On August 22, 2012, the Securities and Exchange Commission (SEC) adopted its long-awaited, final conflict minerals rule. The rule implements the provisions of Section 13(p) of the Securities Exchange Act of 1934 (Exchange Act), which was added by Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 13(p) requires the SEC to adopt regulations requiring each SEC reporting issuer for which “conflict minerals” are necessary to the functionality or production of a product manufactured by the issuer or that the issuer contracts to have manufactured to disclose annually certain information regarding whether any such necessary conflict minerals originated in the Democratic Republic of the Congo (DRC) or one of the countries sharing an internationally recognized border with the DRC (with the DRC, Covered Countries). Section 1502, one of the aptly labeled “name-and-shame” laws, conscripts reporting issuers to serve in the effort to deny financing to armed groups identified as perpetrating serious human rights abuses in the Covered Countries. The designated conflict minerals are in wide use and, therefore, the rule is expected to apply to many SEC reporting issuers and industries.

Issuers with necessary conflict minerals must not only file with the SEC a report on new Form SD covering each calendar year (not fiscal year) and, in some instances, a separate conflict minerals report as an exhibit to their report on Form SD (Conflict Minerals Report), but must also engage in new types of inquiries and, possibly, due diligence investigations that could involve significant new compliance efforts and expense. Although the basic requirements of the final rule are not radically different from those of the proposed conflict minerals rule, the final rule and requirements of Form SD reflect an SEC staff giving careful consideration to the comments on, and the criticisms leveled against, the proposed rule. The requirements of the final rule and Form SD still present a significant compliance burden for many issuers, but their provisions and the guidance the SEC provides in the Adopting Release answer numerous questions raised by the proposed rule and may impose a lighter burden for some issuers than the proposed rule’s terms would have done.

While the rule will become effective 60 days after the Adopting Release is published in the Federal Register, issuers must file their first required reports on Form SD by May 31, 2014 for calendar year 2013. Issuers who may be required to file reports under the rule should quickly implement their procedures for complying with the rule. In light of the high costs of compliance (the SEC estimated $3 to $4 billion initially and some outside estimates are higher), interested parties may challenge the rule in court.

This client alert summarizes the final rule and the requirements of Form SD and discusses practical considerations for issuers to consider.

Subject Issuers

The rule applies to each issuer that files reports with the SEC under Exchange Act Sections 13(a) or 15(d), including domestic issuers, foreign private issuers and smaller reporting companies, for which “conflict minerals” are necessary to the functionality or production of a product that the issuer manufactures or contracts to have manufactured for it.

“Conflict Minerals” Definition
A “conflict mineral” is defined as:

- columbite-tantalite (a precursor to tantalum that is also known as coltan), cassiterite (a precursor to tin), gold, wolframite (a precursor to tungsten), or their derivatives, which are limited to tantalum, tin and tungsten unless the U.S. Secretary of State (Secretary) determines additional derivatives of those minerals are financing conflict in a Covered Country; or
- any other mineral or its derivatives the Secretary determines are financing conflict in a Covered Country.

The Secretary has not determined, at this date, that other minerals or derivatives are financing such conflict. Although the final definition provides more certainty regarding which derivatives of the currently named ores are covered than the proposed definition would have done, the final rule gives the Secretary significant discretion to designate other minerals and derivatives of designated minerals as conflict minerals.

**Three-Step Compliance Process**

The SEC characterizes an issuer’s compliance with the rule as involving a three-step process.

**Step One:** The issuer would determine whether a conflict mineral is necessary to the functionality or production of a product that the issuer manufactures or contracts to have manufactured for it (Necessity Test).

**Step Two:** An issuer that manufactures or contracts to manufacture products that meet the Necessity Test (Conflict Products) would conduct a reasonable country of origin inquiry (RCO Inquiry) to determine if any of the conflict minerals in its Conflict Products originated in a Covered Country or are from recycled or scrap sources and, regardless of the outcome of the RCO Inquiry, prepare and file a report on Form SD to disclose the results of that inquiry and other matters.

