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Alert Memo

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SEC Adopts Disclosure Rules on Conflict Minerals

On August 22, 2012, the Securities and Exchange Commission (the "Commission") adopted final rules on specialized disclosure relating to the use of "conflict minerals" from the Democratic Republic of the Congo (the "DRC") and neighboring countries.[1] New Rule 13p-1 and a new Specialized Disclosure Report, Form SD, implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[2] which added Section 13(p) to the Securities Exchange Act of 1934, as amended (the "Exchange Act"). The conflict minerals disclosure for each calendar year must be filed annually on Form SD no later than May 31 of the following year, beginning May 31, 2014.

The specified minerals are widely used in various types of products, including electronics, lighting, electrical and heating applications, and jewelry, and the Commission estimates the rules will apply to approximately 6,000 companies. Suppliers (whether or not reporting companies) will also be affected; the Adopting Release estimates the total number of affected suppliers at approximately 278,000.

Also on August 22, 2012, the Commission adopted final rules on specialized disclosure relating to payments to governments by companies engaged in resource extraction,[3] implementing Section 1504 of the Dodd-Frank Act. Please refer to our separate Alert Memo ("SEC Adopts Disclosure Rules on Resource Extraction Payments to Governments") available on our website.

Both sets of new rules were adopted after a long delay,[4] as the Commission grappled with disclosure requirements primarily intended to further broad social goals rather than the Commission's investor protection mandate. The final rules reflect thoughtful consideration of the voluminous comments the Commission received on the rule proposals, and include a number of key changes from the proposals. Nevertheless, the Commission only narrowly approved both sets of rules, and ongoing debate and legal challenges to the rules are anticipated.

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1 SEC Rel. No. 34-67716 (Aug. 22, 2012) (the "Adopting Release"), available at http://www.sec.gov/rules/final/2012/34-67716.pdf. The rules were originally proposed on December 15, 2010. SEC Rel. No. 34-63547 (Dec. 21, 2010) (the "Proposing Release") is available at www.sec.gov/rules/proposed/2010/34-63547.pdf.

2 Pub. L. No. 111-203 (the "Dodd-Frank Act").

3 SEC Rel. No. 34-67717 (Aug. 22, 2012), available at http://www.sec.gov/rules/final/2012/34-67717.pdf.

4 The new Section 13(p) of the Exchange Act required the Commission to adopt final rules no later than April 17, 2011. Exchange Act Section 13(p)(1)(A).

I. SUMMARY OF THE FINAL RULES

Affected companies:	• Disclosures are required by any reporting company that manufactures or contracts to manufacture products for which conflict minerals are necessary to those products' functionality or production. • Reporting foreign private issuers and smaller reporting companies are covered. Registered investment companies are not subject to the rules. • "Conflict minerals" are cassiterite, columbite-tantalite (coltan), gold and wolframite and three derivatives: tin, tantalum and tungsten (the "3Ts"). • Key changes from the proposed rules: o The 3Ts are the only derivatives of conflict minerals that are covered.[5] o The Adopting Release provides interpretive guidance on the meaning of "contract to manufacture" that requires a higher level of influence than under the proposal. For example, a company that contracts for products to be sold under its brand name, without influence over the manufacturing, does not "contract to manufacture." o Mining is not considered to be manufacturing. o The Adopting Release provides modified guidance on the meaning of "necessary to the functionality" and "necessary to the production."
Disclosure location:	• The required disclosures are to be provided in new Form SD (Specialized Disclosure Report), including a Conflict Minerals Report as an exhibit if required. • Disclosures must also be posted on the company's website and maintained there for at least one year.

[5] Other minerals or derivatives may be added if the Secretary of State determines they are financing conflict in the covered countries, although there is no indication that the Secretary of State is considering any other minerals or derivatives. The Commission acknowledged various comments on the proposed rules that indicated that although the conflict minerals have other derivatives, the 3Ts are the only economically significant ones. See Adopting Release, p.35.

	• Form SD is not automatically incorporated by reference in Securities Act registration statements, but it appears that failure to file will result in loss of eligibility to use Forms S-3 and F-3 and the Rule 144 safe harbor under the Securities Act of 1933, as amended (the "Securities Act"). • Key changes from the proposed rules: o The new disclosures are in a new standalone form, rather than in the annual report on Form 10-K, Form 20-F or Form 40-F. o The disclosure is "filed," not "furnished" as under the proposal, and is thus subject to liability under Section 18 of the Exchange Act. o CEO/CFO certifications of periodic reports by under Exchange Act Rules 13a-14 and 15d-14 will not apply to conflict minerals disclosures. o There is no specific requirement to maintain reviewable business records relating to conflict minerals disclosures.
Timing:	• The disclosure must be filed annually no later than May 31, covering products manufactured in the prior calendar year, beginning in 2014 for calendar 2013. This timing is unrelated to a company's fiscal year end and provides additional time after the annual report due date for a company with a December 31 fiscal year. • Key changes from the proposed rules: o Disclosures as to a product are required based on when its manufacture is completed (including by a third party), rather than when the company obtains possession of it, as proposed. o Form SD provides an exemption for conflict minerals that are "outside the supply chain" (*i.e.*, smelted, fully refined or located outside the covered countries) prior to January 31, 2013. o A company may delay conflict minerals reporting for an acquired company not previously subject to the rules until the first year that begins no sooner than eight months after the effective date of the acquisition. o For a company required to prepare a Conflict Minerals Report, there is a two-year transition period (four years for smaller

	reporting companies) during which products may be described as "DRC conflict undeterminable" if the company is unable to determine the source of necessary conflict minerals or whether they financed or benefitted armed groups.
Disclosure Step One – Whether to File Form SD:	• A company must undertake a three-step process to determine what, if any, disclosure is required regarding conflict minerals. Step One is to determine whether it manufactures or contracts to manufacture any products for which conflict minerals are necessary to the functionality or production of those products. If not, the company is not required to file Form SD or to make any disclosures. If so, it must proceed to Step Two.
Disclosure Step Two – Reasonable Country of Origin Inquiry:	• In Step Two, the company must conduct a "reasonable country of origin inquiry" to determine whether its "necessary conflict minerals" originated in the DRC or an adjoining country (the "covered countries")[6] or came from recycled or scrap sources. • If the company (a) determines that its necessary conflict minerals did not originate in a covered country, (b) determines that its necessary conflict minerals came from recycled or scrap sources, (c) has no reason to believe that its necessary conflict minerals may have originated in a covered country or (d) reasonably believes its necessary conflict minerals came from recycled or scrap sources, then it must disclose its determination and briefly describe the reasonable country of origin inquiry and the results of the inquiry. The disclosure must be provided on Form SD and on the company's website. • If the company (a) determines that any of its necessary conflict minerals originated in a covered country and are not from recycled or scrap sources or (b) has reason to believe that its necessary conflict minerals may have originated in a covered country and that they may not be from recycled or scrap sources, then it must proceed to Step Three. • Key changes from proposed rules: o The final rules are less burdensome where the company cannot determine the source of its necessary conflict minerals. Under the proposal, the company would have had to proceed to Step Three and prepare a Conflict Minerals Report if it was unable to determine that its conflict minerals did not originate in the

