Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Conflict Minerals Filings — Time For Final Preparations

Law360, New York (April 09, 2014, 12:46 PM ET) -- The filing deadline is drawing near for the first conflict minerals disclosures required by the Dodd-Frank Wall Street Reform and Consumer Protection Act and the conflict minerals rule adopted by the U.S. Securities and Exchange Commission. SEC reporting companies, regardless of their fiscal year, must file a report on new Form SD by Monday, June 2, 2014, if, during calendar year 2013, they used conflict minerals that were necessary to the functionality or production of a product they manufacture or contract to be manufactured.

For a discussion of the requisite due diligence requirements and circumstances triggering conflict minerals disclosure requirements, including associated requirements for a conflict minerals report and an independent private sector audit, see our Sept. 5, 2012, legal update, "U.S. Securities and Exchange Commission Adopts Final Conflict Minerals Disclosure Rule."[1]

Ideally, most SEC reporting companies have determined by now whether they must report any conflict minerals information. For companies that will need to file Form SD, the time has arrived to accelerate their final preparations for this new conflict minerals disclosure.

Litigation

The National Association of Manufacturers, the Chamber of Commerce of the United States of America and the Business Roundtable have brought litigation challenging the SEC's conflict minerals rule. The U.S. District Court for the District of Columbia rejected their arguments and granted summary judgment in favor of the SEC.[2] The plaintiffs appealed this decision, and the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments for this case on Jan. 7, 2014.

While news reports of the oral arguments have suggested that some questioning from two of the three judges on the panel may reflect skepticism of the validity of the rule, as of the date of this writing, it is not clear whether the court will reach its decision in this litigation before the filing deadline for new Form SD, let alone whether the court will overturn the conflict minerals rule or any portion thereof. As of now, the conflict minerals rule, with its upcoming Form SD due date, remains in effect.

Form SD Disclosure Requirements

Conflict minerals disclosure will be set forth in Item 1.01 of Form SD under a separate heading titled "Conflict Minerals Disclosure." Required disclosure levels vary, based on circumstances, as summarized below. The Form SD requirements and instructions can be found on the SEC's website.[3]

***Disclosure When Only Reasonable Country of Origin Inquiry Is Required*.** The conflict minerals rule

requires each SEC reporting company whose use of conflict minerals is necessary for the functionality or production of its products to conduct a reasonable country of origin inquiry.

If, from that inquiry, the company (1) determines that its necessary conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country (DRC) or did come from recycled or scrap sources, or (2) has no reason to believe that its necessary conflict minerals may have originated in the DRC or reasonably believes that its necessary conflict minerals did come from recycled or scrap sources, then it must disclose such determination, together with a brief description of the reasonable country of origin inquiry performed and the results of that inquiry in Item 1.01 of Form SD. This information must also be publicly available on the company's website and its Form SD must provide a link to that website.

***Disclosure When Source and Chain of Custody Due Diligence Is Required*.** If, based on its reasonable country of origin inquiry, an SEC reporting company (1) knows that any of its necessary conflict minerals originated in the DRC and are not from recycled or scrap sources, or (2) has reason to believe that its necessary conflict minerals may have originated in the DRC and has reason to believe that they may not be from recycled or scrap sources, then it will have to conduct source and chain of custody due diligence on its conflict minerals.

If, as a result of its source and chain of custody due diligence, an SEC reporting company determines that its conflict minerals did not originate in the DRC or did come from recycled or scrap sources, then it must disclose its determination and briefly describe its reasonable country of origin inquiry and due diligence efforts and the results of such inquiry and due diligence in Item 1.01 of Form SD.

This information must also be publicly available on the company's website and its Form SD must provide a link to that website. However, in these circumstances, the company will not be required to prepare a separate conflict minerals report.

On the other hand, if the SEC reporting company is not able to determine from its source and chain of custody due diligence that its necessary conflict minerals originated outside the DRC or came from recycled or scrap sources, it must file a conflict minerals report as Exhibit 1.01 to its Form SD. The company must also post the conflict minerals report on its website and provide a link to that report in its Form SD.