**Step Three:** If any conflict minerals in a Conflict Product originated in, or the issuer has reason to believe the conflict mineral may have originated in, a Covered Country and did not come from recycled or scrap sources, the issuer must conduct supply chain due diligence and, if necessary, prepare a Conflict Minerals Report for any Conflict Products containing conflict minerals originating in a Covered Country and not coming from recycled or scrap sources.

Although these steps are described in a very general manner, they may involve a process of great complexity for some issuers. In taking these steps, issuers should keep in mind that the requirements of Form SD relating to conflict minerals disclosure contain a mix of both line item disclosure requirements and requirements for inquiries and due diligence measures that issuers must take.

**Step One—The Necessity Test**

**General.** An issuer will have a product meeting the Necessity Test if:

- the issuer manufactures any product or contracts to have any product manufactured for it; and
- a conflict mineral is necessary to the functionality of that product or necessary to the production of that product and the conflict mineral is contained in the product.

An issuer that does not manufacture any product or contract to have any product manufactured for it or that has no products that it manufactures or contracts to have manufactured for it that meet the Necessity Test will not be required to take any action, make any disclosure or submit any reports under the rule. Whether an issuer meets the Necessity Test as to a product can be a complex determination.

There is no de minimis amount of a conflict mineral that may be present in a product without tripping the rule’s applicability. However, if an issuer does not manufacture or contract to have manufactured for it any product that contains a conflict mineral, the issuer would be free of the rule’s requirements.

**The "manufacture" or "contract to manufacture" requirement.** The terms “manufacture” and “contract to manufacture” are not defined. The SEC suggests that the term “manufacture” is used as it is generally understood, but states its belief that an issuer assembling a product from materials, substances and components manufactured by third parties may be deemed to be manufacturing the product. The SEC does not consider an issuer that only services, maintains, or repairs a product containing conflict minerals to be manufacturing a product.

The determination of when an issuer is “contracting to manufacture” a product is to be made based on the “individual facts and circumstances surrounding an issuer’s business and industry.” Whether an issuer will be considered to be contracting to manufacture a product will turn, in great measure, on the degree of influence the issuer exercises over the materials, parts, ingredients or components to be included in the product, and the
The degree of that influence will be determined based on the issuer’s facts and circumstances. The SEC notes that “contract to manufacture” captures manufacturers that contract to have others manufacture components of their products.

The SEC does provide some very specific guidance that may be helpful to some industries, such as the retail industry. The guidance states that an issuer will not be considered to contract to manufacture a product if the issuer does no more than take one or more of the following actions:

- specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product, unless it specifies or negotiates taking these actions so as to exercise a degree of influence over the manufacturing of the product that is practically equivalent to contracting on terms that directly relate to the manufacturing of the product;
- affixes its brand, marks, logo, or label to a generic product manufactured by a third party; or
- services, maintains, or repairs a product manufactured by a third party.

What degree of specification or negotiation of a contract’s terms, or the type of terms specified or negotiated that, move an issuer into the realm of contracting to manufacture is not precisely defined. Specifying that a product or a component must include a conflict mineral or that a product must include a component known or required to include a conflict mineral will surely cause an issuer to cross the threshold. On the other hand, the SEC views a circumstance in which a cellular telephone service provider specifies that telephones it purchases from a manufacturer for sale to the provider’s customers must function on a certain cellular network as not, in and of itself, involving sufficient influence for the provider to be deemed to be contracting to manufacture the telephones. However, imposing other specifications for the telephones could result in the provider being deemed to be contracting to manufacture the telephones. Helpfully, the SEC has agreed that an issuer reselling generic products purchased from a manufacturer, even ones bearing the reseller’s brand name, with which the reseller had no other involvement is in a position similar to that of a “pure retailer” and should not be deemed to be contracting to manufacture those products.

