



Dodd-Frank Wall Street Reform and Consumer Protection Act Frequently Asked Questions

Conflict Minerals

May 30, 2013

In these Frequently Asked Questions (FAQs), the Division of Corporation Finance is providing guidance on various aspects of Exchange Act Section 13(p), Rule 13p-1 and Item 1.01 of Form SD relating to disclosure regarding the use of conflict minerals from the Democratic Republic of the Congo or adjoining countries. Please refer to Release No. 34-67716 (August 22, 2012) for further information concerning the Section 13(p) rule. These FAQs are not rules, regulations, or statements of the Commission. Further, the Commission has neither approved nor disapproved these FAQs.

(1) Question:

Rule 13p-1 states that "[e]very registrant that files reports with the Commission under Sections 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act, having conflict minerals that are necessary to the functionality or production of a product manufactured or contracted by that registrant to be manufactured, shall file a report on Form SD within the period specified in that Form disclosing the information required by the applicable items of Form SD as specified in that Form (17 CFR 249b.400)." Does this requirement apply to any issuer that files reports with the Commission under Exchange Act Sections 13(a) or 15(d), including voluntary filers?

Answer:

Yes. The rule applies to all issuers that file reports with the Commission under Exchange Act Sections 13(a) or 15(d), whether or not the issuer is required to file such reports. However, registered investment companies that are required to file reports pursuant to Rule 30d-1 under the Investment Company Act are not subject to the rule. See General Instruction C to Form SD.

(2) Question:

Instruction 1 to Item 1.01 of Form SD states that an issuer that mines conflict minerals would not be considered to be manufacturing those minerals for purposes of the rule. Does this Instruction exclude all of the activities customarily associated with mining from the rule? For example, gold mining of lower grade ore often involves, in addition to mining the ore, transporting the mined ore to a processing facility; crushing and milling the ore; mixing crushed/milled ore with cyanide solution; floating cyanide

mixture through a leaching circuit; extracting gold from a leached circuit; melting leached gold, which is often referred to as smelting, into ingots or bars, which are often referred to as doré gold; and transporting the doré gold to refinery for refining process.

Answer:

Yes. An issuer that only engages in those activities customarily associated with mining, including gold mining of lower grade ore, is not considered to be manufacturing those minerals.

(3) Question:

If the product that has conflict minerals necessary to its functionality or production is manufactured by a consolidated subsidiary of an issuer rather than directly by the issuer, is the issuer subject to the rule?

Answer:

Yes. An issuer must determine the origin of conflict minerals, and make any required disclosures regarding conflict minerals, for itself and all of its consolidated subsidiaries.

(4) Question:

Is an issuer that specifies that its logo be etched into a generic product that is manufactured by a third party considered to be "contracting to manufacture" the product?

Answer:

No. The Commission in the adopting release stated that an issuer is not considered to be "contracting to manufacture" a generic product if its actions involve no more than "affixing its brand, marks, logo, or label to a generic product manufactured by a third party." Etching or otherwise marking a generic product that is manufactured by a third party, with a logo, serial number, or other identifier is not considered to be "contracting to manufacture."

(5) Question:

If a product manufactured by an issuer or contracted by an issuer to be manufactured contains a conflict mineral solely because the conflict mineral is 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? We note that the issuer has not contracted to manufacture 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. In this regard, there is no distinction between the components of a product that an issuer directly manufactures or contracts to manufacture and the "generic" ones it purchases to include in a product.

(6) Question:

An issuer manufactures or contracts to manufacture a package or container that contains a conflict mineral, and the issuer uses the package or container in the display, transport, or sale of a product the issuer also manufactures or contracts to have manufactured. Would a conflict mineral necessary to the functionality or production of the package or container also be considered necessary to the functionality or production of the product under the rule? What if the container or packaging is necessary to preserve the product until the time the product is purchased or used?

