SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 229 and 249

[Release No. 34-63547; File No. S7-40-10]

RIN 3235-AK84

CONFLICT MINERALS

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing changes to the annual reporting requirements of issuers that file reports pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The proposed rules would require any issuer for which conflict minerals are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, by that issuer to disclose in the body of its annual report whether its conflict minerals originated in the Democratic Republic of the Congo or an adjoining country. If so, that issuer would be required to furnish a separate report as an exhibit to its annual report that includes, among other matters, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals. These due diligence measures would include, but would not be limited to, an independent private sector audit of the issuer's report conducted in accordance with standards established by the Comptroller General of the United States. Further, any issuer furnishing such a report would be required, in that report, to certify that it obtained an independent private sector audit of its report, provide the audit report, and make its reports available to the public on its Internet website.

DATES: Comments should be received on or before January 31, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

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
- Use the Federal Rulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-40-10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for website viewing and copying in the Commission's Public Reference Room 100 F Street, NE, Washington, DC 20549-1090, on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: John Fieldsend, Special Counsel in

the Office of Rulemaking, Division of Corporation Finance, at (202) 551-3430, 100 F Street, NE, Washington, DC 20549-3628.

SUPPLEMENTARY INFORMATION: The Commission is proposing to add a new Item 104 to Regulation S-K,[1] revise Item 601 of Regulation S-K,[2] and amend Form 20-F,[3] Form 40-F,[4] and Form 10-K[5] under the Securities Exchange Act of 1934 (the "Exchange Act").[6]

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[1] 17 CFR 229.10 et seq.

[2] 17 CFR 229.601.

[3] 17 CFR 249.220f.

[4] 17 CFR 249.240f.

[5] 17 CFR 249.310.

[6] 15 U.S.C. 78a et seq.

I. BACKGROUND AND SUMMARY

A. Statutory Requirements

Section 1502 (the "Conflict Minerals Provision") of the Dodd-Frank Wall Street

Reform and Consumer Protection Act (the "Act")[7] amends the Exchange Act by adding new Section 13(p).[8] The Commission is required pursuant to new Section 13(p) to issue final rules implementing Section 13(p) no later than 270 days after the date of enactment, or April 15, 2011.[9] Section 13(p) requires the Commission to promulgate disclosure and reporting regulations regarding the use of conflict minerals from the Democratic Republic of the Congo (the "DRC") and adjoining countries (together the "DRC countries").[10] Section 1502(a) of the Conflict Minerals Provision, which is titled "Sense of the Congress on Exploitation and Trade of Conflict Minerals Originating in the Democratic Republic of the Congo," sets forth the background for this provision. In Section 1502(a), Congress provides that: "It is the sense of the Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b)."[11]

Section 13(p) mandates that the Commission promulgate regulations requiring

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[7] Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

[8] 15 U.S.C. 78m(p).

[9] See Exchange Act Section 13(p)(1)(A).

[10] The term "adjoining country" is defined in Section 1502(e)(1) of the Act as a country that shares an internationally recognized border with the DRC.

[11] Section 1502(a) of the Act.

that a "person described"[12] disclose annually whether any "conflict minerals"[13] that are "necessary to the functionality or production of a product manufactured by such person"[14] originated in the DRC countries,[15] and make that disclosure publicly available on the issuer's Internet website.[16] If a person's conflict minerals originated in the DRC countries, that person must submit a report (the "Conflict Minerals Report") to the Commission that includes a description of the measures taken by the person to exercise due diligence on the minerals' source and chain of custody.[17] In general, undertaking due diligence involves performing the investigative measures that a reasonably prudent person would perform in the management of his or her own property. Under Section 13(p), the measures that must be taken to exercise due diligence "shall include an independent private sector audit" of the Conflict Minerals Report that is conducted according to standards established by the Comptroller General of the United States, in accordance with the Commission's promulgated rules, in consultation with the Secretary

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[12] The term "person described" is defined in Exchange Act Section 13(p)(2) as one (1) who is required to file reports under Sections 13(p)(1)(A), and (2) the conflict minerals are necessary to the functionality or production of a product manufactured by such person. Section 13(p)(1)(A) does not provide a definition but refers back to Section 13(p)(2).