The language in Rule 13p-1 and Form SD stating the manufacture or contract to manufacture requirement may lead some issuers to question whether manufacturing a Conflict Product for its own use or contracting to have a Conflict Product manufactured for its own use and not for sale by the issuer subjects the issuer to the requirements of the rule. For example, would an airline contracting to have an aircraft manufactured for it for use in carrying the airline’s passengers be subject to the rule’s requirements if that aircraft contained conflict minerals necessary for its functionality? While the literal language of Rule 13p-1 and Form SD appears to capture such an issuer and such Conflict Products, the Adopting Release suggests that an issuer must enter the product in the stream of commerce by offering the product to third parties for consideration in order for the issuer and its Conflict Product to be subject to the rule. Issuers similarly situated to the airline described above may wish to seek clarification of the rule’s application from the SEC.

An issuer that mines or contracts to mine conflict minerals would not be considered to be manufacturing or contracting to manufacture those minerals unless the issuer also engages in manufacturing, whether directly or indirectly through contract, in addition to mining.

The “necessary to the functionality” requirement. Although the rule does not define or provide any bright-line test of when a conflict mineral is necessary to the functionality of a product, the SEC provided guidance on the issue. While this will be a facts and circumstances determination, the SEC advises issuers to consider:

- whether a conflict mineral is contained in and intentionally added to the product or one of its components and is not a naturally-occurring by-product;
- whether a conflict mineral is necessary to the product’s generally expected function, use or purpose; and
- if a conflict mineral is incorporated in the product for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration.

The presence of one or more of the factors could indicate that a conflict mineral is necessary to the functionality of a product.

The intentional addition of the conflict mineral to a product is a significant factor in determining whether this requirement is met. The SEC appears to view the presence of a conflict mineral in a product when the conflict mineral is a naturally-occurring by-product as being an insignificant factor in this determination. However, where the conflict mineral must be present for the product to function as intended and the manufacturing process is contrived to introduce the conflict mineral into the product as a naturally-occurring by-product of that process, an issuer should carefully consider whether the threshold has been crossed.

When determining whether this requirement is met, issuers should focus on a product’s generally expected
function, use or purpose. If a product has multiple functions, uses or purposes, a conflict mineral would need to be necessary to only one of those functions, uses or purposes to be necessary to the functionality of the product.\textsuperscript{8}

**The “necessary to the production” requirement.** The rule is silent on the meaning of the phrase “necessary to the production,” and issuers are once again left with only limited guidance provided by the SEC and their good faith judgment based on the applicable facts and circumstances to determine if this requirement is met. The SEC advises issuers determining if this requirement is met to consider whether a conflict mineral is contained in the product and was intentionally added in the production process, including the production process of a component of the product, and whether the conflict mineral is necessary to produce the product. The SEC takes the position that “only a conflict mineral that is contained in the product should be considered ‘necessary to the functionality or production’ of that product.”\textsuperscript{9} Consequently, a conflict mineral used as a necessary catalyst or that plays some other necessary role in the production of a product will not be deemed necessary to the production of the product unless some quantity, even a trace amount (such as of a catalyst not completely consumed or washed away in the production process), of that conflict mineral ends up as a part of the manufactured product.\textsuperscript{10}

**Conflict minerals outside the supply chain.** In an attempt to ease the compliance burden of the rule, the SEC has exempted issuers from reporting on conflict minerals that were “outside the supply chain” prior to January 31, 2013. Columbite-tantalite, cassiterite and wolframite and their derivatives, tantalum, tin and tungsten, are outside the supply chain if they have been smelted, while gold is outside the supply chain if it has been fully refined. In addition, any conflict mineral or its derivatives that have not been smelted or fully refined are outside the supply chain if they are located outside of the Covered Countries. Consequently, an issuer that manufactures gold jewelry using only gold that is refined, or only gold that is located outside of the Covered Countries, before January 31, 2013, would not have any reporting obligations with regard to that jewelry.