Answer:

No. Only a conflict mineral that is contained in the product would be considered "necessary to the functionality or production" of the product. The packaging or container sold with a product is not considered to be part of the product. Once the consumer starts to use a product, the packaging is generally discarded. This conclusion is true even if a product's package or container is necessary to preserve the usability of that product up to and following the product's purchase. If, however, an issuer manufactures and sells packaging or containers independent of the product, the packaging or containers, in that circumstance, would be considered a product.

(7) Question:

Are issuers 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? For example, are issuers that operate cruise lines required to file reports regarding the conflict minerals in the cruise ships they manufacture or contract to have manufactured?

Answer:

No. The staff would not object if issuers did not file reports on Form SD regarding the conflict minerals in the equipment that they manufacture or contract to have manufactured if that equipment is used for the service provided by the issuer and the equipment is retained by the service provider, is required to be returned to the service provider, or is intended to be abandoned by the customer following the terms of the service. Item 1.01(a) of 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 staff does not interpret equipment used to provide services to be "products" under the rule.

(8) Question:

An issuer manufactures or contracts to have manufactured tools, machines, or other equipment for it to use in the manufacture of products, and those tools, machines, or other equipment contain conflict minerals. If the issuer after using those tools, machines, or other equipment subsequently sells such equipment, is the issuer required to file a report on Form SD regarding the conflict minerals in such equipment?

Answer:

No. The tools, machines, or other equipment are not products of that issuer, and the staff will not view their later entry into the stream of

commerce as transforming them into products of that issuer.

(9) Question:

Item 1.01(c)(2) of Form SD requires an issuer that manufactures products or contracts for products to be manufactured that have not been found to be "DRC conflict free" or that are "DRC conflict undeterminable" to provide a description of those products. What type of product description is required for such products? Does an issuer need to describe such products using model numbers? Does an issuer need to say specifically that the products "have not been found to be 'DRC conflict free'" or are "DRC conflict undeterminable"?

Answer:

As the Commission noted in the adopting release, 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. Regardless of the manner by which an issuer describes its products, however, the description in the Conflict Minerals Report filed with Form SD must state clearly that the products "have not been found to be 'DRC conflict free'" or are "DRC conflict undeterminable," as applicable.

(10) Question:

If an issuer determines that the products it manufactures or contracts to manufacture contain conflict minerals from the Democratic Republic of the Congo or an adjoining country, but the products are "DRC conflict free," is that issuer required to file a Form SD with a Conflict Minerals Report and obtain an independent private sector audit of the Conflict Minerals Report?

Answer:

Yes. The issuer, however, is not required to disclose the products containing those conflict minerals in its Conflict Minerals Report or provide certain other disclosures specified in Item 1.01(c)(2) of Form SD because those products are "DRC conflict free."

(11) Question:

Instruction 3 to Item 1.01 of Form SD permits an issuer that acquires or otherwise obtains control over a company that manufactures or contracts to manufacture products with conflict minerals necessary to the functionality or production of those products that previously had not been obligated to provide a specialized disclosure report for those minerals to report on the acquired company's products beginning with the first reporting calendar year that begins no sooner than eight months after the effective date of the acquisition. Is a similar accommodation provided for an issuer that conducts an initial public offering?

Answer:

Yes. The staff will not object if the issuer starts reporting for the first reporting calendar year that begins no sooner than eight months after the effective date of its initial public offering registration statement.

(12) Question:

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. In determining eligibility for use of Form S-3, the requirement that the registrant has filed in a timely manner all reports and materials required to be filed during the prior twelve calendar months refers only to Exchange Act Section 13(a) or 15(d) reports and Exchange Act Section 14(a) and 14(c) materials. See Compliance and Disclosure Interpretation Question 115.04 under Securities Act Forms. Form SD regarding conflict minerals is required to be filed under Exchange Act Section 13(p). Therefore, the filing of Form SD regarding conflict minerals does not impact an issuer's eligibility to use Form S-3.

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

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