[13] The term "conflict mineral" is defined in Section 1502(e)(4) of the Act as (A) columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold; wolframite (the metal ore from which tungsten is extracted); or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the DRC countries.

[14] Exchange Act Section 13(p)(2)(B).

[15] Exchange Act Section 13(p)(1)(A).

[16] See Exchange Act Section 13(p)(1)(E) (stating that each issuer "shall make available to the public on the Internet website of such [issuer] the information disclosed under" Exchange Act Section 13(p)(1)(A)).

[17] See Exchange Act Section 13(p)(1)(A)(i).

of State.[18] The person submitting the Conflict Minerals Report must also identify the independent private sector auditor[19] and certify the independent private sector audit.[20]

Further, the Conflict Minerals Report must include a description of the products manufactured or contracted to be manufactured that are not "DRC conflict free," the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and "the efforts to determine the mine or location of origin with the greatest possible specificity."[21] The term "DRC Conflict Free" is defined in Exchange Act Section 13(p)(1)(A)(ii) and Exchange Act Section 13(p)(1)(D) as products that do not contain conflict minerals that "directly or indirectly finance or benefit armed groups" in the DRC countries.[22] Each person must make their Conflict Minerals Report available to the public on that person's Internet website.[23]

B. Overview of Proposed Rules

Our proposed rules would apply to issuers who file reports with the Commission

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[18] See id. (requiring in the Conflict Minerals Report "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such [conflict] minerals, which measures shall include an independent private sector audit of such report"). The Conflict Minerals Provision assigns certain responsibilities to other federal agencies. In developing our proposed rules, our staff has consulted with the staff of these other agencies, including the Government Accountability Office (the "GAO"), which is headed by the Comptroller General, and the State Department.

[19] See Exchange Act Section 13(p)(1)(A)(ii) (stating that the issuer must provide a description of the "entity that conducted the independent private sector audit in accordance with" Exchange Act Section 13(p)(1)(A)(i)").

[20] As noted in Exchange Act Section 13(p)(1)(B), if an issuer is required to provide a Conflict Minerals Report that includes an independent private sector audit, that issuer "shall certify the audit" and that certified audit "shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals."

[21] See Exchange Act Section 13(p)(1)(A)(ii).

[22] Id.; Exchange Act Section 13(p)(1)(D).

[23] Exchange Act Section 13(p)(1)(E).

under Exchange Act Sections 13(a)[24] or 15(d)[25] and for which conflict minerals are "necessary to the functionality or production of a product manufactured" or contracted to be manufactured by such issuer.[26] These issuers would be required to disclose, based on their reasonable country of origin inquiry, in the body of their annual reports whether their conflict minerals originated in the DRC countries. If an issuer concludes that its conflict minerals did not originate in the DRC countries, the issuer would disclose this determination and the reasonable country of origin inquiry process it used in reaching this determination in the body of its annual report. Also, the issuer would be required to provide on its Internet website its determination that its conflict minerals did not originate in the DRC countries, disclose that this information is available on its website and the Internet address of that site in the body of its annual report, and maintain records demonstrating that its conflict minerals did not originate in the DRC countries. If the issuer concludes that its conflict minerals did originate in the DRC countries, or is unable to conclude that its conflict minerals did not originate in the DRC countries, the issuer would similarly disclose this conclusion, note that the Conflict Minerals Report is furnished as an exhibit to the annual report, furnish the Conflict Minerals Report, make available the Conflict Minerals Report on its Internet website, disclose that the Conflict Minerals Report is posted on its Internet website, and provide the Internet address of that site.

