SEC Conflict Minerals Howland Greene Comments Federal Register Dec2010

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[Proposed Rules]

17 CFR Parts 229 and 249 Conflict Minerals; Proposed Rule

Electronic Comments

Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml);
Send an e-mail to rule-comments@sec.gov. Please include File Number S7-40-10 on the subject line; or
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Request for Comment:

1. Should our reporting standards, as proposed, apply to all conflict minerals equally? \48\

Ans: Yes.

2. Should our rules, as proposed, apply to all issuers that file reports under Sections 13(a) and 15(d) of the Exchange Act? If not, to what issuers or other persons should our rules apply? Should we require an issuer that has a class of securities exempt from Exchange Act registration pursuant to Exchange Act Rule 12g3-2(b) \49\ to provide The disclosure and reporting requirements in its home country annual report or in a report on EDGAR? Would such an approach be consistent with the Act? \50\

Ans: Yes, if the issuer sells a product that is dependent on a Conflict Minerals (CM) to function or be produced.

Second, yes, if it prevents circumventing the disclosure requirements for CMs.

Third, The SEC should use existing reporting tools which could include EDGAR.

3. Should we have an alternative interpretation of a ``person described?''

Ans: No.

4. Should our rules apply to foreign private issuers, as proposed? Should we exempt such issuers and, if so, why and on what basis? Should the rules otherwise be adjusted in some fashion for foreign private issuers?

Ans: Yes, with the caveat that the information should be available for US investors.

Second, the same rules should apply with the objective of preventing circumvention of reporting by going off shore.

5. Would our proposed rules present undue costs to smaller reporting companies? If so, how could we mitigate those costs? Also, if our proposed rules present undue costs to smaller reporting companies, do the benefits of making their conflict minerals information publicly available justify these costs? Should our rules provide an exemption for smaller reporting companies? Alternatively, should our rules provide more limited disclosure and reporting obligations for smaller reporting companies? If so, what should these limited requirements entail? For example, should our rules require smaller reporting companies to disclose, if true, that conflict minerals are necessary to the functionality or production of their products but not require those issuers to disclose whether those conflict minerals originated in the DRC countries or to furnish a Conflict Minerals Report? Should our rules provide for a delayed implementation date for smaller reporting companies in order to provide them additional time to prepare for the requirement and the benefit of observing how larger companies comply?

Ans: There will be additional costs that may be proportionally higher for small companies, but increased costs will also apply to large firms. A way to mitigate the cost is to phase in the acceptable level of rigor for due diligence over several years and based on company size. Since this disclosure will be new, experience is minimal. The systems for collecting and managing this information exist but may not be used for the CMs at present.

Second, No, on the exemption for small firms. Instead, use phase in of the level rigor for due diligence. You want to send a consistent message that the report is due and prevent circumvention of the requirement.

Third, Allowing more time to develop the adequate level of due diligence but still require reporting within the time frame of the law.

Fourth, No, on the delay; instead, allow for continuous improvement as business standards improve.

6. Should we require that all individuals and entities, regardless of whether they are reporting issuers, private companies, or individuals who manufacture products for which conflict minerals are necessary to the functionality or production of the products, provide the conflict minerals disclosure and, if necessary, a Conflict Minerals Report? If so, how would we oversee such a broad reporting system?

Ans: No. This is beyond the law as written. There will be an impact on the rest of the supply chain as reporters seek information from suppliers. Provide guidance on supply chain due diligence expected of the reporter. Allow and plan for continuous improvement as business systems evolve to manage the CM information. There already are many requirements for

restricted material reporting and tracing batch ingredients; it is just a matter of applying existing tools and process.

7. Would requiring compliance with our proposed rules only by issuers filing reports under the Exchange Act unfairly burden those issuers and place them at a significant competitive disadvantage compared to companies that do not file reports with us? If so, how can we lessen that impact?

Ans: Probably yes, but private companies (non reporters) will likely need to provide the same information to their customers who will need the information for their reports. It is also likely that CM information will become a de facto standard similar to RoHS (EU Restriction of hazardous Substances) for electronics.

If the level of rigor for due diligence is phased in, the burden would be reduced. Allowing and anticipating continuous improvement in subsequent annual reports is probably the best way to ease the extra burden.

8. General Instruction I to Form 10-K contains special provisions for the omission of certain information by wholly-owned subsidiaries. General Instruction J to Form 10-K contains special provisions for the omission of certain information by asset-backed issuers. Should either or both of these types of registrants be permitted to omit the proposed conflict minerals disclosure in the annual reports on Form 10-K?

