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SEC Releases Additional Conflict Minerals FAQs — An Overview for Issuers and Audit Professionals

Yesterday afternoon, the SEC published nine additional FAQs relating to the Conflict Minerals Rule, as described below.

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As was the case with the first set of FAQs released during May 2013, most of the new FAQs hew closely to the Rule, Adopting Release or prevailing market practice. However, a few of the FAQs provide important additional clarity. The full text of the FAQs is available [here](#). Our Alert discussing the May 2013 FAQs is available [here](#).

Although the FAQs provide some additional clarity, they do not address the vast majority of filing-related issues — both within and outside the four corners of the filing — that issuers are grappling with. As of today, there are 55 days until the first Form SD is due. Our strong recommendation is that issuers that have not yet started to prepare their filing do so in earnest. For a discussion of some of the considerations that issuers should take into account as they prepare their first filing, see our recent White Paper.

A summary of the FAQs, in the order presented by the SEC, follows:

Non-CPA Firms May Perform Performance Audits

The FAQs reiterate that an auditor that is not a certified public accountant may perform the independent private sector audit of an issuer's Conflict Minerals Report pursuant to the Performance Audit provisions in the U.S. Government Accountability Office's Yellow Book standards. The Yellow Book standards are available [here](#). (FAQ #13)

An Audit Is Not Required if any Products are DRC Conflict Undeterminable

If, after exercising due diligence, an issuer determines that at least one of its products may be described as DRC conflict undeterminable, the issuer is not required to obtain an audit of its Conflict Minerals Report during the temporary DRC conflict undeterminable transition period. This period is four years for smaller reporting companies and two years for all other issuers. (FAQ #14)

This FAQ provides important additional and welcome clarity for issuers, since most professionals took a narrower view of the DRC conflict undeterminable audit exception. As a result of this FAQ, very few issuers are likely to require an audit before the 2015 program year.

Products May Not Be Described as DRC Conflict Free in the CMR if Some Products are DRC Conflict Undeterminable

If an issuer does not obtain an audit of its Conflict Minerals Report because a product is DRC conflict undeterminable, it may not describe any of its other products as DRC conflict free in the Conflict Minerals Report. The SEC notes in the FAQs that the Adopting Release indicates that an issuer may choose, in its Conflict Minerals Report, to describe its products with conflict minerals sourced from the DRC region as DRC conflict free if, based on

its due diligence, the issuer is able to determine that the conflict minerals in those products did not finance or benefit armed groups in the region. The FAQs go on to note that the Conflict Minerals Rule defines due diligence as including an audit of the Conflict Minerals Report. Therefore, according to the FAQs, to be able to describe qualifying products in its Conflict Minerals Report as DRC conflict free, an issuer must have obtained an audit. (FAQ #15)

A Product with Undeterminable Conflict Minerals Content Cannot Be Described as DRC Conflict Free

During the temporary DRC conflict undeterminable transition period, if an issuer has a product that would qualify as DRC conflict free, except that the product contains a conflict mineral that the issuer is unable to determine did not originate in the DRC region, or for which it is unable to determine did not directly or indirectly finance or benefit armed groups in the region, the issuer may not describe that product as DRC conflict free. (FAQ #16)

Products that Support Conflict Must Be Described as Having Not Been Found To Be DRC Conflict Free

Both during and after the temporary DRC conflict undeterminable transition period, if an issuer determines that a product contains a conflict mineral that did finance or benefit armed groups in the DRC region, it must describe that product as having not been found to be DRC conflict free. (FAQ #16)

The Scope of the CMR Audit Is Limited

The scope of the audit does not include the completeness or reasonableness of the issuer's due diligence, including with respect to which products the issuer described as DRC conflict free or having not been found to be DRC conflict free, or which suppliers are covered by the due diligence measures. The audit scope is limited to the audit objectives provided for in the Conflict Minerals Rule. Under the rule, there are two audit objectives: (1) whether the design of the issuer's due diligence measures as set forth in, and with respect to the period covered by, the issuer's 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 issuer; and (2) whether the issuer's description of the due diligence measures it performed as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the issuer undertook. The audit is not required to cover any matter beyond those objectives, including the completeness or reasonableness of the due diligence measures actually performed. (FAQ #17)