[6] The "adjoining countries" currently comprise Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda and Zambia. A map of the covered countries is included as Annex A.

	covered countries; it could only avoid Step Three if it could "prove a negative." Under the final rules, a company that, after a reasonable country of origin inquiry, has no reason to believe its conflict minerals originated in a covered country need only provide brief disclosure regarding its inquiry and its conclusion. o The final rules are less burdensome with respect to conflict minerals from recycled or scrap sources. Under the proposal, a company that used conflict minerals from recycled or scrap sources would have had to proceed to Step Three and prepare a Conflict Minerals Report, and it would have had to classify those conflict minerals as not "DRC conflict free."
Disclosure Step Three – Conflict Minerals Report:	• *Due diligence on the source and chain of custody*. In Step Three, the company must conduct due diligence on the source and chain of custody of the conflict minerals. If the company's due diligence determines that a product does not contain necessary conflict minerals that directly or indirectly finance or benefit armed groups in a covered country, that product is "DRC conflict free." • *Conflict Minerals Report*. The company must prepare a Conflict Minerals Report, file it as an exhibit to Form SD and post it on the company's website. The report must describe any product that is has not been found to be "DRC conflict free." The company must also obtain an independent private sector audit of the Conflict Minerals Report. • Key changes from the proposed rules: o The due diligence must conform to a nationally or internationally recognized due diligence framework, if one is available. In practice, this requires companies to use the OECD guidelines discussed below, at least until other frameworks emerge. o In Step Three, it may often not be possible to reach a reliable determination as to the source of the company's conflict minerals or whether its minerals directly or indirectly finance or benefit armed groups, and the final rule deals with this prospect in two ways. First, where a company cannot make the determination, it must identify the products in question as "have not been found to be DRC conflict free," rather than "not DRC conflict free," as in the proposal; and such a company may include explanatory disclosure or clarification. Second,

	for an initial period (two reporting cycles, or four for a smaller reporting company), the company could instead state that its conflict minerals are "DRC conflict undeterminable" (in this case, an audit relating to those minerals is also not required). o The rules identify the auditing standards applicable to the independent private sector audit and identify the audit objective narrowly, focusing on the company's due diligence process and its description of that process, rather than on the company's conclusions.

II. KEY DEFINITIONS AND GUIDANCE

Definition of "Manufacture" and "Contract to Manufacture"

The final rules do not define either "manufacture" or "contract to manufacture," but the Commission provided guidance for both terms in the Adopting Release.

- *Manufacture* – A company that only services, maintains or repairs a product is not "manufacturing" the product. As noted above, a mining company is not deemed to manufacture unless it also conducts manufacturing activities; the Adopting Release does not specify what post-extraction processes, such as smelting and refining, might be considered to be manufacturing.

- *Contract to manufacture* – Whether a company contracts to manufacture depends on the degree of influence the company exercises over the materials, parts, ingredients or components included in the product, based on the individual facts and circumstances surrounding the company's business and industry. The term includes contracting to manufacture components of a product, and is not limited to "substantial" influence over the manufacturing. A company is not "contracting to manufacture" if it only (1) specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product, such as training, technical support, price, insurance, indemnity, intellectual property rights or dispute resolution (unless it exercises a degree of influence over the manufacturing of the product that is practically equivalent to doing so); (2) affixes its brand, marks, logo or label to a generic product manufactured by a third party; or (3) services, maintains or repairs a product manufactured by a third party. This guidance should be helpful to retailers in particular, although there will inevitably be close cases. In practice, the determination of whether a company is "contracting to manufacture" for purposes of the rules will be a matter of significant judgment regarding the specific facts and circumstances.

Definition of "Necessary"

The Commission did not define "necessary to the functionality" or "necessary to the production" of a product, indicating that both depend on the company's particular facts and circumstances, but again provided guidance:

- *Necessary* – The conflict mineral must be contained in the product and have been intentionally added to the product or a product component rather than being a naturally occurring by-product. There is no *de minimis* exception; even minute or trace amounts of a conflict mineral in a product or product component could trigger disclosure obligations.

- *Necessary to the functionality* – A company should consider whether the conflict mineral is necessary to the product's generally expected function, use or purpose. Where a product has multiple functions, a conflict mineral need only be necessary for one function to be considered necessary to the product as a whole. If the conflict mineral is incorporated for purposes of ornamentation, decoration or embellishment, the company should consider whether the primary purpose of the product is ornamentation or decoration.

- *Necessary to the production* – The following are not considered necessary to the production: (1) a conflict mineral used as a catalyst or in a similar manner but that is not contained in the product, even in trace amounts; (2) a conflict mineral in a physical tool, machine or other equipment used to manufacture the product; and (3) a conflict mineral included in materials, prototypes and other demonstration devices.

Acquired Companies

A company that obtains control over a company that manufactures or contracts for the manufacturing of products with necessary conflict minerals, where the acquired company previously was not obligated to provide a specialized disclosure report with respect to its conflict minerals, may delay reporting on the acquired company's products until the end of the first reporting calendar year that begins no sooner than eight months after the effective date of the acquisition.

Reasonable Country of Origin Inquiry

A company that reaches Step Two in the disclosure process must conduct a reasonable country of origin inquiry, which must be reasonably designed to determine whether the company's conflict minerals originated in a covered country or came from recycled or scrap sources, and which must be performed in good faith. The Commission did not specify what steps are necessary to meet that standard, stating in the Adopting Release that it is a facts-and-circumstances determination based on a company's size, products, relationships with suppliers and other factors, as well as the available infrastructure, which will evolve over time. The Commission noted that a "reasonableness standard" is not absolute – certainty is not required, and there is no need for disclosure indicating that the determination is uncertain (although companies may wish to provide it).