**Step Two—Reasonable Country of Origin Inquiry and the Report on Form SD**

Nature of the inquiry. If an issuer has Conflict Products, it must proceed to Step Two. In Step Two, the issuer will make an RCO Inquiry as to each of the conflict minerals in those Conflict Products. As with the proposed rule, the final rule does not define the nature of an RCO Inquiry. However, unlike the proposed rule, Form SD prescribes that the RCO Inquiry must be reasonably designed to determine whether any of the conflict minerals in the issuer’s Conflict Products originated in a Covered Country or are from recycled or scrap sources.\textsuperscript{11} Fortunately, the SEC states that the RCO Inquiry standard need not result in absolute certainty that all of the issuer’s conflict minerals (i.e., the conflict minerals in the issuer’s Conflict Products) did not originate in a Covered Country. The issuer need only make a reasonable inquiry and make it in good faith.

The SEC expects that the nature of RCO Inquiries will differ from issuer to issuer based on an issuer’s size, products, relationships with suppliers and other factors, as well as the then-available infrastructure for making such inquiries. As information systems relating to the origin of conflict minerals become more robust and sophisticated, issuers may be expected to make correspondingly more robust and sophisticated RCO Inquiries. The SEC states that an issuer’s policies regarding sourcing of conflict minerals will generally form part of its RCO Inquiry and, therefore, those policies would generally have to be disclosed in the issuer’s report on Form SD.

At least for the time being, the SEC will view an issuer as satisfying the reasonable country of inquiry standard if the issuer obtains from the appropriate processing facility or supplier reasonably reliable representations indicating the facilities at which the issuer’s conflict minerals were processed and demonstrating that those conflict minerals did not originate in a Covered Country or that they came from recycled or scrap sources. The issuer must have a reason to believe those representations are true in light of the surrounding facts and circumstances. Such reasons could be of various types, but should have some support independent of the issuer’s views of the representing party’s reliability. For example, representations from a processing facility holding a “conflict-free” designation from a recognized industry group that requires an independent audit of the facility or for which there is a publicly available independent audit should meet the reasonably reliable representation standard. Moreover, the SEC will not require that the inquiring issuer receive a response from each and every supplier and manufacturer in order to reach a conclusion about the country of origin of its conflict materials provided that the inquiring issuer does not ignore warning signs and other red flags that the conflict minerals provided by any non-responsive supplier or manufacturer originated or may have originated in a Covered Country.\textsuperscript{12}

In the Proposing Release, the SEC indicated that it would assess the reliability of an RCO Inquiry based on whether the information obtained or used in the inquiry provides a reasonable basis for an issuer to trace the origin of the subject conflict minerals. The Adopting Release does not contain a similar indication, but issuers should assume that the SEC and social activists will scrutinize the description of RCO Inquiries in issuers’ reports on Form SD and judge those RCO Inquiries at least by a reasonableness, if not a harsher, standard.
Actions after completing the RCO Inquiry. Based on an issuer’s RCO Inquiry, the issuer will determine, as to each of the conflict minerals for which the RCO Inquiry is made, that:

- the conflict mineral did not originate in a Covered Country or came from recycled or scrap sources;
- it has no reason to believe the conflict mineral may have originated in a Covered Country or reasonably believes the conflict mineral came from recycled or scrap sources;
- it knows that the conflict mineral originated in a Covered Country and is not from recycled or scrap sources; or
- it has reason to believe the conflict mineral may have originated in a Covered Country and has reason to believe the conflict mineral may not have come from recycled or scrap sources.

If the RCO Inquiry results in one of the conclusions in the first two bullet points above, the issuer must file a report on Form SD but need not file the burdensome Conflict Minerals Report (discussed in more detail below). In the report on Form SD, the issuer will disclose its determinations under, and the results of, its RCO Inquiry, and briefly describe its RCO Inquiry. The issuer must also post this information on its website and in its report on Form SD provide a link to its website. Upon the issuer filing its report on Form SD, its labors under the rule with respect to the calendar year covered by the report on Form SD would come to an end. In the event that the RCO Inquiry produced one of the conclusions in the last two bullet points above, however, the issuer would move on to Step Three.