If the Same Framework Is Used for the RCOI and Due Diligence, the RCOI Is Not Required To Be Audited

Most issuers utilize substantially the same procedures for their reasonable country of origin inquiry and due diligence, and the SEC indicated in the Adopting Release that the RCOI is consistent with the supplier engagement approach in the OECD framework. The FAQs clarify that, where the nationally or internationally recognized due diligence framework encompasses the RCOI requirement, the audit does not also include the issuer's RCOI. The FAQs indicate that the audit does not need to include the RCOI because, under the Conflict Minerals Rule, that inquiry is a distinct step separate from the due diligence process. As a result, the auditor need only opine on whether the design of the issuer's due diligence framework is in accordance with the portion of the nationally or internationally recognized due diligence framework beginning after the country of origin determination. With respect to the second audit objective, the issuer's Conflict Minerals Report is required to describe the due diligence measures it undertook. As such, the auditor need only opine on whether the issuer actually performed the due diligence measures described in the Conflict Minerals Report after the issuer determined it had reason to believe its conflict minerals may have originated in the DRC region. (FAQ #18)

If a Product Contains Recycled or Scrap Minerals and Minerals that Trigger a CMR, Disclosure in the Body of the Form SD Is Required

If a product manufactured or contracted to be manufactured by an issuer includes some conflict minerals from recycled or scrap sources (which would not require the issuer to file a Conflict Minerals Report) and other conflict minerals which would require the issuer to file a Conflict Minerals Report, the issuer must include in the body of its Form SD the required disclosures for the recycled or scrap conflict minerals. The issuer also must file a Conflict Minerals Report as an exhibit to the Form SD that includes a description of the due diligence it performed and any other required disclosures about its conflict minerals that are not from recycled or scrap sources.

The Conflict Minerals Report would not need to include the disclosures for the conflict minerals from recycled or scrap sources. In addition, the audit would not include the conflict minerals from recycled or scrap sources since an issuer is only required to obtain an audit of its Conflict Minerals Report and not of the disclosures contained in the body of its Form SD. (FAQ #19)

Due Diligence Measures Do Not Necessarily Need To Be Performed During the Applicable Calendar Year Compliance Period

The second audit objective — which is whether the issuer's description of the due diligence measures it performed, as set forth in the Conflict Minerals Report, with respect to the period covered by the report, is consistent with the due diligence process that the issuer undertook — does not require the issuer to exercise due diligence constantly throughout the entire calendar year covered by the Conflict Minerals Report. The FAQs also clarify that, although the "period covered by the report" is the calendar year, the issuer's due diligence measures described in the Conflict Minerals Report may begin before or extend beyond the calendar year. (FAQ #20)

The Levels of Detail Required in the CMR Concerning Due Diligence Design and the Measures Performed are Different

The first audit objective requires the auditor to express an opinion or conclusion as to whether the design of the issuer's due diligence measures as set forth in, and with respect to the period covered by, the issuer's 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 issuer. Although the Conflict Minerals Rule indicates that the auditor must express an opinion or conclusion as to the design of the issuer's due diligence measures "as set forth in" the Conflict Minerals Report, the rule does not require an issuer to include a full description of the design of its due diligence in its Conflict Minerals Report.

The second audit objective requires the auditor to opine as to whether the issuer's description in the Conflict Minerals Report of the due diligence measures it performed with respect to the period covered by the report is consistent with the due diligence process that the issuer undertook. Under the Conflict Minerals Rule, the due diligence measures undertaken that are the subject of the second audit objective must be described in the Conflict Minerals Report, and the description must be in sufficient detail for the auditor to be able to form an opinion or conclusion about whether the description in the Conflict Minerals Report is consistent with the process the issuer actually performed. (FAQ #21)

For Further Information

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