Ans: We defer to others who better understand the nuance of where the report is placed. The reporting should be informative and not circumvent the disclosure requirements. If a wholly owned subsidiary is the primary reason for reporting, but by using the parent's report, the information can be diluted or glossed over because it loses association with the subsidiary and the products, the report should reference the subsidiary. This is especially important for holding companies. CM Reporting should be informative to the investing public.

9. Should we define the term "manufacture?" If so, how should we define the term?

Ans: Keep the term "manufacturer" consistent with normal business terms. It should include imported products which are sold under the issuer's brand name(s).

10. Should our rules, as proposed, apply both to issuers that manufacture and issuers that contract to manufacture products in which conflict minerals are necessary to the functionality or production of those products?

Ans: Yes. When the CM is used for processing, but not incorporation into the product, guidance on supply chain due diligence will be helpful.

11. Should we require a minimum level of influence, involvement, or control over the manufacturing process before an issuer must comply with our proposed

rules? If so, how should we articulate the minimum amount? Should we require issuers to have nominal, minimal, substantial, total, or another level of control over the manufacturing process before those issuers become subject to our rules? How would those amounts be measured? Should we require that issuers must, at minimum, mandate that the product be manufactured according to particular specifications?

Ans: If the issuer uses the CM to make a product or resells under the issuer's brand name a CM containing product, they should report. The concern is adhering to the intent of the law which stated "conflict minerals are necessary to the functionality or production of a product manufactured by that person". Since no threshold is specified, the limiting factor should be the need of the CM to achieve the manufacture's objective – a product that performs an intended function.

12. Is it appropriate to consider issuers who sell generic products under their own labels or labels that they establish to be contracting the manufacture of those products as long as those issuers have contracted with other parties to have the products manufactured specifically for them? If not, what would be a more appropriate approach?

Ans: If a product is sold under a brand name held by the issuer, the issuer should report. If an issuer sells other brands as a distributor or retailer, they should only have to report the retail or distributor function they play as it applies to those products.

13. Is it appropriate for our rules, as proposed, to consider reporting issuers that are mining companies as "persons described" under Section 1502? Does the extraction of conflict minerals from a mine constitute "manufacturing" or "contracting to manufacture" a "product" such that mining issuers should be subject to our rules?

Ans: We defer to others, but think the definition should be consistent within business definitions. As a point of discussion, extracting materials from a mine or pit eventually involves processing, which is usually done near the mine/pit.

14. Alternatively, should a mining issuer not be viewed as manufacturing a product under our rules unless it engages in additional processes to refine and concentrate the extracted minerals into salable commodities or otherwise changes the basic composition of the extracted minerals?

Ans: If some form of processing occurs, the miner should be considered a manufacturer.

15. If so, what transformative processes, if any, should mining issuers be permitted to perform on conflict minerals before our proposed rules should consider them to be manufacturing products to which conflict minerals are necessary?

Ans: Direct extraction and transport of the unaltered material could be considered outside the scope of manufacture. Beyond that, any form of beneficiation should be considered manufacturing.

16. Should our rules define the phrase “necessary to the functionality or production of a product,” or is that phrase sufficiently clear without a definition? If our rules should define the phrase, how should it be defined?

Ans: This phrase is pretty clear. Necessary to functionality or production covers intentionally added (CMs) to serve a function in the product and it includes uses that may not incorporate the CM in the product, but requires the CM to produce the product. We think that a point of clarification, that trace quantities which are normal contaminants would not require reporting is appropriate.

17. If we were to define this phrase, should we delineate it to mean that a conflict mineral would be necessary to a product's functionality only if the conflict mineral is necessary to the product's basic function? If so, should we define the term “basic function” and, if so, how should we define that term? Should we define the term to include components of a product if those components are necessary to the product's basic function such that a conflict mineral would be considered necessary to the functionality of a product if the conflict mineral is necessary to the functionality of any of the product's components that are required for that product's basic function? For example, if the only conflict minerals in an automobile are contained in the automobile's radio, should our proposed rules consider those conflict minerals necessary to the automobiles? If that radio is marketed and sold with the automobile, should our proposed rules consider the conflict minerals that are isolated in the radio necessary to the functionality of the automobile? Alternatively, should such a definition consider only conflict minerals isolated in an automobile component required specifically for the automobile's basic function as necessary for the functionality of the automobile?