Step Three—Due Diligence and the Conflict Minerals Report

If the results of an issuer’s RCO Inquiry cause the issuer to have to proceed to Step Three as to any conflict mineral in a Conflict Product, the issuer must exercise due diligence on the source and chain of custody of that conflict mineral. The ultimate goal of the due diligence would be to determine if the conflict minerals in the issuer’s Conflict Products originated in a Covered Country and financed or benefited an armed group perpetrating serious human rights abuses in a Covered Country. Responding to the criticism of the proposed rule’s lack of any standard of what would constitute acceptable due diligence measures, the SEC included a requirement in Form SD that an issuer’s due diligence conform to a nationally or internationally recognized due diligence framework if such a framework is available for the particular conflict mineral.[13]

To satisfy the due diligence requirement, a framework must have been established by a body or group that has followed due-process procedures, including disseminating the framework broadly for public comment, and be consistent with the standards in the Government Auditing Standards (GAGAS) established by the U.S. Government Accountability Office. The SEC recognizes the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Guidance) of the Organisation for Economic Co-Operation and Development (OECD)[14] as satisfying the SEC’s criteria for due diligence frameworks and currently believes the OECD Guidance to be the only nationally or internationally recognized due diligence framework in existence at this time.

If the due diligence investigation results in the issuer determining that a conflict mineral did not originate in a Covered Country or did come from a recycled or scrap source, the issuer would disclose that determination in its report on Form SD, giving a brief description of its RCO Inquiry and the due diligence efforts it undertook in making that determination and the results of its RCO Inquiry and due diligence efforts. The issuer must also post this information on its website and in its report on Form SD provide a link to its website. However, the issuer would not be required to file a Conflict Minerals Report as an exhibit to its report on Form SD.

If the foregoing determination is not made regarding all of the conflict minerals as to which the issuer is conducting source and chain of custody due diligence in Step Three, the issuer must prepare and file a Conflict Minerals Report as an exhibit to its report on Form SD relating to each conflict mineral for which that determination is not made and post the Conflict Minerals Report on its website.

Conflict Minerals Report. A Conflict Minerals Report must contain a description of the measures the issuer took to exercise due diligence on the source and chain of custody of the conflict minerals as to which the issuer must make the Conflict Minerals Report. Issuers should note that, while Form SD requires reports on Form SD to give a “brief description” of or “briefly describe” the issuer’s RCO Inquiry and, if required in a report on Form SD when no Conflict Minerals Report is required as described above, its due diligence efforts, Form SD does not similarly qualify the nature of the description of an issuer’s due diligence efforts required to appear in a Conflict Minerals Report.

If the issuer has Conflict Products that are not “DRC conflict free,” the issuer’s Conflict Minerals Report must describe those Conflict Products that are not DRC conflict free, the facilities used to process the conflict minerals in those Conflict Products, the country of origin of the conflict minerals and the issuer’s efforts to determine the mine or location of origin of the conflict minerals with the “greatest possible specificity.” Conflict Products are
“DRC conflict free” if they contain only conflict minerals that:

- do not directly or indirectly finance or benefit an “armed group” in a Covered Country; or
- were obtained by the issuer from recycled or scrap sources.

Although the matter is unclear under the definition of “DRC conflict free,” presumably the SEC means for any Conflict Products that an issuer contracts to have manufactured for it to be deemed DRC conflict free if the manufacturer obtains the conflict minerals contained in those Conflict Products from recycled or scrap sources.