The Adopting Release states that a company may rely on supplier and smelter representations regarding the origination of the conflict minerals if the company has reason to believe the representations are true given the facts and circumstances, taking into account any applicable warning signs or other circumstances indicating that the conflict minerals may have originated in the covered countries or did not come from recycled or scrap sources. For example, a company would have reason to believe a smelter representation was

true if the processing facility received a "conflict-free" designation by a recognized industry group that requires an independent private sector audit of the smelter, or if the facility itself obtained an independent private sector audit that is made publicly available. However, a company need not receive representations from all of its suppliers as long as it designs the inquiry reasonably, performs the inquiry in good faith and does not ignore warning signs that some of its conflict minerals may have originated in the covered countries.[7]

Nationally or Internationally Recognized Due Diligence Framework

A company that reaches Step Three in the disclosure process must conduct due diligence on the source and chain of custody of its necessary conflict minerals. The due diligence must conform to a nationally or internationally recognized due diligence framework, if one is available. To qualify, the framework must be established following due process procedures, including the broad distribution of the framework for public comment, and be consistent with the generally accepted government auditing standards ("GAGAS," referred to as "the Yellow Book") established by the Comptroller General of the Government and Accountability Office ("GAO"). Currently, the only such framework in place is the OECD's "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas,"[8] described in more detail in Part III below. Form SD and the Adopting Release provide guidance on how a company should conduct due diligence if there is no framework in place for a conflict mineral.

Determination Whether Conflict Minerals "Directly or Indirectly Finance or Benefit Armed Groups"

The Commission has provided only limited guidance regarding how a company should determine whether its conflict minerals directly or indirectly finance or benefit armed groups in the covered countries. The Commission did not clarify what would constitute, for example, an "indirect benefit" to an armed group. Form SD defines the term "armed group" , as in Exchange Act Section 13(p), as "an armed group that is identified as a perpetrator of serious human rights abuses in the annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961" relating to the covered countries. The Commission noted in the Adopting Release that authority to identify those perpetrators is assigned to the U.S. Department of State, and that the Commission

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[7] The due diligence guidance developed by the Organisation for Economic Co-operation and Development ("OECD") provides examples of red flags that should trigger increased diligence. See note 8 below and the description of the OECD guidance in Part III below.

[8] OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2011) (the "OECD due diligence guidance"), available at http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/46740847.pdf.

lacks "the authority and expertise to provide further guidance or qualify the State Department's conclusions in this area."[9]

The Commission suggests in the Adopting Release that the due diligence framework used would provide guidance to a company in determining whether its conflict minerals directly or indirectly finance or benefit armed groups in the covered countries.[10] The conflict minerals map produced by the State Department pursuant to Dodd-Frank Section 1502[11] and the State Department guidance for commercial entities seeking to exercise due diligence on conflict minerals used in their products and on their suppliers[12] also both provide guidance to companies in this determination, although the Adopting Release notes that they do not have a direct impact on the rules and a company need not rely solely on them in making the determination.[13]

The Adopting Release does state that products would be considered "DRC conflict free" if the conflict minerals contained in those products did not directly or indirectly finance or benefit armed groups in the covered countries at the time they were purchased and transported through the supply chain from the mine to the company even if at some later time an element of that supply chain becomes controlled by an armed group (and even if the money the company paid to purchase the conflict minerals is seized by the armed group and thus in fact benefits the armed group).

Conflict Minerals Report

The Conflict Minerals Report must include a description of the company's due diligence on the source and chain of custody of its conflict minerals (including, as a critical component, the independent private sector audit), a statement that the company has obtained the independent private sector audit, the name of the auditor and the audit report, a description of the products manufactured or contracted to be manufactured by the company that have not been found to be "DRC conflict free," the facilities used to process the conflict minerals used in those products, the country of origin of those minerals and the company's efforts to determine the mine or location of origin with the greatest possible specificity. If the company's due diligence process is relatively consistent throughout the supply chain, the

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9 Adopting Release, p.198.

10 The OECD due diligence guidance notes that it is intended "to help companies respect human rights and avoid contributing to conflict through their sourcing decisions." OECD due diligence guidance, p.12. Accordingly, the due diligence framework is designed to allow companies to identify and prevent or mitigate "adverse impacts" associated with those decisions, which include financing or otherwise contributing to conflict.

11 The current Conflict Minerals Map, published by the Humanitarian Information Unit of the U.S. Department of State on June 7, 2012, is available at https://hiu.state.gov/Products/DRC_ConflictMinerals_2012May23_HIU_U540.pdf.

12 U.S. Department of State, Bureau of Economic, Energy, and Business Affairs, Statement Concerning Implementation of Section 1502 of the Dodd-Frank Legislation Concerning Conflict Minerals Due Diligence (July 15, 2011), available at http://www.state.gov/e/eb/diamonds/docs/168632.htm.

13 See Adopting Release, p.196.

description of the due diligence can be general, but if there are significantly different processes for various aspects of the supply chain (e.g., for different minerals or products), those differences should be described.

- *DRC conflict free* – A product is "DRC conflict free" if it does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the covered countries.

- *DRC conflict undeterminable* – During an initial two-year transition period (four years for smaller reporting companies) after the rule takes effect, a product may be designated "DRC conflict undeterminable" if, after conducting due diligence, the company is unable to determine that (1) its conflict minerals did not originate in the covered countries, (2) its conflict minerals that originated in the covered countries did not directly or indirectly finance or benefit armed groups, or (3) its conflict minerals came from recycled or scrap sources. This transition period is intended to allow viable tracking systems to be put in place in the covered countries and throughout supply chains and avoid a *de facto* embargo on conflict minerals from the covered countries.

  If a company uses this designation for some of its products, it is also not required to obtain an independent private sector audit regarding the related minerals, but it must include in the Conflict Minerals Report a description of the steps it has taken or will take, if any, since the end of the period covered in its most recent prior Conflict Minerals Report to mitigate the risk that those minerals benefit armed groups, including any steps to improve its due diligence. Certain sections of the Report may also be modified to reflect the company's lack of information.

- *Have not been found to be DRC conflict free* – After the transition period, those products will be required to be described as having "not been found to be DRC conflict free," and the company will be required to provide the independent private sector audit with respect to the related minerals in the Conflict Minerals Report. The Adopting Release acknowledges that the expression "have not been found to be DRC conflict free" could bear an unjustified stigma where no affirmative determination has been made. It points out that a company may include clarification, and the Adopting Release even provides illustrative language.[14]

In response to some commentators that questioned whether the rules would require physical labeling of products as "DRC conflict free" or "not DRC conflict free," the Commission clarified that the final rules do not require any physical labeling but only descriptions of the products using those terms in the required disclosures.

[14] Adopting Release, p.189 and n.562.

Independent Private Sector Audit

The independent private sector audit must comply with standards established by the GAO. The Commission indicated that the GAO does not intend to establish new auditing standards for the audit; auditors may use the provisions for either Attestation Engagements or Performance Audits in GAGAS.

The objective of the audit is to express an opinion or conclusion as to (1) whether the design of the company's due diligence measures as set forth in, and with respect to the period covered by, the Conflict Minerals 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 (2) whether the company's description of the due diligence measures in the Conflict Minerals Report is consistent with the due diligence process the company undertook.