Ans: With defining functionality of the product, the intent of the law should not be circumvented. If a product is commonly sold with features that go beyond the basic function, as the example of the automobile radio, the whole product as sold should be covered. For the automobile example, a radio is a typical part that should be included in the reporting.

18. If we were to define the phrase “necessary to the functionality,” should we delineate it to mean that a conflict mineral would be necessary to a product's functionality if the conflict mineral is included in a product for any reason because that conflict mineral would be contributing to the product's economic utility? Does the fact that, if a conflict mineral is not “necessary” it, axiomatically, could be excluded from the product or the manufacturing process supports such a broad reading?

Ans: We think the important consideration is that the CM is intentionally used in the product. The use does not need to be specific to the basic functionality, but overall functionality, i.e., a car that transports you while providing a radio to listen to.

19. Should we define the phrase to indicate that, as one letter suggested, a conflict mineral should be considered necessary when; or [t]he conflict mineral is used by the [issuer] for the production of a product and such mineral is purchased in mineral form by the [issuer] and used by the [issuer] in the production of the final product but does not appear in the final product; and [t]he conflict mineral is essential to the product's use or purpose; or [t]he conflict mineral is required for the marketability of the product?'' \73\

Ans: We agree with the intentional use in the product or process. Limiting the language to use of the mineral alone will not cover the more likely case where the CM metal (derived from the mineral) is used in further steps in the supply chain. If conflict mineral is required for the direct production of a product, but is not actually incorporated, the issuer should report. The intent of the law should not be circumvented by extinguishing information in the supply chain.

20. Should we delineate the phrase “necessary to the production” to mean that a conflict mineral would be necessary to a product's production only if the conflict mineral is intentionally included in a product's production process even if that conflict mineral is ultimately included in the final product because it was removed or washed away prior to the completion of the production process? Should we consider conflict minerals necessary to the production of a product if they are not contained in the product but they are necessary to the functionality or production of a physical tool or machine used to produce a product? Should we consider such conflict minerals necessary to the production of a product if the tool or machine used to produce the product was manufactured for the purpose of producing the product? Would such an approach cover too broad a group of tools or machines? Should we limit such an approach to certain kinds of tools or machines, and if so, which ones? Should we be more specific and provide, as a letter recommended, that a conflict mineral is necessary to a product's production only if it is ``used by [an issuer] for the production of a product and such mineral is purchased in mineral form by the [issuer] and used by the [issuer] in the production of the final product but does not appear in the final product?'' \74\

Ans: For practical reasons, the term “necessary for production” should mean that the CM or CM metal is used in the production of the product. The activity should have some direct involvement that involves direct contact with the product or materials used to make the product. It should not include indirect uses, such as power lines or computers which power or control the process. Examples of “necessary for production” would be a catalyst used to make a substance or a die containing CM metals used to make a part. The part is made with direct involvements of the CM metal and then the part/material is used in the product. The part/material can be made in the prior level of the supply chain or in the production of process of product. The important concept is the CM is important in the manufacturing process with direct contact with but does not end up in the product.

21. Should we delineate the phrase “necessary to the production” so that our rules would not consider conflict minerals occurring naturally in a product

or conflict minerals that are purely an unintentional byproduct of the product as necessary to the production of that product?

Ans: Include “necessary for production”. The idea is that a deliberate choice was made to use a CM. If the CM or related metal is not intentionally added but occurs as a trace contaminant, then it should not require reporting. The issuer should have information in their records to indicate the natural origin of the CM. Analytical capabilities are so sophisticated that trace materials are detectable.

22. Should we require issuers to provide the conflict minerals disclosure and reporting requirements mandated under Section 13(p) in its Exchange Act annual report, as proposed? Should we require, or permit, the conflict minerals disclosure to be included in a new, separate form furnished annually on EDGAR, rather than adding it to Form 10-K, Form 20-F, and Form 40-F? Would requiring issuers to disclose the information in a separate annual report be consistent with Section 13(p)? Should we develop a separate annual report to be filed on EDGAR that includes all of the specialized disclosures mandated by the Dodd-Frank Act? \81\ What would be the benefits or burdens of such a form for investors or issuers with necessary conflict minerals?

Ans: We defer to others more knowledgeable in how to best meet the intent of the law. The CM information should be easily available. If EDGAR is a tool to provide easier access to the information, its use should be allowed.

23. Should we require some brief disclosure in the body of the annual report, as proposed?

Ans: Yes.

24. Should our rules provide that, rather than be included in the body of the annual report, all required information would be set forth in the Conflict Minerals Report that would be furnished as an exhibit to the annual report?