If, after conducting its due diligence, an issuer is unable to determine whether or not its Conflict Products are DRC conflict free (which Conflict Products would be classified as “DRC conflict undeterminable”), for the first two calendar years after effectiveness of the rule (and for another two calendar years thereafter for smaller reporting companies), the issuer’s Conflict Minerals Report must describe (1) those Conflict Products that are DRC conflict undeterminable, (2) the facilities used to process the conflict minerals in those Conflict Products, if known, (3) the country of origin of the conflict minerals, if known, and (4) the issuer’s efforts to determine the mine or location of origin of the conflict minerals with the “greatest possible specificity.” For any Conflict Products that are DRC conflict undeterminable, the issuer must disclose the steps it has taken or will take, if any, since the end of the period covered by its most recent Conflict Minerals Report to mitigate the risk that the conflict minerals included in those Conflict Products benefit armed groups, including any steps to improve its due diligence. It appears that this latter requirement will continue to apply beyond the two or four-year grace period described above.

After the applicable grace period, an issuer must describe any Conflict Products that are DRC conflict undeterminable as having not been found to be DRC conflict free and provide the information required for Conflict Products that are not DRC conflict free. It is not clear how, after the applicable grace period, an issuer will report the facilities used to process the subject conflict minerals or their country of origin if, even after implementing the most rigorous due diligence measures, the issuer cannot determinate the identity of such facilities or the country of origin.

Audit of the Conflict Minerals Report. An issuer’s due diligence measures must include an independent private sector audit of the Conflict Minerals Report, which is characterized as a critical component of the due diligence process. The audit must be conducted in accordance with standards established by the U.S. Comptroller General, which are currently (and are expected to remain) GAGAS. An issuer’s independent public accounting firm may conduct the audit without necessarily compromising that firm’s independence under the independence requirements of Rule 2-01 of Regulation S-X.

Unlike the proposed rule, the final rule sets out the objective of this audit, which is to express an opinion or conclusion as to whether:

- the design of the issuer’s due diligence measures as described in, and for the period covered by, the Conflict Minerals Report was in conformity, in all material respects, with the recognized due diligence framework used by the issuer; and
- the description of the due diligence measures the issuer performed that appears in the Conflict Minerals Report is consistent with the due diligence process the issuer undertook.

The Conflict Minerals Report must include a statement that the issuer obtained the audit (which will constitute an audit certification, but will not be separately signed by an officer of the issuer), identify the auditor (if it is not identified in the audit report) and include the audit report prepared by the auditor in accordance with GAGAS.

For the first two calendar years after the rule is effective, any issuer with Conflict Products that are DRC conflict undeterminable will not need to obtain an audit of the Conflict Minerals Report, at least with respect to such Conflict Products. Smaller reporting companies have the benefit of that exception to the audit requirement for an additional two calendar years after the initial two-year period.

Upon the filing of a report on Form SD that attaches as an exhibit any required Conflict Minerals Report and the required posting of both reports on the issuer’s website, the issuer will have complied with the requirements of Rule 13p-1 and Form SD for the calendar year covered by the report on Form SD.

SEC Review of Conflict Minerals Reports

Exchange Act Section 13(p) provides that, if an issuer relies on a private sector audit or other due diligence processes previously determined by the SEC to be unreliable, the Conflict Minerals Report will not satisfy the rule’s requirements. The SEC has stated that it “may determine an issuer’s independent private sector audit or other due diligence processes to be unreliable and any Conflict Minerals Report that relies on such unreliable due diligence process would not satisfy the statute’s reporting requirement.” In light of that statement, issuers will
have to take care to ensure that the audit of their Conflict Minerals Reports and the due diligence measures they employ are not of a type that has been previously determined by the SEC to be unreliable.

**Liability for Reports on Form SD and Conflict Minerals Reports**

Unlike the proposed rule, the final rule provides that reports on Form SD and Conflict Minerals Reports will be “filed” with the SEC. As a result, issuers will have liability under Exchange Act Section 18 for false or misleading material statements in those reports. An issuer would have the standard defense to Section 18 claims if the issuer can prove it acted in good faith and had no knowledge that the statement complained of was false or misleading. Properly conducted RCO Inquiries and due diligence investigations should help issuers ensure their disclosures are not false or misleading.

