	gpierce@morganlewis.com
David A. Sirignano	202.739.5420	dsirignano@morganlewis.com
George G. Yearsich	202.739.5255	gyearsich@morganlewis.com

New York

Stephen P. Farrell	212.309.6050	sfarrell@morganlewis.com
David W. Pollak	212.309.6058	dpollak@morganlewis.com

Philadelphia

James W. McKenzie	215.963.5134	jmckenzie@morganlewis.com
Alan Singer	215.963.5224	asinger@morganlewis.com

Palo Alto

Thomas W. Kellerman	650.843.7550	tkellerman@morganlewis.com
---------------------	--------------	--

Pittsburgh

Amy I. Pandit	412.560.7415	apandit@morganlewis.com
---------------	--------------	--

Princeton

Emilio Ragosa	609.919.6633	eragosa@morganlewis.com
---------------	--------------	--

Irvine

Ellen S. Bancroft	949.399.7130	ebancroft@morganlewis.com
Bryan S. Gadol	949.399.7140	bgadol@morganlewis.com

Los Angeles

John F. Hartigan	213.612.2630	jhartigan@morganlewis.com
------------------	--------------	--

Morgan Lewis

Moscow/London

Carter Brod
Iain Wright

+7 495 212 2550
+44 (0)20 3201 5630

cbrod@morganlewis.com
iwright@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 24 offices across the United States, Europe, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labor and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2013 Morgan, Lewis & Bockius LLP. All Rights Reserved.