Companies Stay the Course on Conflict Minerals Reporting

Conflict Minerals

Rule 13p-1 ("Rule 13p-1") under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), requires the disclosure of certain information by public companies ("CM Reporting Companies") that manufacture or contract to manufacture products that use minerals specified in the rule that are necessary to the functionality or production of these products. These minerals are columbite-tantalite (coltan), cassiterite, wolframite, gold, and their derivatives, which are limited to tantalum, tin, and tungsten (collectively, "Conflict Minerals").

Rule 13p-1 requires CM Reporting Companies (i) to conduct a "reasonable country of origin inquiry" ("RCOI") to determine whether their Conflict Minerals originated in the Democratic Republic of the Congo (the "DRC") or any of its adjoining countries (collectively with the DRC, the "Covered Countries") or are from recycled or scrap sources, and (ii) if the RCOI finds that any of these Conflict Minerals may have originated in any of the Covered Countries and is not from recycled or scrap sources, to conduct due diligence ("Due Diligence") on the source and chain of custody of such Conflict Minerals to ascertain whether these Conflict Minerals originated in any Covered Country and directly or indirectly financed or otherwise benefited armed groups in such country. Rule 13p-1 requires CM Reporting Companies to file a Form SD with the SEC which shall include (A) in the case where the RCOI determination is that the Conflict Minerals did not originate in any Covered Country or are from recycled or scrap sources, such determination and a brief description of the RCOI in the body of the Form SD in accordance with Item 1.01(b) of Form SD, or (B) a conflict minerals report ("CMR") as an exhibit, which shall include a description of the company's Due Diligence process and results in accordance with Item 1.01(c) of Form SD.

2017 SEC Statement

In August 2015, the U.S. Court of Appeals for the District of Columbia Circuit reaffirmed its prior holding that Section 13(p)(1) of the Exchange Act ("Section 13(p)(1)") and Rule 13p-1 violate the First Amendment to the extent the statute and rule require regulated entities to report to the SEC and to state on their website that any of their products have not been found to be "DRC conflict free."[1] On April 3, 2017, the U.S. District Court for the District of Columbia entered final judgment in the case and remanded it to the U.S. Securities and Exchange Commission (the "SEC"). In response to the court's remand, the SEC Division of Corporation Finance issued a statement on April 7, 2017 (the "SEC Statement") in which it indicated that it will not recommend enforcement action to the SEC if companies only file disclosures required under the provisions of

[1] *See Nat'l Ass'n of Mfrs., et al. v. SEC*, 800 F.3d 518, 530 (D.C. Cir 2015).

Item 1.01(a) and (b) of Form SD. The SEC Statement in essence means that companies required to file a CMR under Item 101(c) of Form SD will likely not be subject to SEC enforcement if they fail to file such CMR.

Response to the SEC Statement

Based on Forms SD filed for calendar year 2016 and 2017, most companies have chosen not to take advantage of the relief granted by the SEC Statement. There has been no material change to the total number of CMRs as a percentage of the total number of Forms SD filed in each year since the SEC Statement was issued (the "CMR Percentage"). The CMR Percentage for the calendar year 2015 report (the reporting year prior to the SEC Statement) was 80.8%; 79% for the calendar year 2016 report (a 1.8% decrease from the prior year); and 79.1% for the calendar-year 2017 report (a 0.1% increase from the prior year) (see Figure 1 below). Companies may have decided to not take advantage of the SEC's relief for a number of reasons, including ongoing campaigns by non-governmental organizations and "socially responsible" investment funds to push companies to improve their Conflict Minerals sourcing and disclosure performance; the improvements being realized from and desire to continue the momentum of various industry-driven Conflict Minerals sourcing initiatives; and the desire by a growing number of companies to burnish their corporate social responsibility credentials.

Figure 1 – Forms SD Filed with the SEC*

Calendar Year Report	Forms SD	Forms SD with CMR	Forms SD with CMR as a % of Forms SD
2013	1,322	1,016	76.9%
2014	1,271	1,015	79.9%
2015	1,221	987	80.8%
2016	1,158	915	79.0%
2017	1,108	876	79.1%

*As of July 9, 2018

Outlook for Conflict Minerals Reporting

While there has been speculation after the Trump administration took office that Section 13(p)(1) and Rule 13p-1 would be repealed or amended, it appears that there is currently not much political will to follow through on any of the different initiatives that have been proposed or

discussed: legislation (different bills have been proposed in the U.S. House of Representatives), Presidential action (draft Presidential Memorandum to suspend Rule 13p-1 leaked in February 2017) and SEC action (statement issued in January 2017 by the then acting Chairman of the SEC directing the SEC staff to consider whether the SEC's April 2014 statement which relieved companies from Rule 13p-1's requirement that their CMRs include certain phrases in describing their Conflict Minerals, is still appropriate and whether any additional relief is appropriate). We expect that most companies will continue to stay the course with their Conflict Minerals due diligence and reporting regardless of the status of the Conflict Minerals law, which means that the current information requests and related requirements for much of the Conflict Minerals supply chain will continue.

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