**Incorporation by Reference**

General Instruction B.4. to Form SD provides that reports on Form SD and Conflict Minerals Reports (which include the audit report) will not be deemed incorporated by reference into any filing under the Securities Act of 1933 (e.g., a registration statement) or the Exchange Act, unless an issuer specifically incorporates those reports by reference.

**Signatures**

Unlike Exchange Act annual reports, chief executive officer and chief financial officer certifications are not required for reports on Form SD or Conflict Minerals Reports. However, reports on Form SD must be signed by an executive officer, but not by the issuer’s directors.

**Practical Considerations**

**Complete compliance efforts soon.** Many issuers started preparing to comply with the conflict minerals rule not long after the SEC issued the proposed rule. Those issuers must now ensure any compliance procedures they finally implement are consistent with the final rule’s requirements. Issuers that may be affected by the rule and have not yet started their preparations for compliance should do so immediately.

Any product manufactured in calendar year 2013 will be the potential subject of the issuer’s first report on Form SD and, if required, Conflict Minerals Report. For issuers that contract to have products manufactured for them, this means that any of their products manufactured in 2013 will be a part of their 2013 report, even if the issuer did not take delivery of those products until 2014 or later. In light of this application of the rule, an issuer’s compliance procedures should include procedures for tracking the date of manufacture of those products the issuer manufactures itself and those products the issuer contracts to have manufactured for it.

Issuers that have not already done so should familiarize themselves with the OECD Guidance and should engage with their suppliers of conflict minerals in raw material form or the manufacturers with whom they contract for the manufacture of products or of product components that may contain conflict minerals to determine how best to work with those suppliers and manufacturers to conduct RCO Inquiries and, if necessary, due diligence on the source and chain of custody of their conflict minerals consistent with the OECD Guidance.

Conflict minerals contained in Conflict Products over the course of a year may come from different sources. As a result, issuers should not wait until later in 2013 to start collecting the necessary information as to the conflict minerals contained in the Conflict Products manufactured in 2013, but should begin to collect that information starting at the first of the year.

**Review sourcing policies.** The SEC considers that an issuer’s policies regarding sourcing of conflict minerals will generally form part of its RCO Inquiry and, if they do, those policies will generally be required to be disclosed in the report on Form SD. As a result, issuers may wish to revisit their sourcing policies to ascertain if they provide appropriate policies regarding the sourcing of conflict minerals and use of conflict minerals that are not DRC conflict free and modify those policies as appropriate to lessen the burden of compliance with the rule and to prevent reputational damage to the issuer.

**Review purchase, supply and manufacturing contracts.** An issuer should review its product purchase, supply and manufacturing contracts to ensure that each of those contracts adequately addresses the sources of conflict minerals sold to the issuer pursuant to those contracts or contained in products (or components) the issuer contracts to have manufactured for it. Issuers should consider having future contracts specify, and amending existing contracts, where possible, to specify, that any conflict minerals sold to the issuer or contained in products manufactured for the issuer be certified as DRC conflict free. This type of provision may require the conflict minerals only be sourced from smelters or other processing facilities certified to be DRC conflict free by
an acceptable, independent third party. Moreover, such contracts should require suppliers of conflict minerals and manufacturers of Conflict Products or components containing conflict minerals to provide the issuer with appropriate representations and other information necessary for the issuer’s RCO Inquiry and, if required, the issuer’s due diligence on the source and chain of custody of those conflict minerals.

**Review disclosure controls.** Issuers should review their disclosure controls and procedures and revise them as necessary to address the requirements of the rule and Form SD. In addition, issuers must ensure that their disclosure controls and procedures are revised to ensure disclosure of the fees related to any audit of the Conflict Minerals Report conducted by their independent accounting firms, which must be reported under the “All Other Fees” category of the independent accountant fee disclosures.

