Skadden

Securities Regulation and Compliance Alert

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Conflict Minerals Disclosures Due June 1, 2015

Conflict minerals disclosures on Forms SD for calendar year 2014, if required, must be filed with the U.S. Securities and Exchange Commission (SEC) by June 1, 2015 — the Monday after the annual May 31 due date. As companies finalize these reports, we note the following points of interest:

Status of legal challenge. It has been over a year since the D.C. Court of Appeals' April 2014 decision that deemed the requirement for companies to label their products in the conflict minerals disclosures as not "DRC conflict free" unconstitutionally compelled speech in violation of the First Amendment. After the court decided in November 2014 to reconsider its decision, most observers expected further action before the next Form SD filing deadline. At this point, however, no such further action is likely to occur by June 1, 2015.

Absent further guidance, the steps the SEC and its staff took in response to the ruling will remain in effect. The SEC issued a partial stay of the conflict minerals rules and the SEC's Division of Corporation Finance issued interim guidance that relieved companies from having to label their products as originally prescribed by the rules and, in some instances, having to obtain an independent private sector audit until the SEC or a court takes further action. Most companies chose to rely on this guidance in preparing their 2013 conflict minerals reports and, therefore, did not label their products or obtain an audit of their conflict minerals disclosures. We expect the same approach will be taken this year.

SEC staff guidance. The SEC staff promised, and most observers expected, further written guidance after the filing of the first set of Form SDs and conflict minerals reports. Although the staff has not issued any new guidance, and we do not expect it to do so before the end of the month, certain members of the staff have made public comments about the reports that may be helpful.

First, the staff has noted that it disagrees with the view that the description required in the conflict minerals report of the facilities used to process the necessary conflict minerals in a company's products does not require a list of the company's smelters. Many companies provided only a general description of the types of facilities used in their reports last year. It is our understanding that those companies believed that if smelters were required to be disclosed, the rules would have specifically included this requirement. As a result of the staff's guidance, we recommend that companies reconsider their decision to not name smelters when preparing their 2014 conflict minerals reports.

The staff also has noted that it believes certain companies used language in their conflict minerals reports that potentially could be viewed as a determination by the company that its products are conflict-free. The staff stated in public guidance that companies could describe their products as conflict-free only if they obtained an independent third-party audit of their conflict minerals disclosures. As a result, companies should be mindful of this guidance when describing their products in their reports.

Finally, the staff has commented that it expects to see separate descriptions of reasonable country of origin inquiries (RCOI) and due diligence efforts. This comment seems to be in response to the approach some companies took last year that combined those descriptions. Although elements of the RCOI can certainly support a company's due diligence efforts, we recommend that the disclosures in the conflict minerals reports clearly address each item separately.

Describe improvements and anticipated future steps. One of the requirements for a company that is unable to determine whether its products are conflict-free is to disclose the steps it has taken and expects to take to improve its diligence since the end of the period covered by its prior conflict minerals report. Companies should carefully consider changes they have made, including analyzing their prior disclosures, to ensure they will be in a position to report progress. In doing so, companies also may want to consider a recent report issued by Amnesty International and Global Witness, titled "Digging for Transparency: How U.S. Companies Are Only Scratching the Surface of Conflict Minerals Reporting," which takes a critical view on companies' efforts to comply with the conflict minerals rules.

Finally, depending on the outcome of the pending litigation, companies may be required to engage an independent auditor to express an opinion on the design and description of the due diligence measures employed during calendar year 2015. To prepare for this possibility, we recommend that companies begin considering the steps required to identify and engage an auditor for this process.