LEGAL UPDATES

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SEC Publishes Second Set of Conflict Mineral FAQs Focusing on Audit Requirement

The Securities and Exchange Commission (SEC) has released new answers to nine Frequently Asked Questions about the conflict minerals rule. The regulation requires most reporting companies to disclose the presence of conflict minerals in products that they manufacture or contract to manufacture. The latest FAQs focus on products that the issuer has reason to believe originated in the Democratic Republic of Congo or an adjoining country. Issuers must now obtain an independent private sector audit (IPSA) of their Conflict Minerals Report (CMR) and if the issuer has identified conflict minerals in its products that report must be attached as an exhibit to the new Form SD.

Highlights of the new guidance are summarized below.

The independent auditor need not be a certified public accountant, as long as the auditor meets the applicable requirements under the Performance Audit provisions of the GAO's Government Auditing Standards (the Yellow Book), which can be found online at www.gao.gov/yellowbook.

The objective of the IPSA is to express an opinion or conclusion as to:

Whether the design of the issuer's due diligence measures conforms with the criteria set forth in its nationally or internationally recognized due diligence framework; and

Whether the issuer's description of its due diligence measures in its CMR is consistent with the due diligence process that it actually undertook during the period covered by the report (the calendar year).

The scope of the IPSA includes only the CMR and not the disclosures in the body of the Form SD. As to the CMR, the audit only covers the completeness or reasonableness of the issuer's due diligence measures. It does not include the issuer's reasonable country of origin inquiry, even if this inquiry is encompassed in the issuer's due diligence framework.

An issuer is not required to fully describe the design of its due diligence framework in the CMR. However, the CMR must describe the due diligence measures in sufficient detail to enable the auditor to form an opinion or conclusion about whether the description in the CMR is consistent with the process the issuer actually performed.

Although an issuer's due diligence measures must apply to conflict minerals in products manufactured during the calendar year, the issuer's due diligence measures need not be carried out constantly throughout the year.

If an issuer determines that any of its products are "DRC conflict undeterminable" during the temporary transition period (four years for smaller reporting companies and two years for all others), the issuer is not required to obtain an IPSA of its CMR. However, the issuer may not designate any of its remaining products as "DRC conflict free" unless it concludes that the conflict minerals contained in the product did not originate in the DRC or an adjoining country, or directly benefit armed groups in those countries and obtains an IPSA of a CMR containing those conclusions.

If an issuer determines that a product contains a conflict mineral that did finance or benefit armed groups in the DRC or an adjoining country, it must describe that product as "having not been found to be 'DRC' conflict free." This rule applies both during and after the temporary transition period.

If an issuer determines that a product contains only conflict minerals that came from recycled or scrap sources, it is not required to file a CMR, though the issuer must disclose those conflict minerals in the body of its specialized disclosure report on Form SD. If a product contains some conflict minerals from recycled or scrap sources and also includes conflict minerals not from recycled or scrap sources, its CMR would not need to include the disclosures for the conflict minerals from the recycled or scrap sources.

What This Means to You

The first Form SD filing deadline of June 2, 2014 is rapidly approaching. If your company has questions concerning the applicability of these rules to its business or requires assistance in fulfilling the reporting obligations, please contact your Husch Blackwell attorney or an attorney in our Securities & Corporate Governance group.