SQUIRE SANDERS

Conflict Minerals – Part III of III
What M&A Lawyers Should Know About the Conflict Minerals Rule

October 2012

Overview

Section 1502 of the Dodd-Frank Act required the Securities and Exchange Commission (SEC) to promulgate new disclosure and reporting requirements concerning the use of certain minerals originating in several central African countries because those minerals were helping to finance extraordinary violence in the Democratic Republic of the Congo (DRC).

On August 22, 2012, the SEC promulgated the long-awaited Conflict Minerals Rule. (The Conflict Minerals Rule and the SEC Release are available online.) The Release includes a flowchart that the SEC suggests as a guide to compliance with the Conflict Minerals Rule.

M&A Checklists

In addition to the following summary of the Conflict Minerals Rule, we have included sample Due Diligence Questions and Representations and Warranties for M&A transactions.

Conflict Minerals Rule

The Conflict Minerals Rule (the Rule) requires any reporting company having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that reporting company to file a report with the SEC on Form SD, disclosing whether those conflict minerals originated in a Covered Country (defined below), whether those conflict minerals came from recycled or scrap sources, and the activities performed to reach those conclusions. The reports must also be posted on the reporting company's website for one year.

It is important to note that the Rule requires a reporting company to perform diligence and report its findings. The Rule does not prohibit the use of conflict minerals in products. Instead, the Rule requires public disclosure of how the conflict minerals are used by the reporting company. Customer requirements and shareholders' and the public's reactions to the reporting company's disclosures could influence the reporting company's actions and policies with respect to conflict minerals.

Note, it is not only reporting companies that should be concerned about the Rule. Non-reporting companies may be asked by their customers to provide information about conflict minerals in their products. To provide that information, the non-reporting company suppliers will need to perform their own diligence, even if they are not required to file disclosure reports with the SEC.

SQUIRE SANDERS

Key Terms

"Conflict Minerals" are **tantalum** (derived from columbite-tantalite), **tin** (derived from cassiterite), **tungsten** (derived from wolframite), **gold** or any other minerals or derivatives thereof that the US Secretary of State may in the future conclude are financing conflict in the Covered Countries (defined below). Conflict minerals that are "outside the supply chain" before January 31, 2013 are excluded from reporting requirements.

Conflict minerals that are from recycled or scrap sources are deemed to be "DRC conflict free" and require disclosure only about the inquiry that led the reporting company to conclude that the conflict minerals were from recycled or scrap sources.

"Covered Countries" are the Democratic Republic of the Congo, Zambia, Angola, Republic of the Congo (Brazzaville), Central African Republic, South Sudan, Uganda, Rwanda, Burundi and Tanzania.

A reporting company is any entity that files reports with the SEC under Section 13(a) or 15(d) of the Securities Exchange Act of 1934 (i.e., Forms 10-Q, 10-K, 20-F and 8-K). There is no exception from the Rule for foreign private issuers, emerging growth companies or smaller reporting companies.

Filing/Reporting

Disclosures that are required by the Rule are to be made by reporting companies on new Form SD, which is due for every reporting company on a calendar year basis (regardless of the company's fiscal year). The Form SD must be filed with the SEC by May 31 of the following year. The first reports are due on May 31, 2014.

The Rule provides that Form SD is to be filed, not furnished. Reporting companies will, therefore, be subject to liability under Section 18 of the Exchange Act for any false or misleading statements in their Form SD.

3-Step Analysis Required by the Rule

The Rule requires an issuer to undertake a 3-step analysis of the use and origin of the conflict minerals.

- Step 1 – Does the Rule apply to us?
- Step 2 – Do our conflict minerals come from the Covered Countries?
- Step 3 – Do our conflict minerals benefit or finance armed groups in the Covered Countries?

Step One: Application of the Rule

A reporting company that has conflict minerals that are necessary to the functionality or production of a product manufactured or contracted to be manufactured by it is subject to the Rule.