Ans: We defer to more knowledgeable people, but suggest that information be easily accessible.

25. Instead, should all required information, including the Conflict Minerals Report, be included in the body of the annual report?

Ans: We defer to more knowledgeable people, but suggest that information be easily accessible.

26. Should issuers with necessary conflict minerals that did not originate in the DRC countries be required to disclose any information other than as proposed? For example, should we require such an issuer to disclose the countries from which its conflict minerals originated?

Ans: No. Stick with the requirements of the law. A reporter can provide additional information if they so choose. The due diligence effort should be documented in the issuer’s records.

27. Should we, as proposed, require issuers to describe the reasonable country of origin inquiry they used in making their determination that their conflict minerals did not originate in the DRC countries? Is a separately captioned section in the body of the annual report the appropriate place for this disclosure?

Ans: Yes. The fact that a reasonable enquiry was made should be stated in the report, but the actual information would be in the issuer's records available to the independent auditor.

28. Should we require, as proposed, that an issuer maintain reviewable business records if it determines that its conflict minerals did not originate in the DRC countries? Are there other means of verifying an issuer's determination that its minerals did not originate in the DRC countries? Should we specify for how long issuers would be required to maintain these records? For example, should we require issuers to maintain records for one year, five years, 10 years, or another period of time?

Ans: Yes. As mentioned previously, the initial efforts should be reasonable and be expected to improve over time. Smaller firms with fewer resources could have more leeway. The idea is to get started and improve the system over reporting cycles. This information would be in the issuer's records and used by the third party auditor. Recommended record retention is three years but this is based on standard record retention.

29. Should we require the disclosure in an issuer's annual report to be provided in an interactive data format? Why or why not? Would investors find interactive data to be a useful tool to easily find the information provided? If so, what format would be most appropriate for providing standardized data disclosure? For example, should the format be eXtensible Business Reporting Language (XBRL), as one letter recommended,\82\ or should the format be eXtensible Markup Language (XML)?

Ans: We defer to others on this set of questions.

30. Should we require issuers to briefly disclose in the body of their annual reports the contents of the Conflict Minerals Report? If so, how much of the information in the Conflict Minerals Report should we require issuers to disclose?

Ans: Yes, to indicate to interested parties where the report can be found and if DRC CMs are being reported. The issuer should be able to include more information such as the products or business is DDRC Conflict Free.

31. Should we require an issuer to post its audit report on its Internet Web site, as proposed?

Ans: Yes.

32. Should we require, as proposed, that an issuer post its Conflict Minerals Report and its audit report on its Internet Web site at least until it files its subsequent annual report? If not, how long should an issuer keep this information posted on its Internet Web site?

Ans: Yes, until the subsequent CM report.

33. Is a reasonable country of origin inquiry standard and an appropriate standard for determining whether an issuer's conflict minerals originated in the DRC countries for purposes of our rules implementing the Conflict Minerals Provision? If not, what other standard would be appropriate? Rather than requiring a reasonable country of origin inquiry as proposed, should our rules mandate that the standard for making the supply chain determinations, as set forth in Exchange Act Sections 13(p)(1)(A)(i) and (ii) (and described below), also applies to the determination as to whether an issuer's conflict minerals originated in the DRC countries? Should we provide additional guidance about what would constitute a reasonable country of origin inquiry in determining whether conflict minerals originated in the DRC countries?

Ans: There should be a reasonable country of origin standard that the independent auditor can review and decide if the claim is valid. The standard needs to address the various levels of a supply chain that will likely be involved. There should be recognition that the initial report may not be as rigorous for want of experience but would improve with each iteration of the CM report. Guidance will be needed as multiple level supply chains will complicate the information flow.

34. Should we not require any type of inquiry? For example, would it be appropriate and consistent with the Conflict Minerals Provision to permit an issuer to make no inquiry, so long as it disclosed that fact?

Ans: No, because the issuer could circumvent the intent of the law.

35. Should issuers be able to rely on reasonably reliable representations from their processing facilities, either directly or indirectly through their suppliers, to satisfy the reasonable country of origin inquiry standard? If so, should we provide additional guidance regarding what would constitute reasonably reliable representations and what type of guidance should we provide? If not, what would be a more appropriate requirement?

Ans: Yes. Guidance will be needed. Reasonable representations that are based on acceptable national verification programs could be used. The national programs would need independent third party assessment of the representation. The idea is that the representation is checked by a credible third party. ISO quality programs are an example on how this could be approached.

