Publications

Client Alert: The SEC's Final "Conflict Mineral" Rule Has Been Adopted and Will Impact Companies Whose Products Contain Tin, Tantalum, Tungsten and Gold

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On August 22, 2012, the U.S. Securities and Exchange Commission (the SEC) adopted its final rule requiring public disclosure by certain companies that file reports with the SEC and whose products contain tin, tantalum, tungsten or gold (conflict minerals). Under the new rule, covered companies must ascertain whether any conflict minerals used in their products originate in the Democratic Republic of the Congo (the DRC) or any adjoining country in Africa (collectively, the Covered Countries), and must undertake additional due diligence and reporting with respect to the source and chain of custody of such conflict minerals. The new rule implements Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which added Section 13(p) to the Securities Exchange Act of 1934.

Because conflict minerals are used in a wide variety of products and industries, the new rule will impact a significant number of SEC reporting companies and their suppliers. For example, tin is commonly used in automobile parts, steel plating, solder and alloys (bronze, brass and pewter); tantalum is commonly used in electronic components and as an alloy for making carbide tools and jet engine components; tungsten is commonly used in metal wires, electrodes and contacts in various lighting, electronic, electrical, heating and welding applications; and gold is commonly used in electric plating, interconnecting wiring and jet engine components.

Form and Timing of Disclosure. All covered companies must disclose information on a calendar year basis regarding their use of conflict minerals on a new SEC Form SD. Form SD must be filed annually by May 31 of each year (regardless of the company's fiscal year). The initial Form SD, covering disclosures for the 2013 calendar year, must be filed with the SEC by May 31, 2014.

Requirements of New Rule; Steps to Compliance. There are three distinct steps that a company should undertake to comply with the new rule.

- ***Step One – Determine Whether Conflict Minerals Are Used in the Company's Products.***

The new rule applies to conflict minerals that are "necessary to the functionality" or "necessary to the production" of a product or a component that the company manufacturers or contracts with a third party to manufacture. There is no de minimis threshold for the application of this broad standard, so the presence of even a small amount of conflict minerals is sufficient to trigger reporting under the new rule. If conflict minerals are used, the company is required to proceed to Step Two and conduct a reasonable inquiry to ascertain the origin of the conflict minerals.

- ***Step Two – Reasonable Country of Origin Inquiry; Required Disclosures.***

Under the new rule, a company that uses conflict minerals in its products is required to conduct a "reasonable country of origin inquiry" to determine whether the conflict minerals originated in any of the Covered Countries or came from recycled or scrap sources. An inquiry is reasonable if the company obtains reliable written representations that identify the smelters/refineries at which the conflict minerals were processed and demonstrate that those conflict minerals either did not originate from any Covered Countries or came from recycled or scrap sources. Such representations are reliable if the company has reason to believe that they are true in light of all facts and circumstances (for example, the smelters/refineries are designated as "conflict free" by a recognized industry group, and the company is not aware of any facts that would cause it to question such representations).

If, after conducting the country of origin inquiry, a covered company has no reason to believe that its conflict minerals may have originated in a Covered Country, or reasonably believes that its conflict minerals came from recycled or scrap sources, then it would file a Form SD with the SEC and disclose on its website a description of the inquiry it undertook and the results thereof.

If the company has reason to believe that its conflict minerals may have originated in a Covered Country, or has reason to believe that its conflict minerals may not have come from recycled or scrap sources and is unable to determine the origin of the conflict minerals, then it is required under the new rule to conduct the additional due diligence summarized in Step Three.

- ***Step Three – Additional Due Diligence; Additional Conflict Minerals Report.***

Under the new rule, a company is required to conduct additional due diligence on the source and chain of custody of the conflict minerals if its initial country of origin inquiry determined that conflict minerals may have originated in a Covered Country or may not have come from recycled or scrap sources. To comply with this requirement, the company is required to follow a nationally or internationally recognized due diligence framework.

If, after conducting this additional due diligence, the company determines that its conflict minerals did not originate in any of the Covered Countries, or came from recycled or scrap sources, then the company will be required to make the Form SD and website disclosures required under Step Two. If, however, the company determines that its conflict minerals did originate in a Covered Country and not from recycled or scrap sources, or is otherwise unable to determine the origin of its conflict minerals, then the company is required to file a comprehensive Conflict Minerals Report as an exhibit to its Form SD.

The Conflict Minerals Report must describe in detail the company's due diligence measures, and describe each of the company's products that it has determined to be "DRC conflict free," not to be "DRC conflict free," or "DRC conflict undeterminable." The Conflict Minerals Report must identify the country of origin of the conflict mineral, the smelters/refineries used to process the conflict minerals, the efforts used to determine the specific mine of the conflict minerals, and any steps the company has taken or will take to mitigate the risk that the conflict minerals will finance or benefit armed groups in the Covered Countries.

The new rule requires an independent audit of any Conflict Minerals Reports which identify conflict minerals as either "DRC conflict free" or not "DRC conflict free." For the first two years of the new rule (through December 31, 2014), no audit will be required of Conflict Minerals Reports that identify all conflict minerals as "DRC conflict undeterminable."

The Time to Start Thinking About Compliance is Now. The new rule will present a number of challenges for many SEC reporting companies. Companies will need to make both legal determinations and business decisions, consider what compliance policies and procedures are needed, and conduct due diligence on their products and supply chains. Given that the disclosures required under the new rule will apply to activities undertaken during the 2013 calendar year, companies should start thinking about compliance now.

For more information regarding the SEC's final rule or for assistance with developing a plan for compliance, please contact your regular Vorys attorney or one of the attorneys referenced to the right.