Step Two: Reasonable Country of Origin Inquiry

If conflict minerals are necessary to the functionality or production of a product manufactured by a reporting company, the rules require the reporting company to disclose on a new Form SD whether those conflict minerals originated in the Covered Countries.

In order to make such disclosure, the reporting company must perform a "reasonable country of origin inquiry" in good faith to determine whether its conflict minerals originated in the Covered

Countries or if the materials are from scrap or recycled sources (which are deemed to be "DRC conflict free" and therefore do not require disclosure).

Form SD

If it has no further due diligence obligations after the reasonable country of origin inquiry, the reporting company will be required to file a Form SD disclosing certain information about its conflict minerals and its reasonable country of origin inquiry. The company must disclose this information on its website for one year.

DRC Conflict Undeterminable

For calendar years 2013 and 2014 (and for calendar years 2013 – 2016 for a "smaller reporting company"), a reporting company that performs its reasonable country of origin inquiry but is unable to determine whether its conflict minerals are from the Covered Countries and whether they benefit or finance armed groups is permitted to conclude that its products are "DRC conflict undeterminable." For products that are "DRC conflict undeterminable," the reporting company must disclose certain information in its Conflict Minerals Report. For products that are "DRC conflict undeterminable," an independent private sector audit of the Conflicts Minerals Report is not required as to those products.

Step Three: Due Diligence on Source and Supply Chain

If, after completing its reasonable country of origin inquiry, the reporting company:

- knows or has reason to believe that its conflict minerals originated in the Covered Countries; or
- knows or has reason to believe that its conflict minerals are not from recycled or scrap sources; or
- cannot determine the source of its conflict minerals

then the reporting company must exercise further due diligence on the source or chain of custody of its conflict minerals.

Conflict Minerals Report

The Conflict Minerals Report must include more detailed information about the reporting company's use of conflict minerals, including steps taken to determine the source and chain of custody of its conflict minerals or to determine that they came from recycled or scrap sources; an independent private sector audit; information about the products that have "not been found to be 'DRC conflict free;'" and steps taken to mitigate the risk that "DRC conflict undeterminable" minerals do not benefit armed groups.

Private Sector Audit

In most circumstances, the reporting company also is required to have an independent private sector audit of the reporting company's Conflict Minerals Report. The objectives of the independent private sector audit are to express an opinion or conclusion as to whether (a) the due diligence measures taken conform to a nationally or internationally recognized due diligence framework, and (b) the due diligence measures set forth in the Conflict

Minerals Report were actually performed. The audit is not required to state any opinion as to the conclusions reached by the reporting company.

M&A Implications of the Conflict Mineral Rule

The Rule permits a reporting company that takes control of (presumably through acquisition or merger) a company that manufactures or contracts for the manufacture of products with necessary conflict minerals and that previously had not been required to file a Form SD report for those minerals, may delay the reporting on the acquired company's products until the end of the first calendar year that begins no sooner than eight months after the closing date of the acquisition. Release, pages 23, 106. For example,

- Closing (February 2013) + eight months (October 2013), reporting can be delayed such that the acquired company's products will be included in the Form SD for calendar year 2014.
- Closing (June 2013) + eight months (February 2014), reporting can be delayed such that the acquired company's products will be included in the Form SD for calendar year 2015.

Without this permitted delay, for an acquisition or merger completed at end of a calendar year, a reporting company would have been required to include the acquired company's products in the Form SD for the year that begins immediately after the closing, which would give a reporting company very little time to establish systems, gather data, and prepare the Form SD and related disclosure.

If the company acquired was already required to report or perform due diligence, then the acquiring company cannot delay reporting on the acquired company's products and would be required to include such information in the acquiring company's next report.

Sample Due Diligence Questions

Due diligence questions for the acquisition target could include:
Are you a reporting company under the Exchange Act?
Do you manufacture or contract to manufacture products for sale to third parties?
Do you manufacture or contract to manufacture products for sale to third parties?
Are any of tantalum, tin, tungsten or gold ("conflict minerals") contained in your final products?
If yes, are any of those conflict minerals necessary to the functionality or necessary to the production of those products?
If yes, which conflict minerals are used in products you manufacture or that you contract with others to manufacture? Please list each product and which conflict mineral(s) it contains.