**Select an auditor for the Conflict Minerals Report.** Issuers expecting to prepare a Conflict Minerals Report should consider who will audit their Conflict Minerals Reports. In doing so, issuers should discuss with their current auditors whether the auditor will be prepared to audit the Conflict Minerals Report, including auditing the consistency of the disclosure of the issuer’s due diligence measures in the report with the issuer’s actual due diligence efforts, and provide the required audit report. To avoid any possible auditor independence concerns under Rule 2-01 of Regulation S-X, issuers should ensure that the engagement for the audit of the Conflict Minerals Report does not allow the auditor to provide services that extend beyond the scope of that audit. Issuers should also inquire as to whether the auditors would require the audit to be an attestation engagement or a performance audit under GAGAS and the expected cost of each type of audit.

When engaging an auditor to audit their Conflict Minerals Reports, issuers should ensure that the engagement is pre-approved by the audit committee in accordance with Rule 2-01(c)(7) of Regulation S-X because the performance of the audit will be considered a “non-audit service.”

**Examine availability of the “outside the supply chain” reporting exception.** Issuers who purchase columbite-tantalite, cassiterite or wolframite in smelted form, gold in a fully refined state, or any conflict minerals, including the named derivatives, that have not been smelted or fully refined may wish to consider if they can take advantage of the exception for conflict minerals deemed to be “outside the supply chain” prior to January 31, 2013. Those issuers that are not prepared to comply with the rule for calendar year 2013 may especially wish to consider the availability of this exception in their particular circumstances. It remains to be seen how the SEC would react if, prior to January 31, 2012, an issuer were to smelt, refine, or if not smelted or refined, to acquire and hold outside the Covered Countries all those conflict minerals necessary for the issuer or its contract manufacturers to manufacture the issuer’s Conflict Products for the next year or years solely in order for the issuer to take advantage of the “outside the supply chain” exception and, thus, to delay intentionally its initial report on Form SD and any accompanying Conflict Minerals Report for one or more years.

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2. The countries that share an internationally recognized border with the DRC presently include Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia. See Adopting Release n.7 at p. 6.


4. See Adopting Release n.59 at p. 34.

5. Id. at p. 21.

6. Id. at p. 91.

7. The incorporation of a conflict mineral in a product solely as ornamentation or decoration where the product’s primary purpose is not, unlike gold jewelry, ornamentation or decoration may weigh more lightly in any determination of whether the conflict mineral is necessary to the functionality of the product. See Adopting Release at p. 88.

8. Id. at pgs. 87-88.
9. Id. at p. 83.

10. Id. at p. 90.

11. Unlike the proposed rule, Form SD includes a definition of “conflict minerals from recycled or scrap sources.” The term is defined to mean conflict minerals from recycled metals, which are reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing. Recycled metal includes excess, obsolete, defective and scrap metal materials that contain refined or processed metals appropriate to recycle in the production of tin, tantalum, tungsten or gold. Minerals that are partially processed, unprocessed or a bi-product from another ore are not recycled metals. See Item 1.01(d)(6) of Form SD.

12. See Adopting Release at pgs. 149-150.

13. Where a nationally or internationally recognized framework is not available for a conflict mineral or derivative, issuers are to exercise appropriate due diligence through measures of their own design. Form SD sets forth rules for the use of frameworks that become available during the course of a year. See Item 1.01(c)(1)(v) of Form SD.


15. “Armed group” means 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 a Covered Country. See Item 1.01(d)(2) of Form SD.

16. The Adopting Release indicates that the audit may be done either as an attestation engagement or as a performance audit under GAGAS. See Adopting Release at p. 214. Under GAGAS, attestation engagements must be performed by certified public accountants or similar persons while persons conducting a performance audit need not be certified public accountants as long as they meet the independence and other requirements of GAGAS for persons performing performance audits. See Adopting Release n.650 at p. 214.

17. Adopting Release at p. 199.

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