36. Should any qualifying or explanatory language be allowed in addition to or instead of the reasonable country of origin inquiry standard, as proposed, regarding whether issuers' conflict minerals originated in the DRC countries? For example, should issuers be able to state that none of their conflict minerals originated in the DRC countries “to the best of their knowledge” or

that "they are not aware" that any conflict minerals originated in the DRC countries?

Ans: **Qualification language should be allowed when the qualification is quantified and used in context of a continuous improvement process. A products manufacturer may have received clear information on 80% of the materials used are not CMs. That leaves 20% which they don't believe to be CMs but have not received firm information. This qualification would be followed in the next annual report to indicate the actual status of the remaining 20%. The intent is a reasonable effort with improvement over time with experience and established business norms and standards**

37. Should our rules, as proposed, require issuers that are unable to determine the origin of their conflict minerals to label their products that contain such minerals as not "DRC conflict free"? Is this approach consistent with the Conflict Minerals Provision"? Would it be more appropriate to allow such issuers to label such products differently, such as "May Not Be DRC Conflict Free"? Would having a separate category for products that contain such unknown origin minerals be consistent with the Conflict Minerals Provision? Would the proposed approach be confusing for readers, or can issuers sufficiently address any confusion by including supplemental disclosure for those products that contain minerals of unknown origin?

Ans: If the issuer cannot determine that the product is DRC conflict free, reporting that fact should be the requirement. Product labeling is not included in the law and would be a significant burden.

38. Should our rules, as proposed, permit issuers to describe their products that contain conflict minerals that do not qualify as being DRC conflict free or that may not qualify as being DRC conflict free based on their individual facts and circumstances? If not, how should we require issuers to describe their products that contain conflict minerals that do not qualify as being DRC conflict free? If an issuer had hundreds or thousands of products that were not DRC conflict free, would the report provide overwhelming information? Would it be unduly expensive to produce?

Ans: Yes, the intent of the law was to provide the product information. Some level of flexibility in describing which products contain DCR CMs and which are uncertain allows the issuer some leeway. The issuer could use categories or families of products that reduce the effort (and number of products). This could be verified though production bills of materials. This information would be part of the business records that would be required and available to the third party auditor. The information in the report should be adequate to provide the investing public information on what products use the DCR CM.

39. Should our rules, as proposed, require issuers to disclose the facilities, countries of origin, and efforts to find the mine or location of origin only for its conflict minerals that do not qualify as DRC conflict free, and not for all of its conflict minerals? Alternatively, should we require issuers to disclose the facilities, countries of origin, and efforts to find the mine or location of origin for all of its conflict minerals

regardless of whether those conflict minerals do not qualify as DRC conflict free?

Ans: The specific location should only apply if there is DCR CM present. An issuer should be able to state detailed information about all its CMs; if the CM is DCR Conflict Free, the country of origin will be enough.

40. Should our rules require issuers to disclose the mine or location or origin of their conflict minerals with the greatest possible specificity in addition to requiring issuers, as proposed, to describe the efforts to determine the mine or location of origin with the greatest possible specificity? If so, how should we prescribe how the location is described?

Ans: Yes. The intent of the law is to improve the social conditions of the mine. GPS coordinates could be used along with the name and township information.

41. As suggested in a submission,\115\ should our rules require issuers to include information on the capacity of each mine they source from along with the weights and dates of individual mineral shipments?

Ans: No, the mine should be specific enough to track it into the future but overall capacity, weights and dates could be optional but not required.

42. We are proposing that an issuer "certify the audit" by certifying that it obtained such an audit. Should we further specify the nature of the certification? We are not proposing that anyone sign this certification. Should our rules require issuers to have the audit's certification signed? If so, who should be required to sign the certification? Also, if we revise our proposal to require an individual to sign, should the individual who signs the certification sign it in his or her capacity within the company or on behalf of the company? What liability should our rules assign to the individual who signs the certification?

Ans: The issuer should certify the audit. We defer to others on the nature of the certification as long as the objective of accurate information is met. As with certain EPA monitoring reports, a designated person should make the certification on behalf of the company.

43. Should our rules, as proposed, require an issuer to furnish its independent private sector audit report as part of its Conflict Minerals Report? Are there other ways to give effect to the Conflict Minerals Provision's requirement of Section 13(p)(1)(B) that the issuer "certify the audit * * * that is included in" [emphasis added] the Conflict Minerals Report? Would investors find the audit report useful? How would the potential liability for a furnished audit report affect the cost and availability of such audit services?