SQUIRE SANDERS

Due diligence questions (con't):
Which of the necessary conflict minerals for such products were from recycled or scrap sources?
Of such products whose necessary conflict minerals did not come from recycled or scrap sources, are any of the smelters or refiners of such conflict minerals certified as "conflict free"? Identify the smelters/refiners in your supply chain that supply conflict minerals to you. Indicate whether, in each case, such smelter/refiner is certified as "conflict-free," and provide a contact name for each. If you do not source directly from smelters/refiners, please provide any information from your supplier that identifies smelters/refiners from which such conflict minerals are sourced.
Of your products whose necessary conflict minerals did not come from recycled or scrap sources, what are the countries of origin of the necessary conflict minerals for such products? What efforts did you undertake to determine the countries of origin?
Do any of the countries of origin include the Democratic Republic of the Congo, Zambia, Angola, Republic of the Congo, Central African Republic, South Sudan, Uganda, Rwanda, Burundi, and Tanzania (the "Covered Countries")?
For any conflict minerals originating in any of the Covered Countries, did any such conflict minerals benefit or finance armed groups in such countries?
If yes, have you obtained a necessary independent private sector audit report?
Please provide a copy of your conflict minerals policy.
Do you participate in any industry-specific activities relating to conflict minerals sourcing, disclosures, or reports? If so, please describe.
Do any of your customers have a conflict minerals policy that prohibits or limits their purchase of products containing conflict minerals? Please provide copies of any such policies.
Are conflict minerals provisions included in any of your customer or supplier agreements? Please provide copies of same.
Please provide copies of any correspondence, communication, or reporting to customers or from suppliers relating to conflict minerals since August 22, 2012.

These questions will elicit responses about conflict minerals that are "outside the supply chain" by January 31, 2013, although such conflict minerals are excepted from the reporting requirements.

SQUIRE SANDERS

Also, note that after May 31, 2013, the due diligence questions should be adjusted to reflect that by that time any reporting company with necessary conflict minerals would have already been required to file a Form SD.

Sample Representations and Warranties

Representations and warranties in merger and acquisition agreements might include:

The Seller and its Affiliates are, and since January 1, 2013 have been, in compliance in all material respects with all rules and regulations regarding conflict minerals, including Rule 13p-1 under the Exchange Act (17 CFR Part 240, § 240.13p-1) and any applicable written standards, requirements, directives or policies of the SEC or any other Governmental Entity relating thereto (the "Conflict Minerals Rule"). Neither the Seller nor any of its Affiliates has received any written communication from any Governmental Entity or any third person that alleges that the Seller or any of its Affiliates has failed to perform the due diligence or make the reports or disclosures required by the Conflict Minerals Rule or has submitted any false and misleading statements in its Form SD or Conflict Minerals Report. No potential violation of the Conflict Minerals Rule has been discovered by or brought to the attention of the Seller since January 1, 2013.

The Seller and its Affiliates [are/are not] required to file a Form SD. [If required, the] Seller and its Affiliates have made available to Buyer a true and complete copy of its draft of Form SD. Seller and its Affiliates have retained copies of all data and background information used in its preparation of such draft report.

To Seller's knowledge and to the knowledge of Seller's Affiliates, in each case after reasonable due diligence, Schedule [__] lists the names, locations, and contact persons for all smelters and refiners through which their conflict minerals are sourced and accurately identifies which of those smelters and refiners are certified as conflict free. Seller and its Affiliates have made available to Buyer a true and complete copy of all conflict free smelter and conflict free refiner certificates.

Seller and its Affiliates have made available to Buyer a true and complete copy of (a) their conflict minerals policy, (b) all communications and correspondence with suppliers and customers relating to conflict minerals since August 22, 2012.

Contacts

Dynda A. Thomas
+1 216 479 8583
dynda.thomas@squiresanders.com

Frank M. Placenti
+1 602 528 4004
frank.placenti@squiresanders.com