The Adopting Release states that it would not be inconsistent with the auditor independence requirements in Rule 2-01 of Regulation S-X if the independent public accountant also performs the independent private sector audit of the Conflict Minerals Report, but that the engagement to perform the Conflict Minerals Report audit would be considered a "non-audit service" subject to the pre-approval requirements of Rule 2-01(c)(7) of Regulation S-X. The Commission also noted that independence for purposes of the independent private sector audit is not the same as the OECD's independence requirement for auditors conducting audits of conflict mineral smelters; these and other services that extend beyond the scope of the audit of the Conflict Minerals Report would need to be considered separately with respect to the requirements of Rule 2-01 of Regulation S-X.

The company's "audit certification," which is required by Section 13(p), need not be signed by an officer of the company. Instead, the certification takes the form of a statement in the Conflict Minerals Report that the company obtained an independent private sector audit.

Recycled or Scrap Sources

Conflict minerals from recycled or scrap sources are considered DRC conflict free and do not require the company to prepare a Conflict Minerals Report. However, if as a result of its reasonable country of origin inquiry the company has reason to believe its conflict minerals may not have been from recycled or scrap sources, it must exercise due diligence on the source and chain of custody of the minerals using a nationally or internationally recognized due diligence framework for conflict minerals from recycled or scrap sources, where available. Currently, the only such standard is the OECD standard for recycled gold.[15] There is no such due diligence framework for recycled cassiterite,

[15] See Adopting Release, p.232.

columbite-tantalite or wolframite (or the 3Ts) at this time. Where there is no such framework, the company must describe its due diligence measures in the Conflict Minerals Report, but need not obtain an independent private sector audit regarding those recycled conflict minerals.

The final rule tracks the OECD definition of "recycled metals" – minerals from recycled metals, including reclaimed end-user or post-consumer products and scrap process metals created during product manufacturing, but not minerals that are partially processed or unprocessed, or a byproduct from another ore.[16]

Filing Status and Liability

Because disclosures are "filed" and not "furnished," the disclosures are subject to the liability provisions of Section 18 of the Exchange Act,[17] in addition to the general antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Form SD is not deemed incorporated by reference into any Securities Act filing, however, unless the company specifically incorporates it by reference.[18] The incorporation by reference language in Form S-3 refers to all documents subsequently filed pursuant to Section 13(a), 13(c), 14 or 15(d) of the Exchange Act. Companies may wish to specifically exclude reports filed under Sections 13(p) and (q) in the incorporation by reference language, since Form SD is arguably filed pursuant to Section 13(a) as well as Sections 13(p) and (q).[19]

Although the Commission noted comments expressing concern that Form SD compliance could affect eligibility to use certain Securities Act registration statement forms, the Adopting Release and final rules do not specifically address those concerns. As a result, it seems that failure to file Form SD will result in the loss of eligibility for the Rule 144 safe harbor under the Securities Act for resales of the company's securities[20] and make the company an "ineligible issuer" pursuant to Rule 405 under the Securities Act (resulting in, among other things, ineligibility to file automatically effective registration statements and use free writing prospectuses),[21] and failure to file Form SD on a timely basis will result in

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16 See OECD due diligence guidance, p.12 n.2.

17 Under Section 18 of the Exchange Act, a person shall not be liable for misleading statements in a filed document if it can establish that it acted in good faith and had no knowledge that the statement was false or misleading.

18 The Adopting Release does not clearly resolve the issue of incorporation by reference into Securities Act filings, but the parallel release on resource extraction payment disclosure amends Form SD to include an instruction making this point clear. See SEC Rel. No. 34-67717 (Aug. 22, 2012), available at http://www.sec.gov/rules/final/2012/34-67717.pdf.

19 See Adopting Release, n.342 (noting that issuers that fail to comply with the final rules could be violating Exchange Act Sections 13(a) and (p) and 15(d), as applicable).

20 A selling security holder is eligible for the Rule 144 safe harbor for resales of the company's securities if, among other requirements, the company has filed all required reports under Section 13 of the Exchange Act during the 12 months preceding the sale. See Rule 144(c)(1).

21 An "ineligible issuer" includes a company that has not filed all "reports" required to be filed under Section 13 of the Exchange Act for the preceding 12 calendar months. See Rule 405. An ineligible issuer does not qualify as a "well-known seasoned issuer" ("WKSI") and consequently, may not use an automatically effective shelf registration statement on Forms

the loss of the company's eligibility to use Form S-3 and Form F-3 registration statements.[22] However, we understand that Commission Staff are currently collecting a variety of interpretive questions relating to this rule (including on these points) as well as the rule on payments by resource extraction issuers and are considering the appropriate mechanism for responding to these questions.

S-3 or F-3, and may not use a free writing prospectus in the offering process. See Rules 405, 163 and 164 and General Instruction I.D.1(a)(i) to Form S-3.

[22] The eligibility requirements for Forms S-3 and F-3 require that the registrant has, among other things, timely filed all required reports under Section 13 of the Exchange Act for the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement. See General Instruction I.A.3(b) to Form S-3.

III. INTERNATIONAL CONTEXT

Background to the Final Rule

Dodd-Frank Act Section 1502 was intended by Congress to further the humanitarian goal of ending the extremely violent conflict in the DRC, particularly sexual and gender-based violence, which has been partially financed by the exploitation and trade of conflict minerals originating in the covered countries.[23] The Commission noted in the Adopting Release that "Congress chose to use the securities laws disclosure requirements to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict mineral supply chains."[24]

Legislation and Regulation in Other Jurisdictions

Other jurisdictions have passed or are considering legislation or regulation relating to conflict minerals. In 2010, the state of California passed an act prohibiting companies that are in violation of Exchange Act Section 13(p) (once it becomes effective) from bidding on or submitting a proposal to the state government for a contract with any state agency for goods or services related to products or services that are the reason the company must comply with Section 13(p). The state of Maryland passed a similar law in May 2012, and the state of Massachusetts is currently considering similar legislation. Some cities, such as Pittsburgh, Pennsylvania, and St. Petersburg, Florida, have adopted resolutions that favor products deemed DRC conflict free in municipal purchasing decisions. The European Union, the United Kingdom, Canada and other countries are also considering possible disclosure and supply chain due diligence requirements relating to conflict minerals.[25]

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[23] See Dodd-Frank Act Section 1502(a); Adopting Release, p.7.

[24] Adopting Release, p.8.

[25] The European Commission recently committed to advocate greater support for and use of the OECD due diligence guidance to make conflict minerals supply chains more transparent. See Communication from the European Commission to the European Parliament, the Council and the European Economic and Social Committee, Trade, growth and development: Tailoring trade and investment policy for those countries most in need, p.15 (2012), available at http://trade.ec.europa.eu/doclib/docs/2012/january/tradoc_148992.EN.pdf.