***Conflict Minerals Report and Independent Private Sector Audit*.** When a conflict minerals report is required, it must describe the measures the company took to exercise due diligence on the source and chain of custody of its conflict minerals. The due diligence efforts must conform to a nationally or internationally recognized due diligence framework. These measures must include an independent private sector audit of the conflict minerals report.

For conflict minerals disclosures required to be filed in 2014 and 2015 (and, for smaller reporting companies, also for filings in 2016 and 2017), no independent private sector audit is required when products are "DRC conflict undeterminable."

If a company discloses that its products are "DRC conflict undeterminable," the conflict minerals report must disclose the steps being taken to mitigate the risk that necessary conflict minerals benefited armed groups, including steps to improve due diligence.

When an independent private sector audit is required, its objective is to express an opinion or conclusion as to whether:

- The design of the company's due diligence framework, as set forth in the company's conflict minerals report, with respect to the period covered by the report, is in conformity with, in all material respects, the criteria set forth in the nationally or internationally recognized due diligence framework used by the company, and

- The company's description of the due diligence measures it performed as set forth in the conflict minerals report, with respect to the period covered by the report, is consistent with the due diligence process that the company undertook.

Form SD does not require the auditor to express an opinion as to whether the due diligence measures were effective or whether the company's conflict minerals are "DRC conflict free."

The conflict minerals report must provide a description of the company's products that have not been found to be "DRC conflict free" or are "DRC conflict undeterminable." This description must include the facilities used to process the necessary conflict minerals, the country of origin of the necessary conflict minerals, and the company's efforts to determine the mine or location of origin with the greatest possible specificity. This description is not needed if the necessary conflict minerals are solely from recycled or scrap sources.

***Form SD Signature Requirement*.** Form SD must be signed on behalf of the SEC reporting company by one of its executive officers. (Because Form SD does not require a specific executive officer to sign, the form does not need to be signed by the chief executive officer or the chief financial officer if there is another executive officer available to sign on behalf of the company.)

SEC Guidance

The staff of the Division of Corporation of Finance of the SEC (staff) has provided guidance on its conflict minerals rule in the form of frequently asked questions, including interpretations relevant to disclosures contained in the conflict minerals report to be filed with Form SD.

For example, while the rule requires descriptions of products that have not been found to be "DRC conflict free" or that are "DRC conflict undeterminable," the staff has stated that it is not necessary for the product description to contain model numbers. However, the product description in the conflict minerals report filed with a Form SD must clearly state that the products either "have not been found to be 'DRC conflict free'" or are "DRC conflict undeterminable," as applicable.

The staff has also made clear that an SEC reporting company must file a Form SD with a conflict minerals report and obtain an independent private sector audit if it determines that the products it manufactures or contracts to manufacture contain conflict minerals from the DRC, even if the conflict minerals do not directly or indirectly finance or benefit armed groups in the DRC. In those circumstances, however, the company does not have to disclose the products containing those conflict minerals or make other disclosures with respect to the "DRC conflict free" products.

For more information on the staff's conflict minerals guidance, see our June 5, 2013, legal update, "Securities and Exchange Commission Provides Guidance on Conflict Minerals and Resource Extraction Payments Disclosure."[4]

Practical Considerations

With the spring disclosure deadline approaching, SEC reporting companies impacted by the conflict minerals rule should be pushing to finish their relevant inquiries and due diligence, including actively following up with suppliers that have not yet provided necessary information.

They should also be identifying which of their necessary conflict minerals are likely to be "DRC conflict undeterminable" this year and what procedures, including improved due diligence steps, they should be implementing on a going-forward basis to mitigate the risk that these minerals benefit armed groups in the DRC. It is important for these companies to confirm that the scope of their inquiries and due diligence comprehensively covers their products that use conflict minerals.

If an SEC reporting company requires an independent private sector audit of a conflict minerals report, it should confirm that it has retained an appropriate auditor and that its conflict minerals report is being drafted and audited on a schedule that will result in a timely filing of Form SD.

