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Public Company Advisor

Practical Insights for Public Company Counsel

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King & Spalding's Public Company Practice Group periodically publishes the Public Company Advisor *to provide practical insights into current corporate governance, securities compliance and other topics of interest to public company counsel.*

SEC Provides FAQs on Conflict Minerals Rules

On May 30, 2013, the Securities and Exchange Commission's Division of Corporation Finance released twelve Frequently Asked Questions in an effort to provide issuers with guidance on various aspects of Exchange Act Section 13(p), Rule 13p-1 and Item 1.01 of Form SD, relating to the disclosure otherwise known as the "Conflict Minerals Rules." In this edition of the Public Company Advisor, we highlight several of these eagerly-awaited FAQs.

Given the expanding list of interpretive questions that have developed since the rules were adopted, and this limited release of FAQs, it may be possible that additional guidance will be forthcoming from the Division of Corporation Finance. However, at this time, issuers and their counsel are still left to apply a significant amount of judgment to an issuer's facts and circumstances under the SEC's final conflict minerals rules. Nevertheless, these FAQs could provide welcome relief to many issuers, including service providers like airlines, and consumer product manufacturers concerned with the makeup of their product's packaging or containers.

Highlights from the SEC's Conflict Minerals Rules FAQs

- (Question #1) Do the conflict minerals rules apply to "voluntary" filers (aka "debt-only" filers)?
    - (Answer) Yes, the rules apply to all issuers that file reports with the SEC under Exchange Act Sections 13(a) and 15(d), whether or not the issuer is required to file such reports.
- (Question #3) Is an issuer subject to the conflict minerals rules if the relevant product is manufactured by a consolidated subsidiary of an issuer rather than directly by the issuer?
    - (Answer) Yes, an issuer must make any required disclosure for itself and all of its consolidated subsidiaries. We believe that this FAQ also makes it clear that the rule does not apply to unconsolidated joint ventures.
- (Question #5) If an issuer's product contains a conflict mineral in a "generic" component included in the product, does the issuer need to conduct a reasonable country of origin inquiry regarding the origin of the conflict mineral in the generic component?

- (Answer) Yes, an issuer would be required to conduct a reasonable country of origin inquiry with respect to conflict minerals included in generic components included in products it manufactures or contracts to manufacture. There is no distinction between the components that an issuer directly manufactures or contracts to manufacture and the "generic" ones it purchases to include in the product.

- (Question #6) Would a conflict mineral that is necessary to the functionality or production of a "package or container" that contains the issuer's product also be considered necessary to the functionality or production of the underlying product?

  - (Answer) No, only a conflict mineral that is contained in a product would be considered necessary to the functionality or production of a product. The packaging or container sold with a product is not considered to be part of the product even if the package or container is necessary to preserve the product. However, an issuer that manufactures and sells "packaging and containers" independent of a product would be subject to the rules (with respect to the packaging / container).

- (Question #7) Are issuers, such as airlines, railways, and cruise lines, that manufacture or contract for the manufacturing of equipment they use in providing a service they sell required to report on the conflict minerals in that equipment?

  - (Answer) No, the Form SD requires issuers only to report on conflict minerals that are necessary to the functionality or production of "products" they manufacture or contract to have manufactured, and the SEC staff does not interpret equipment used to provide services to be "products" under the rule. The staff also provides a helpful example noting that the service provider's equipment would not be subject to the rule if the equipment is retained by the service provider, is required to be returned, or is intended to be abandoned by the customer following the terms of the service.

- (Question #9) What type of product description is required for products that have not been found to be "DRC conflict free" or that are "DRC conflict undeterminable"?

  - (Answer) The rule permits an issuer to describe its products based on its own facts and circumstances because the issuer is in the best position to know its products and to describe them in terms commonly understood within its industry. An issuer is not required to describe its products using model numbers.

- (Question #11) What transition period is available to an issuer that conducts an initial public offering?

  - (Answer) The issuer may start its relevant conflict minerals reporting for the first reporting calendar year that begins no sooner than eight months after the effective date of the initial public offering registration statement.

- (Question #12) Does the failure to timely file a Form SD regarding conflict minerals cause an issuer to lose eligibility to use Form S-3?
    - (Answer) No.

Link to the SEC's full set of Conflict Minerals Rules FAQ's

http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm

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