Ans: Yes, make the audit report available. It will increase the cost but will also improve the rigor of the process. Transparency is important.

44. Should our rules provide that, as proposed, the independent private sector audit report furnished as an exhibit to an issuer's annual report not be deemed to be incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the issuer specifically incorporates it by reference? Is this audit report qualitatively different from other experts' reports for which consent is required under our rules?

Ans: We defer to others on this set of questions.

45. Are there other ways we should treat the audit report under our rules to balance the interests of receiving a high quality audit and not unnecessarily increasing potential liability and costs?

Ans: We defer to others on this question.

46. Should we, as proposed, require the Conflict Minerals Report to be furnished as an exhibit to the issuer's annual report? If not, how should it be provided?

Ans: We defer to others on this set of questions.

47. Should we require the Conflict Minerals Report to be filed as an exhibit, rather than furnished, which would affect issuers' liability under the Exchange Act or under the Securities Act (if any such issuer incorporates by reference its annual report into a Securities Act registration statement)?

Ans: We defer to others on this set of questions.

48. Under Exchange Act Section 18, “Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to [the Exchange Act] or any rule or regulation there under or any undertaking contained in a registration statement as provided in subsection (d) of section 15, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading.'' \133\ Is it appropriate not to have the Conflict Minerals Report subject to the Section 18 liability even if the elements of Section 18 liability can be established? Should we require the Conflict Minerals Report to be filed for purposes of Exchange Act Section 18, but permit an issuer to elect not to incorporate it into Securities Act filings?

Ans: We defer to others with the caveat that investors should be able to rely on the issuer’s report. Allowing a phase in regarding the level of rigor for small issuers means that initial reports from small issuers may be less reliable the first year but better in subsequent years.

49. Should the Conflict Minerals Report be furnished annually on Form 8-K.\134\ Would that approach be consistent with Exchange Act Section 3(p)(1)(A)? If so, should foreign private issuers, which do not file Forms 8-K, be permitted to submit the Conflict Minerals Report either in their Form 20-F or 40-F as applicable, or annually on Form 6-K, at their election?

Ans: We defer to others on this set of questions.

50. Should our rules, as proposed, require an issuer to use due diligence in its supply chain determinations and the other information required in a Conflict Minerals Report? If so, should those rules prescribe the type of due diligence required and, if so, what due diligence measures should our rules prescribe? Alternatively, should we require only that persons describe whatever due diligence they used, if any, in making their supply chain determinations and their other .conclusions in their Conflict Minerals Report?

Ans: Yes. There should be a general standard of effort to determine if CMs are present or used to produce their product. The effort should be reasonable. If the product does not normally use a CM, the issuer should not be required to prove a negative. For information obtained from suppliers, the issuer should be allowed to rely on a supplier declaration relative to a CM that is also publicly available on the supplier's web site and can be clearly associated with parts or products covered by the report. In the event that the supplier does not make the CM status publicly available, the statement of an independent third party can be used by the supplier and relied upon by the issuer for the part or material involved. In all instances, there needs to be a clear trail of information to show that the information is connected. This information will be kept in the company records and used as required.

51. Should different due diligence measures be prescribed for gold because of any unique characteristics of the gold supply chain? If so, what should those measures entail?

Ans: No.

52. Should our rules state that an issuer is permitted to rely on the reasonable representations of its smelters or any other actor in the supply chain,\147\ provided there is a reasonable basis to believe the representations of the smelters or other parties?

Ans: Yes. The smelters would need to be members of a national accepted verification process.

53. Is our approach to issuers that are unable to determine that their products did not originate in the DRC countries appropriate?

Ans: Yes. The default should be the assumption that you need to show DRC countries are not involved.

54. Should our rules prescribe any particular due diligence standards or guidance?

Ans: Yes. Rules should be based on standard practices that a reasonable and prudent person would use or national standards as appropriate or as they will likely evolve.

55. Should our rules require that an issuer use specific national or international due diligence standards or guidance, such as standards developed by the OECD, the United Nations Group of Experts for the DRC, or another such organization? If so, should our rules require the issuer to disclose which due diligence standard or guidance it used? Should we list acceptable national or international organizations that have developed due diligence standards or guidance on which an issuer may rely? Should our rules permit issuers to rely on standards from federal agencies if any such agencies develop applicable rules?

Ans: Yes, especially if appropriate standards exist for the business or product category. The standards can be national or international. They can also use federal or state agency standards if they are appropriate.