As required by Section 13(p), our proposed rules would require that an issuer

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[24] 15 U.S.C. 78m(a).

[25] 15 U.S.C. 78o(d).

[26] Exchange Act Section 13(p)(2)(B).

provide, in its Conflict Minerals Report, a description of the measures it had taken to exercise due diligence on the source and chain of custody of its conflict minerals, which would have to include a certified independent private sector audit of the Conflict Minerals Report that identifies the auditor and is furnished as part of the Conflict Minerals Report. Further, the issuer would be required to include in the Conflict Minerals Report a description of its products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free,"[27] the facilities used to process those conflict minerals, those conflict minerals' country of origin, and the efforts to determine the mine or location of origin with the greatest possible specificity. The issuer would be required to exercise due diligence in making these determinations in the Conflict Minerals Report.

II. DISCUSSION

The Conflict Minerals Provision establishes, and we are likewise proposing, a disclosure requirement for conflict minerals that is divided into three steps. The first step required by Section 1502 is for the issuer to determine whether it is subject to the Conflict Minerals Provision. An issuer is only subject to the Conflict Minerals Provision if it is a "person described," which the Conflict Minerals Provision defines as one for whom "conflict minerals are necessary to the functionality or production of a product manufactured by such person."[28] If an issuer does not meet this definition, the issuer would not be required to take any action, make any disclosures, or submit any reports. If,

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[27] The definition of the term "DRC conflict free" in our proposed rules would be identical to the definition in Exchange Act Sections 13(p)(1)(A)(ii) and 13(p)(1)(D).

[28] Exchange Act Section 13(p)(2).

however, an issuer meets this definition, that issuer would move to the second step.

The second step would require the issuer to determine after a reasonable country of origin inquiry whether its conflict minerals originated in the DRC countries. If the issuer determines that its conflict minerals did not originate in the DRC countries, the issuer would disclose this determination and the reasonable country of origin inquiry it used in reaching this determination in the body of its annual report.[29] If, however, the issuer determines that its conflict minerals did originate in the DRC countries, or if it is unable to conclude that its conflict minerals did not originate in the DRC countries, the issuer would disclose this conclusion in its annual report and move to the third step.[30]

Finally, the third step under the Conflict Minerals Provision would require an issuer with conflict minerals that originated in the DRC countries, or an issuer that is unable to conclude that its conflict minerals did not originate in the DRC countries, to furnish a Conflict Minerals Report as described in greater detail below. As required by Section 13(p)(1)(A)(ii), in the Conflict Minerals Report, the issuer would be required to provide, among other information, a description of any of its products that contain conflict minerals that it is unable to determine did not "directly or indirectly finance or benefit armed groups" in the DRC countries.[31] The issuer would identify such products by describing them as not "DRC conflict free." If any of its products contain conflict

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[29] The issuer also would be required to make available this disclosure on its Internet website, disclose in its annual report that the disclosure is posted on its Internet website, and disclose the Internet address on which this disclosure is posted. Such an issuer, however, would not have any further disclosure or reporting obligations with regard to its conflict minerals.

[30] The issuer also would be required make its Conflict Minerals Report available to the public on its Internet website, disclose in its annual report that the Conflict Minerals Report is posted on its Internet website, and disclose the Internet address on which the Conflict Minerals Report is posted.

[31] See Exchange Act Section 13(p)(1)(A)(ii).

minerals that do not "directly or indirectly finance or benefit" these armed groups, the issuer may describe such products as "DRC conflict free," whether or not the minerals originated in the DRC countries.