The UK government has expressed support for greater transparency regarding conflict minerals and promoted the use of OECD due diligence guidance by UK companies. The UK Foreign & Commonwealth Office has noted that "[w]hile the UK supports an international approach to achieving greater transparency in the trade in minerals we are interested to see how the US Government will implement their new Dodd-Frank legislation on conflict minerals (s. 1502) and are closely monitoring its implementation." See the *Conflict Minerals*, UK FOREIGN & COMMONWEALTH OFFICE, http://www.fco.gov.uk/en/global-issues/conflict-minerals/.

In September 2010, a bill was introduced in the Canadian Parliament requiring, among other things, Canadian companies to exercise due diligence before purchasing minerals originating in the Great Lakes Region of Africa and track the supply chain of the minerals from extraction to final utilization to ensure that no illegal armed group benefited from any transaction involving those minerals. The bill has not progressed beyond a first reading in the House of Commons. The text of the bill may be found at http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4668098&File=33.

OECD Due Diligence Guidance

Various industry and government groups have been working for some time on responsible supply-chain management. The Adopting Release highlights the "Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" developed by the OECD[26] as the only supply chain due diligence framework currently that is sufficiently developed and internationally recognized to qualify for use in complying with the due diligence aspect of the final rules. The OECD released a supplement with specific guidance on implementation of the OECD due diligence framework for the supply chains of tin, tantalum and tungsten at the same as its main due diligence guidance,[27] and thereafter released a second supplement with guidance on implementation of the framework for the gold supply chain.[28] It should be noted that the OECD framework generally aims "to help companies respect human rights and avoid contributing to conflict through their sourcing decisions,"[29] and includes steps to prevent or mitigate the risk that they may be contributing to conflict; Section 1502 of the Dodd-Frank Act and the final rules have the same overall goal, but take a disclosure-based approach and do not explicitly require a company to avoid using conflict minerals.

OECD's due diligence guidance consists of the following five steps:

1. *Establish strong company management systems*
   - Adopt and commit to a supply chain policy for minerals originating from conflict-affected and high-risk areas.
   - Structure internal management systems to support supply chain due diligence.
   - Establish a system of controls and transparency over the mineral supply chain.
   - Strengthen company engagement with suppliers.
   - Establish a company level grievance mechanism.

[26] See note 8 above.

[27] OECD due diligence guidance, p.27.

[28] OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Supplement on Gold (2012), available at http://www.oecd.org/corporate/guidelinesformultinationalenterprises/FINAL%20Supplement%20on%20Gold.pdf.

[29] OECD due diligence guidance, p.12.

2. *Identify and assess risks*[30] *in the supply chain*
   - For upstream companies:
     - Identify the scope of the risk assessment of the mineral supply chain.
     - Map the factual circumstances of the company's supply chain(s), underway and planned.
     - Assess risks in the supply chain.
   - For downstream companies
     - Identify, to the best of their efforts, the smelters/refiners in their supply chain.
     - Identify the scope of the risk assessment of the mineral supply chain.
     - Assess whether the smelters/refiners have carried out all elements of due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas.
     - Where necessary, carry out, including through participation in industry-driven programs, joint spot checks at the mineral smelter/refiner's own facilities.

3. *Design and implement a strategy to respond to identified risks*
   - Report findings to designated senior management.
   - Devise and adopt a risk management plan.
   - Implement the risk management plan, monitor and track performance of risk mitigation, report back to designated senior management and consider suspending or discontinuing engagement with a supplier after failed attempts at mitigation.
   - Undertake additional fact and risk assessments for risks requiring mitigation or after a change of circumstances.

4. *Carry out an independent third-party audit of smelter/refiner's due diligence practices*
   - Plan an independent third-party audit of the smelter/refiner's due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas.
   - Implement the audit in accordance with set out audit scope, criteria, principles and activities.

5. *Report annually on the supply chain due diligence*
   - Annually report or integrate, where practicable, into annual sustainability or corporate responsibility reports additional information on due diligence for

[30] Although the OECD due diligence guidance defines "risks" generally to include any potential adverse impacts to the company or others in connection with its operations (including the supply chain), the guidance is focused on the risks that a company may be contributing to conflict, and a "high-risk area" (as opposed to a "conflict-affected area") may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. See, *e.g.*, OECD due diligence guidance, p.13.

responsible supply chains of minerals from conflict-affected and high-risk areas.

In August 20011, the OECD launched a pilot implementation of its due diligence guidance for tin, tantalum and tungsten by downstream companies, which will run for 12 months. The pilot is intended to test and assist with the implementation of the OECD's tin, tantalum and tungsten supplement, share information, and identify best practices, tools and methodologies for implementing the guidance.[31]

Other Supply Chain Tracking and Reporting Initiatives

A number of other initiatives are focused on facilitating supply chain tracking and reporting. For example:

- In 2010, the Electronic Industry Citizenship Coalition ("EICC") and the Global e-Sustainability Initiative ("GeSI") launched the Conflict-Free Smelter ("CFS") Program, which identifies and validates conflict-free smelters and refiners.[32]

- EICC and GeSI also developed E-TASC (Electronics – Tool for Accountable Supply Chains), a web-based tool for supply chain tracking and reporting that enables suppliers to submit supply chain information for use by multiple customers participating in the system rather than provide individualized information to each customer. Suppliers can also use the accompanying validated audit program to reduce the time and cost of multiple audits.[33]

- The ITRI Tin Supply Chain Initiative ("iTSCi") tracks and traces tin, tantalum and tungsten sourced from mines in the covered countries to ensure conformity

[31] See OECD, Downstream Pilot Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Baseline Report on the Supplement on Tin, Tantalum, and Tungsten, available at http://www.oecd.org/investment/guidelinesformultinationalenterprises/Downstream%20baseline%20report%20(20%20Dec).pdf. The OECD has published a progress report on the pilot implementation, OECD, Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas, Cycle 2 Interim Progress Report on the Report on the Supplement on Tin, Tantalum, and Tungsten (2012) ("OECD interim progress report"), available at http://www.oecd.org/investment/guidelinesformultinationalenterprises/Downstream%20cycle%202%20report%20-%20Edited%20Final%20-%201%20June.pdf.

[32] The CFS Program requires smelters and refiners to undergo a third-party audit to ensure that they have procured only from global conflict-free sources. To date, the CFS Program has identified 12 compliant tantalum smelters, six compliant gold smelters and at least one compliant tin smelter, and is working to identify a compliant tungsten smelter by the end of 2012. See Conflict-Free Smelter (CFS) Program: Compliant Smelter and Refiner Lists, available at http://www.conflictfreesmelter.org/cfshome.htm.