56. Should our rules, as proposed, require that a complete fiscal year begin and end before issuers are required to provide their initial disclosure or Conflict Minerals Report regarding their conflict minerals?

Ans: Yes, as stated in the law.

57. If we require issuers to provide their disclosure or reporting requirements in their Exchange Act annual reports, should we permit them to file an amendment to the annual report within a specified period of time subsequent to the due date of the annual report, similar to Article 12 schedules or financial statements provided in accordance with Regulation S-X Rule 3-09,\149\ to provide the conflict minerals information? \150\ If so, why and for which issuers should our rules permit such a delay? For example, should we allow this delay only for smaller reporting companies?

Ans: We defer to others on this set of questions.

58. Should we phase in our rules and permit certain issuers, such as smaller reporting companies, to delay compliance with the Conflict Minerals Provision's disclosure and reporting obligations until a period after that which is provided in the Exchange Act Section 13(p)(1)(A)?

Ans: No on the delay, but accept a level of lesser level rigor for smaller firms with the requirements that a subsequent report address improvements in the process used by the company from the previous year. This would essentially require continuous improvement as a defense against what may have been a less accurate report in the previous year. The objective is to get the reporting process started and improve it over time.

59. Is “possession” the proper determining factor as to when issuers should provide the required disclosure or a Conflict Minerals Report regarding a necessary conflict mineral? If not, what would be a more appropriate test and why?

Ans: We defer to others with the caveat that accounting tricks should not be allowed to circumvent the intent of the law.

60. Should our rules allow individual issuers to establish their own criteria for determining which reporting period to include any required conflict minerals disclosure or Conflict Minerals Report, provided that the issuers are consistent and clear with their criteria from year-to-year?

Ans: Yes, allowing some level of flexibility is reasonable. Information systems may have a time delay so as long as the reporting is consistent and accurate, the actual use date is less important since reporting will be done annually.

61. We note it is possible issuers may have stockpiles of existing conflict minerals that they previously obtained. Do we adequately address issuers' disclosure and reporting obligations regarding their existing stockpiles of conflict minerals? If not, how can we address existing stockpiles of conflict minerals? Should our rules permit a transition period so that issuers would not have to provide any conflict minerals disclosure or report regarding any conflict mineral extracted before the date on which our rules are adopted? Alternatively, would the reasonable country of origin inquiry standard for determining the origin of the conflict minerals and the due diligence standard or guidance for determining the source and chain of custody of the conflict minerals that originated in the DRC countries accomplish the same goal? For example, should issuers be required to inquire about the origin of their conflict minerals extracted before the date on which our rules are adopted? As another example, should issuers file a Conflict Minerals Report regarding conflict minerals that originated in the DRC countries before the date on which our rules are adopted?

Ans: Yes. There is likely to be existing stocks of CM metals and CM containing parts/products. The report should address this and report changes in the subsequent CM reports. One could argue that CM related inventory acquired after January 1, 2011 should require full reporting. At minimum, full reporting for CM materials should start with the effective date of these regulations.

62. Should there be a de minimis threshold in our rules based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise? If so, what would be a proper threshold amount? Would this be consistent with the Conflict Minerals Provision? \153\

Ans: The law does not provide for de minimis threshold. The threshold should be the intentional use of the CM for the product/process to function.

63. Should our rules, as proposed, include an alternative approach for conflict minerals from recycled or scrap sources as proposed? If so, should that approach permit issuers with necessary conflict minerals to classify those minerals as DRC conflict free, as proposed? Should we require, as proposed, issuers using conflict minerals from recycled or scrap sources to furnish a Conflict Minerals Report, including a certified independent private sector audit, disclosing that their conflict minerals are from these sources? If not, why not?

Ans: Yes. The requirement to investigate materials derived from recycled materials is valid in light of the fact that recycling can be used as a way to launder CM metals. The recycler should have adequate documentation that the processed materials are from scrap and are not circumventing the intent of the law. Smelters and recyclers who are part of a recognized national program that verifies their operation and can show that the recycling and smelting is not circumventing the CM reporting law could issue a declaration the issuer could rely on.

64. Instead, should our rules require issuers with recycled or scrapped conflict minerals to undertake reasonable inquiry to determine they are recycled or scrapped and to disclose the basis for their belief that their minerals are, in fact, from these sources?

Ans: Yes. As mentioned in #63, the level of effort would be less if the recycler/smelter provided a declaration based on a national recognized verification program.