More broadly, SEC reporting companies affected by the conflict minerals disclosure rule should be sure they have adequate disclosure controls and procedures in place to confirm that a compliant report will be filed when due. They should evaluate these controls and procedures to determine whether any improvements are necessary or advisable to ensure the timely filing of Form SD on an annual basis, taking into account lessons learned from this year's process.

An appropriate due diligence and reporting process should be referenced on annual compliance calendars.
Preparations for the Form SD should not be delayed pending the outcome of litigation seeking to overturn the SEC's conflict minerals rule. The conflict minerals disclosures will take time to produce. It is possible that the appellate court may not issue its decision before the due date for Form SD.

Even if the opinion is released before the end of May, if the court upholds the conflict minerals rule in whole or in part, there may not be sufficient time at that point to prepare the filing. Therefore, SEC reporting companies impacted by the rule should proceed with the work necessary to be in a position to disclose the requisite information by the due date.

Use of conflict minerals that may benefit armed groups in the DRC has become a sensitive political subject. SEC reporting companies should realize that the audience for their conflict minerals disclosure may extend beyond the SEC and investors. Public awareness of the conflict minerals issue may influence the way companies draft their required disclosure (and ultimately whether they make any changes to the sourcing of these minerals and their alternatives).

Questions and reaction regarding the use of conflict minerals may arise whether or not the SEC's rule is upheld, which is another reason why companies should continue to gather information about the conflict minerals they use, even while uncertainty may remain regarding the outcome of the pending litigation on the SEC's conflict minerals rule.

In addition to the SEC's conflict minerals disclosure rule, there have been conflict minerals initiatives outside the United States. For example, the European Commissionrecently proposed a draft regulation establishing a European Union system of self-certification for EU importers of tin, tantalum, tungsten and gold.[5]

International interest in the conflict minerals issue presents another reason for companies, particularly

companies with international business, to continue to monitor information about the source of the conflict minerals used in their products while the litigation surrounding the validity of the SEC's conflict minerals rule proceeds.

Under the SEC rule, conflict minerals are reportable on a calendar-year basis. That means decisions being made now with respect to sourcing of conflict minerals and contracting to manufacture products that may contain conflict minerals will affect the disclosures that SEC reporting companies will need to make in reports on Form SD to be filed in 2015 with respect to 2014 activities. As a result, companies should consider whether they want to make any changes to their 2014, and subsequent, production procedures based on the results of their inquiries and due diligence efforts with respect to the upcoming conflict minerals filing.

An SEC reporting company that needs to file a Form SD this spring should determine which executive officer will sign the form on behalf of the company. While Form SD is not subject to certification by the chief executive officer and the chief financial officer, it is nevertheless an SEC disclosure document. The company should ascertain how involved the signing officer wants to be in the related inquiry and due diligence process sufficiently in advance of the filing deadline to provide that officer with the necessary background.

—By Laura D. Richman, Mayer Brown LLP

Laura Richman is counsel in Mayer Brown's Chicago office.

[1] Available at http://www.mayerbrown.com/files/Publication/0bd3401f-837a-41d0-b8d4-e8a34e2dedee/Presentation/PublicationAttachment/b4cbf266-ea65-4691-a832-a687c361bd55/UPDATE-Corporate_US_SEC_Conflict_Minerals_Rule_0912_V3.pdf.

[2] Nat'l Assoc. of Manufacturers v. SEC, No. 1:13-cv-00635-RLW, slip op (D.D.C. July 23, 2013)

[3] Available at http://www.sec.gov/about/forms/formsd.pdf.

[4] Available at http://www.mayerbrown.com/files/Publication/583aae6d-7f47-4138-a4fc-be72d92650a4/Presentation/PublicationAttachment/0418c673-ab94-40c9-8aa1-c95203e98756/UPDATE-Corp_Conflict_Minerals_0613_V4.pdf.

[5] For more information, see our March 17, 2014, legal update, "Conflict Minerals: the EU's Proposal on Responsible Sourcing," available at http://www.mayerbrown.com/Conflict-Minerals-03-17-2014/