[33] See the E-TASC website, e-tasc.achilles.com.

with the OECD due diligence guidelines and provides chain of custody information suitable for use in the CFS Program.[34]

- Initiatives by the German Federal Institute for Geosciences and Natural Resources ("BGR") include a comprehensive mapping database of DRC artisanal dig sites and an Analytical Fingerprint method that identifies mine site-specific chemical and mineralogical parameters to track the mine's "fingerprint" through the supply chain independent of shipping documentation and tagging procedures.[35]

- The Public-Private Alliance for Responsible Minerals Trade ("PPA") established by the U.S. State Department and the U.S. Agency for International Development is working to establish a verifiable traceability scheme for the covered countries for conflict-free minerals.[36]

- The International Conference on the Great Lakes Region of central Africa ("ICGLR"), comprised of 12 countries in that region, has established standards for traceability and certification of conflict minerals compliant with the OECD due diligence guidelines. Beginning in December 2012, the government and companies in each member country must comply with the standards upon export of the minerals, which is evidenced by a certificate that minerals are "conflict free." Any imports of the minerals from another member country must also be accompanied by such a certificate.[37] The DRC passed legislation in February 2012 requiring adherence to the ICGLR standards.

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[34] iTSCi contemplates risk assessment and independent third party audits to ensure that the minerals may be deemed DRC conflict free. See *ITSCi Project Overview*, ITRI, https://www.itri.co.uk/index.php?option=com_zoo&view=item&Itemid=189.

[35] See, e.g., *BGR – Analytical Fingerprint – "Coltan fingerprint": BGR enables the certification of trading chains*, BGR, http://www.bgr.bund.de/EN/Themen/Min_rohstoffe/Rohstoff_forsch/LF_Herkunftrsnachweis_COLTAN_Newsletter01-2010.html?nn=1572780.

[36] See, e.g., Overview of Public-Private Alliance for Responsible Minerals Trade (PPA), available at http://www.resolv.org/site-ppa/files/2011/09/PPA-Overview-03.27.121.pdf, and Public-Private Alliance for Responsible Minerals Trade Participation and Governance Protocols, available at http://www.resolv.org/site-ppa/files/2011/09/PPA-Participation-and-Governance-Protocols-06.19.12-Final1.pdf.

[37] See, e.g., *ICGLR Regional Initiative against the Illegal Exploitation of Natural Resources (RINR)*, ICGLR, https://icglr.org/spip.php?article94, and ICGLR Regional Certification Mechanism (RCM) – Certification Manual, available at http://www.oecd.org/dataoecd/3/0/49111368.pdf. The ICGLR countries are Angola, Burundi, Central African Republic, Republic of Congo, the DRC, Kenya, Rwanda, South Sudan, Sudan, Tanzania, Uganda, and Zambia (which includes all covered countries).

IV. POTENTIAL LEGAL CHALLENGE

Several organizations, including the Chamber of Commerce, Business Roundtable and certain industry associations, have suggested that they would challenge the final rules. Such a challenge would likely focus on the Commission's cost-benefit analysis. In an action brought by the Chamber of Commerce and Business Roundtable, the federal Court of Appeals for the D.C. Circuit struck down the Commission's "proxy access" rule (Rule 14a-11) because "among other reasons, the Commission failed adequately to consider the rule's effect upon efficiency, competition, and capital formation."[38]

The Adopting Release includes a detailed economic analysis and an estimate of compliance costs that is dramatically higher than in the Proposing Release – approximately $3 billion to $4 billion initially and between $207 million and $609 million annually. The Commission did not, however, attempt to quantify the potential benefits of the rule or assess whether the choices it made would advance the rulemaking's objective. The Commission noted that the statute aims to achieve compelling social benefits, but that it could not quantify such benefits with any precision, in part because it is not able to assess how effective Section 13(p) will be in achieving those benefits, and in part because the social benefits are "quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve."[39] The Commission's economic analysis addressed many of the specific issues raised by the Chamber of Commerce in a July 10, 2012 comment letter on the proposed rules that seemed to be setting the stage for a lawsuit, but there could still be a challenge. It is not clear how the fact that the rule was adopted pursuant to specific direction from Congress in the Dodd-Frank Act will affect the outcome of any such challenge. The two dissenting Commissioners focused in their statements at the open meeting on the cost-benefit analysis and on the choices open to the Commission in implementing the mandate.

The Adopting Release (like the release the same day on payments by resource extraction issuers) includes severability language that may be intended to address the effects of potential litigation. The language states that if any provision of the rule, or its application to any person or circumstance, is held to be invalid, that invalidity shall not affect other provisions or the application of those provisions to other persons or circumstances that can be given effect without the invalid provision or application. It also provides that if any portion of Form SD not related to conflict minerals disclosure is held to be invalid, that invalidity shall not affect the use of the form for purposes of conflict minerals disclosure.[40]

Despite the potential for litigation, however, given the significant efforts that will be needed for compliance, companies should undertake the necessary preparations that will keep them on a timetable to submit a report in 2014 covering the 2013 calendar year.

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38 *Business Roundtable v. SEC*, 647 F.3d 1144 at 1146 (D.C. Cir. 2011).

39 Adopting Release, p.244.

40 Adopting Release, p.243.

V. NEXT STEPS AND RECOMMENDATIONS

- *Determine whether the company is subject to the conflict minerals disclosure rules. (See Annexes B-1 and B-2 for flowcharts.)*

  - Is the company a reporting company under the Exchange Act? Even if not, the company may nonetheless need to provide conflict minerals information about products it supplies directly or indirectly to U.S. reporting companies.[41]

  - Does the company manufacture products or product components that contain conflict minerals or contract to manufacture products or product components that contain conflict minerals?

    - Analyze products and product components to determine whether conflict minerals contained therein are necessary to the products' functionality or production.

    - Analyze such products and product components to determine whether any conflict minerals are present, even in trace amounts.

    - Survey suppliers to determine whether products or components obtained from those suppliers contain conflict minerals.

    - Conflict minerals are found in a diverse range of products and applications, including electronics, jewelry, specialty glass, metal alloys, tin plating and solders for joining pipes and electronic circuits, metal plating, communications and aerospace equipment, light bulb/x-ray filaments, lubricants, metal coatings, electrical components, metal wires, electrodes and electrical contacts. Also consider the content of items such as product packaging and ornamentation.

  - Ensure all products are considered for which the manufacture was complete starting January 1, 2013, including products contracted to be manufactured by another party. Where a product component contains conflict minerals, completion of the final product is the relevant date.