65. Should our rules, as proposed, require that issuers use due diligence in determining whether their conflict minerals are from recycled or scrap sources as proposed and file a Conflict Minerals Report including an independent private sector audit of that report? If so, should our rules prescribe the due diligence required? If our rules should not require due diligence, should our rules require any alternative standard or guidance? If so, what standard or guidance? Should our rules define what constitutes recycled or scrap conflict minerals? If so, what would be an appropriate definition?

Ans: Yes. The independent audit would corroborate that the recycler/smelter participates in a recognized verification program.

There should be guidance to assure that recycling and reuse of CM metals is not discouraged while assuring that sham recycling and smelting operations are not “laundering” DRC CMs.

66. Should this treatment be limited to gold, or should it apply to all conflict minerals, as proposed?

Ans: All.

67. Is our alternative approach to recycled and scrap minerals appropriate? Is there a significant risk that conflict minerals that are not “DRC conflict

free" may be inappropriately processed and "recycled" so as to take advantage of this alternate approach?

Ans: Recycling and smelting deserve an alternative approach. As with any activity, there needs to be a way to avoid circumventing the requirements.

68. Should we allow exemptions to the information required by smaller reporting companies regarding their use of recycled or scrap minerals? For example, should we not require smaller reporting to furnish a Conflict Minerals Report regarding their recycled or scrap minerals? As another example, if we require smaller reporting companies to furnish a Conflict Minerals Report with respect to recycled or scrap minerals, should we not require those issuers to have such Conflict Minerals Reports audited?

Ans: If a recycler/smelter has issued a conformance statement under a national verification program (which includes third party auditing), that should be easy for small and large firms to use with minimal extra effort or expense to meet the requirements for reporting. While some small companies may have SEC reporting obligations, it is expected that most will have to provide CM information to their customers.

69. Should our rules address specifically the Conflict Minerals Provision's revision, waiver, or termination requirements? If so, how should our rules address this?

Ans: The law is clear on the waiver requirements so we think no additional action is required.

D. Request for Comment

We request comment on the accuracy of our estimates. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and (v) evaluate whether the proposed amendments will have any effects on any other collections of information not previously identified in this section.

\185\ This number corresponds to the estimated number of forms expected to be affected by the proposed rules and form amendments.\186\ The proposed rules and form amendments would not change the number of annual responses.

In particular, we request comment and supporting empirical data for purposes of the PRA on whether the proposed rule and form amendments:

Will affect the burden hours and costs required to produce the annual reports on Forms 10-K, 20-F, and 40-F; and

If so, whether the resulting change in the burden hours and costs required to produce those Exchange Act annual reports is the same as or different than the estimated incremental burden hours and costs proposed by the Commission.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing these burdens. Persons submitting comments on the collection of information requirements should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Room 10102, New Executive Office Building, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090, with reference to File No. S7-40-10. Requests for materials submitted to OMB by the Commission with regard to these collections of information should be in writing, refer to File No. S7-40-10, and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE., Washington, DC 20549-0213. OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Ans: We defer to your numerical analysis. The numbers do not seem unreasonable.

70. We request comment on whether the proposed rules, if adopted, would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commentators are requested to provide empirical data and other factual support for their view, if possible.

Ans: The important aspect of this question is timing and level of diligence. We do not have factual data but using experience gained from EU requirements for the Restriction of Hazardous Substances and other substance/restricted material requirements (REACH) we think the level of accuracy in report will improve The effective dates were not delayed but the enforcement became more rigorous as experience was gained with time.

G. Solicitation of Comment

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

How the proposed amendments can achieve their objective while lowering the burden on small entities;

The number of small entity companies that may be affected by the proposed amendments;

Whether small entity companies should be exempt from the rule;

The existence or nature of the potential impact of the proposed amendments on small entity companies discussed in the analysis; and

How to quantify the impact of the proposed amendments.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

Ans: It is difficult to determine a realistic cost impact, especially for small businesses.

71. We request comment on whether our proposals would be a ``major rule'' for purposes of SBREFA. We solicit comment and empirical data on:

The potential effect on the U.S. economy on an annual basis;

Any potential increase in costs or prices for consumers or individual industries; and

Any potential effect on competition, investment or innovation.

An: We defer to more experienced others to answer these questions. There is a significant amount of effort required to get the CM reporting program in place. Once in place, the management of CMs (and other materials) could be part of a program through which the issuer shows their products are better managed than their competitor's from a social and materials perspective. This is based on an issuer integrating the CM requirement into a substance management program for their products/processes.

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