SHEARMAN & STERLING LLP

CAPITAL MARKETS

CLIENT PUBLICATION

August 23, 2012

SEC Adopts Dodd-Frank Conflict Minerals Rules

On August 22, 2012, the Securities and Exchange Commission (the "SEC") adopted rules (the "Conflict Minerals Rules") implementing Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which relates to reporting requirements regarding conflict minerals originating in the Democratic Republic of the Congo and adjoining countries (together, the "Covered Countries"). The new rules impose additional disclosure obligations on issuers that use "conflict minerals" in their products. Affected issuers are required to comply with the Conflict Minerals Rules beginning with the year ended December 31, 2013 by filing their conflict minerals disclosure and, if required, conflict minerals report on new Form SD by May 31, 2014.

This Client Alert highlights the principal provisions of the Conflict Minerals Rules and the key changes from the proposed rule issued by the SEC on December 15, 2010 (the "Proposed Rules"), as announced at the SEC open meeting on August 22, 2012 at which the Conflict Minerals Rules were adopted. We intend to publish a more detailed client memorandum analyzing the Conflict Minerals Rules as soon as the text of the final rule is formally published.

The Conflict Minerals Rules adopt the three-step framework proposed in the Proposed Rules:

Step One: Each issuer must first determine whether it is subject to the Conflict Minerals Rules. The Conflict Minerals Rules apply if conflict minerals are necessary to the functionality or production of products manufactured or contracted to be manufactured by an issuer. Issuers whose products do not use conflict minerals are not subject to the Conflict Minerals Rules and are not required to make any conflict minerals disclosures.

- "Conflict minerals" are: (i) tantalum, (ii) tin, (iii) tungsten and (iv) gold.
- If conflict minerals are contained in a machine or tool (e.g., a computer or power lines) used in the production of a product, or if conflict minerals are used in the production process (e.g., as a catalyst), but are not contained in the final product, such products would not be subject to conflict minerals disclosure.

- Mining companies whose operations are limited to mining conflict minerals and selling unfinished minerals on to a smelter—or refinery, in the case of gold—for upgrading and processing are not subject to conflict minerals disclosure.

Step Two: If an issuer uses conflict minerals in its products, it must undertake a reasonable country of origin inquiry to determine whether the conflict minerals it uses originated in the Covered Countries or from recycled or scrap sources. If the issuer determines that its conflict minerals did not originate in the Covered Countries or that its conflict minerals originated from recycled or scrap sources, it only needs to disclose that determination and describe the inquiry it used in reaching that determination.

- The Conflict Minerals Rules do not prescribe a standard for the reasonable country of origin inquiry. However, the inquiry may be based on representations from suppliers and/or from the facilities that processed the conflict minerals.
- The conflict minerals disclosure (including the conflict minerals report, if required under Step Three) will be required to be filed on Form SD, a new form adopted by the SEC. The Form SD for all issuers will be based on the calendar year and must be filed by May 31 following the end of the calendar year to which the Form SD relates.
- The Form SD would be considered "filed" and therefore subject to liability for misleading statements under Section 18 of the Securities Exchange Act of 1934. However, the conflict minerals disclosures are not covered by SOX 302 CEO/CFO certifications and not required to be incorporated into Securities Act registration statements.

Step Three: Finally, if an issuer determines or has reason to believe that its conflict minerals may have originated in the Covered Countries or may not be from scrap or recycled sources, it is required to conduct due diligence on the source and chain of custody of the conflict minerals and file a conflict minerals report containing certain additional disclosures and an independent private sector audit.

- The due diligence framework must conform to a nationally or internationally recognized due diligence standard, such as the conflict minerals due diligence guidelines adopted by the OECD.
- For a two-year transition period (four years for smaller reporting companies), if, based on the reasonable country of origin inquiry in Step Two, the issuer is unable to determine the origin of its conflict minerals, the issuer may classify the minerals as "DRC conflict-undeterminable". While issuers are still required to exercise due diligence on the source of DRC conflict-undeterminable minerals, no independent audit will be required with respect to DRC conflict-undeterminable minerals during the transition period.

The SEC press release announcing the adoption of the Conflict Minerals Rules can be found here.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

Richard J.B. Price
London
+44.20.7655.5097
rprice@shearman.com

Pamela M. Gibson
London
+44.20.7655.5006
pgibson@shearman.com

Abigail Arms
Washington, DC
+1.202.508.8025
aarms@shearman.com

Christophe Asselineau
Paris
+33.1.53.89.70.00
christophe.asselineau@shearman.com

Robert Evans III
New York
+1.212.848.8830
revans@shearman.com

Cynthia Urda Kassis
New York
+1.212.848.7969
curdakassis@shearman.com

Jason R. Lehner
Toronto
+1.416.360.2974
jlehner@shearman.com

Jonathan Handyside
London
+44.20.7655.5021
jonathan.handyside@shearman.com

Copyright © 2012 Shearman & Sterling LLP. Shearman & Sterling LLP is a limited liability partnership organized under the laws of the State of Delaware, with an affiliated limited liability partnership organized for the practice of law in the United Kingdom and Italy and an affiliated partnership organized for the practice of law in Hong Kong.