[41] The U.S. Department of State stated in a comment letter on the proposed rules that it would encourage private companies not subject to the disclosure requirements to voluntarily disclose conflict minerals information. Comment Letter from Robert D. Hormats, Under Secretary of State for Economic, Energy, and Agricultural Affairs, and María Otero, Under Secretary of State for Democracy and Global Affairs, U.S. Department of State (Mar. 24, 2011), available at http://www.sec.gov/comments/s7-40-10/s74010-201.pdf.

- *Establish a compliance program and allocate resources.*

  - Establish a company working group, including individuals with responsibility for engineering, legal, public relations, quality, supply management and corporate responsibility.

  - Assign specific authority and responsibility for the program at a senior level.

  - Assess need for outside consultants.

  - Ensure sufficient resources.

  - Establish an organizational structure and communication processes to ensure that critical information, including the supply chain policy, reaches relevant employees and suppliers and that detected noncompliance can be reported and remediated promptly.

  - Establish a system of controls over the mineral supply chain and related systems.[42]

  - Plan required personnel training (*e.g.*, management, engineering, supply chain management, quality, public relations, corporate responsibility and legal staff), including with respect to compliance.

  - Incorporate supply chain processes and policy into company-wide code of conduct and grievance mechanism.

- *Consider establishing a conflict minerals policy describing the company's practices regarding conflict minerals sourcing.*

  - The policy could include a statement about the company's policy on supply chain transparency, basic principles on conflict mineral sourcing and the steps the company is taking and plans to take regarding supply chain management.

  - The OECD has published model supply chain policies,[43] and many companies, particularly in the technology sector, have adopted and published on their websites conflict minerals policies.

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[42] In large part, these controls may be required as part of the disclosure controls and procedures mandated by Rules 13a-15 and 15d-15 under the Exchange Act.

[43] See OECD due diligence guidance, p.20 and OECD interim progress report, p.11.

- *Engage with suppliers.*
    - Identify and contact each entity in the company's supply chain about the company's expectations for its supply chain.
    - Where practicable, establish long-term relationships with suppliers rather than short-term or one-off contracts, to facilitate a common understanding and simplify supply chain diligence.
    - Consider ways to support and build supplier capabilities to improve their performance and conform more quickly to the company's conflict minerals policy. As needed, design measurable improvement plans with suppliers to track progress.
    - Develop formal policies for terminating non-responsive and non-compliant suppliers.
    - If a supplier, consider ways to streamline due diligence processes and representations to clients, including use of industry-wide initiatives and tools (examples of which are described above under "International Context"). Monitor developments on an ongoing basis.
- *Establish a traceability system over mineral supply chain.*
    - Select the due diligence framework to be used (as noted above, the OECD due diligence framework is currently the only nationally or internationally recognized framework). Monitor development of other approaches on an ongoing basis.
    - Establish data management and collection systems capable of supporting supplier identification, prioritization, responses and smelter identification.
    - Develop questionnaires and certifications for suppliers and determine any additional documentation, due diligence and compliance requirements.
    - Consider using industry-wide guidelines, initiatives and tools for supply chain management, including template letters for suppliers and customers, data exchange standards for conflict minerals and chain-of-custody programs. (For a description of some of these initiatives, see "International Context" above.) Monitor developments on an ongoing basis.
    - System should include identification of conflict minerals that are "outside the supply chain" prior to January 31, 2013.

- *Identify, assess and respond to risks related to the reliability of the due diligence process.*[44]

  - OECD due diligence framework provides guidance for risk assessment and response.

  - Develop, adopt and implement a risk management plan.

  - If a downstream company (*e.g.*, metal traders and exchanges, component manufacturers, product manufacturers, original equipment manufacturers and retailers):

    - If possible, identify smelters/refiners in the supply chain.

    - Engage with smelters/refiners and obtain information on country of origin of conflict minerals and the transit and transportation routes used between the mine and the smelters/refiners. Be alert for red flags that should prompt additional diligence, such as minerals transported through a covered country or minerals claimed to originate from a country with limited known reserves or expected production levels of that mineral.

    - Conduct an independent third-party audit of conflict mineral due diligence by smelters/refiners.

- *Consider alternative sources of conflict minerals.*

  - Find alternative sources for conflict minerals to replace non-responsive, non-compliant or high-risk smelters/refiners or suppliers.

  - Consider alternative sources for conflict minerals as part of contingency planning.

- *Amend contracts to address conflict minerals policy.*

  - Amend procurement and supplier contracts to:

    - require suppliers to follow the company's policy regarding the use of conflict minerals and any materials containing conflict minerals; and

    - require suppliers to cooperate with the company's efforts to meet its conflict minerals reporting obligations, including providing any

[44] To the extent that a company decides to implement a conflict-free supply chain policy, it should also include risks that its operations might be contributing to conflict. See p.16 and note 31 above for a discussion of the approach to risk in the OECD due diligence framework.

information the company may request and cooperating with any inquiry or audit with respect to the conflict minerals supply chain, including, if necessary, the right of the company to conduct unannounced spot-checks and inspect documentation.

- Consider requiring direct suppliers to include "flow down" clauses in contracts with sub-suppliers.

- Consider including confidential supplier disclosure requirements regarding use of, or requirements for suppliers to use, specific smelters/refiners.

- If a supplier, consider establishing standardized form of representations to give customers.

- *Consider communications strategy.*

  - Beyond the required disclosure, consider whether to publish conflict minerals policy, include disclosure in sustainability or corporate responsibility reports, or otherwise highlight company activities.

* * *

Please feel free to call any of your regular contacts at the Firm or any of our partners and counsel listed under "Capital Markets" or "Corporate Governance" in the Practices section of our website (http://www.clearygottlieb.com) if you have any questions.

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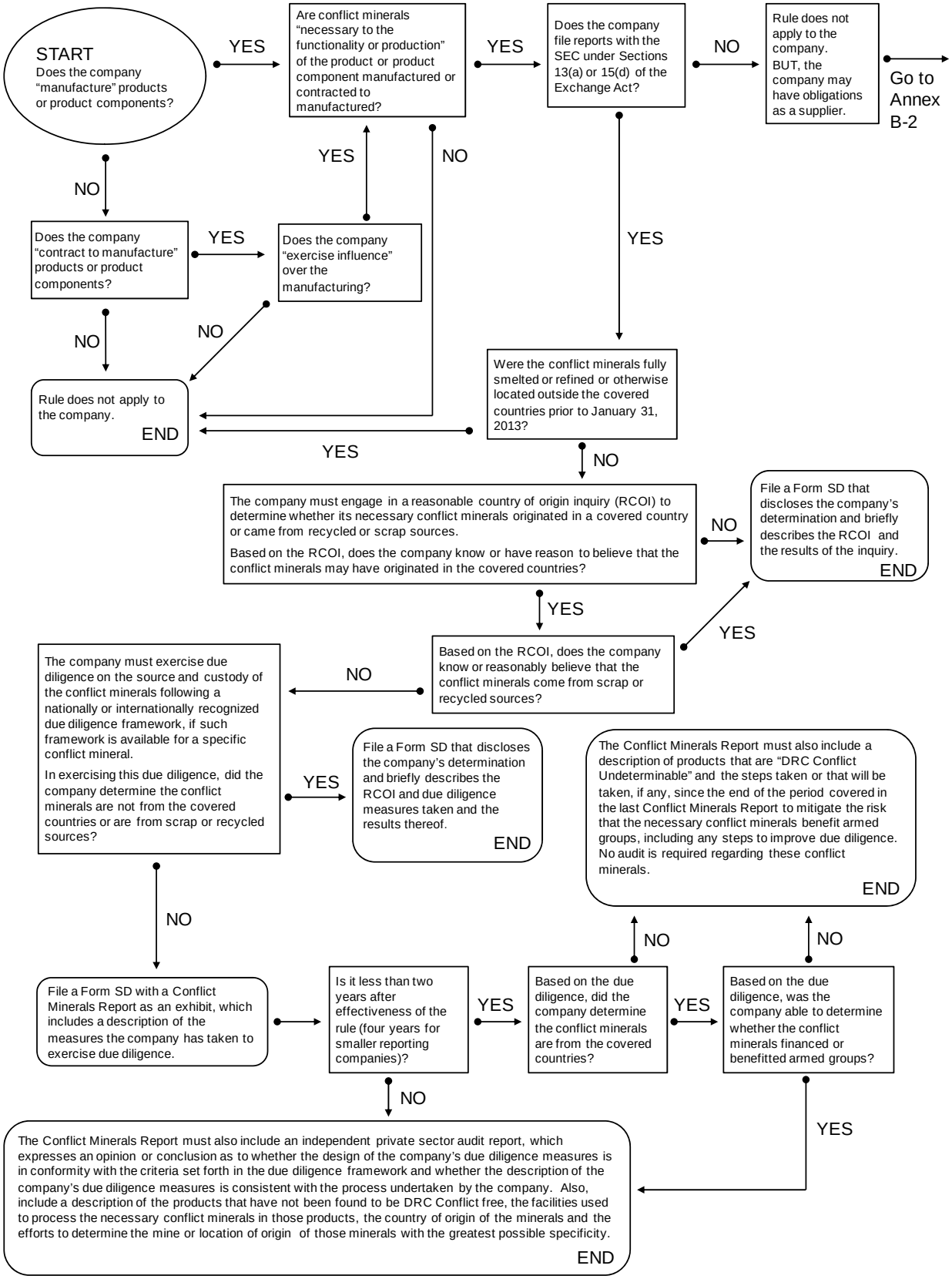
Annex A

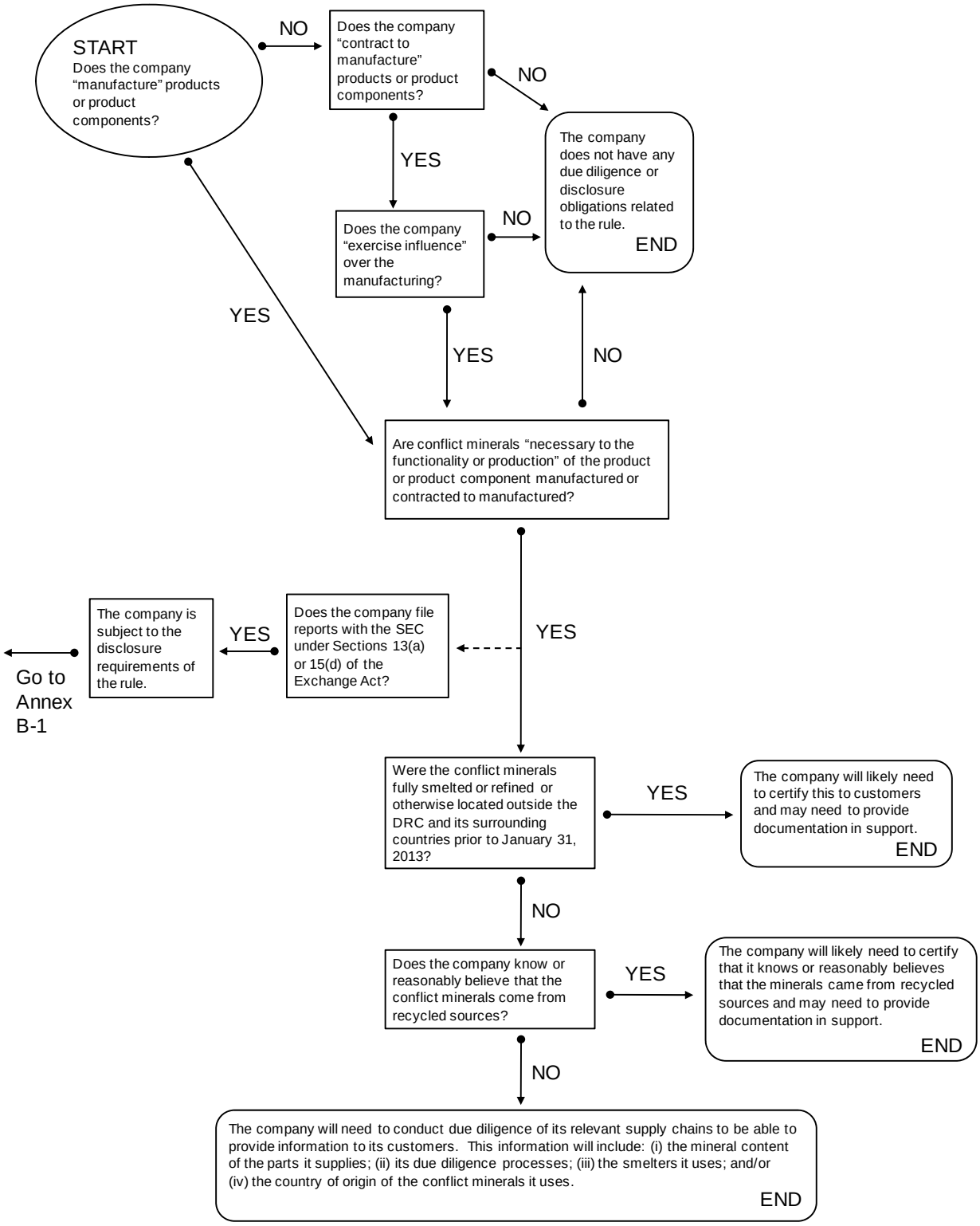
Covered Countries

Reporting Company Flowchart[45]



[45] This flowchart is adapted from the flowchart included in the Adopting Release.

Supplier Flowchart



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