A. Conflict Minerals

The Conflict Minerals Provision defines the term "conflict mineral" as cassiterite, columbite-tantalite, gold, wolframite, or their derivatives, or any other minerals or their derivatives determined by the Secretary of State to be financing conflict in the DRC countries.[32] Cassiterite is the metal ore that is most commonly used to produce tin, which is used in alloys, tin plating, and solders for joining pipes and electronic circuits.[33] Columbite-tantalite is the metal ore from which tantalum is extracted. Tantalum is used in electronic components, including mobile telephones, computers, videogame consoles, and digital cameras, and as an alloy for making carbide tools and jet engine components.[34] Gold is used for making jewelry and, due to its superior electric conductivity and corrosion resistance, is also used in electronic, communications, and aerospace equipment.[35] Finally, wolframite is the metal ore that is used to produce tungsten, which is used for metal wires, electrodes, and contacts in lighting, electronic,

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[32] Section 1502(e)(4) of the Act. Presently, the Secretary of State has not designated any other mineral as a conflict mineral. Therefore, the conflict minerals include only cassiterite, columbite-tantalite, gold, wolframite, or their derivatives.

[33] Tin Statistics and Information, U.S. GEOLOGICAL SURVEY. available at, http://minerals.usgs.gov/minerals/pubs/commodity/tin/.

[34] Niobium (Columbium) and Tantalum Statistics and Information, U.S. GEOLOGICAL SURVEY, available at, http://minerals.usgs.gov/minerals/pubs/commodity/niobium.

[35] Gold Statistics and Information, U.S. GEOLOGICAL SURVEY, available at, http://minerals.usgs.gov/minerals/pubs/commodity/gold.

electrical, heating, and welding applications.[36] Based on the many uses of these minerals, we expect the Conflict Minerals Provision to apply to many companies and industries.

B. Step One – Determining Issuers Covered by the Conflict Mineral Provision

1. Issuers That File Reports Under the Exchange Act

Our proposed rules would apply to any issuer that files reports with the Commission under the Exchange Act, provided that the issuer is a "person described" under the Conflict Minerals Provision. The Conflict Minerals Provision defines a "person described" as one for whom conflict minerals are "necessary to the functionality or production of a product manufactured by such person."[37] We note that the provision could be read to apply to any company, including companies that are not subject to Commission reporting requirements, or individuals, so long as conflict minerals are necessary to the functionality or production of a product manufactured by that entity or individual. Such a broad reading of the provision, however, does not appear warranted given the provision's background and its location in the section of the Exchange Act dealing with reporting issuers.[38] Conversely, the Conflict Minerals Provision does not

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[36] Tungsten Statistics and Information, U.S. GEOLOGICAL SURVEY, available at, http://minerals.usgs.gov/minerals/pubs/commodity/tungsten.

[37] See supra note 12.

[38] H.R. REP. No. 111-517, Joint Explanatory Statement of the Committee of Conference, Title XV, "Conflict Minerals," at 879 (Conf. Rep.) (June 29, 2010) ("The conference report requires disclosure to the SEC by all persons otherwise required to file with the SEC for whom minerals originating in the Democratic Republic of Congo and adjoining countries are necessary to the functionality or production of a product manufactured by such person."); 156 CONG. REC. S3978 (daily ed. May 19, 2010) (statement of Sen. Feingold) (stating that the "Brownback amendment was narrowly crafted" and, in discussing the provision, referring only to "companies on the U.S. stock exchanges"); 156 CONG. REC. S3865-66 (daily ed. May 18, 2010) (stating that the Conflict Minerals Provision "is a narrow SEC reporting requirement" and referring only to "SEC reporting requirements" in discussing the provision); and 156 Cong. Rec. S3816-17 (daily ed. May 17, 2010) (statement of Sen. Durbin) (stating that the provision "would require companies listed on the New York Stock Exchange to disclose in their SEC filings").

limit its disclosure or reporting obligations to issuers of any particular size. Again, the only limiting factor appears to be whether conflict minerals are "necessary to the functionality or production" of an issuer's products.[39] Based on these considerations, we are not proposing to include an exemption for smaller reporting companies, although we request comment below on whether that would be appropriate.

We have received letters and other communications with a variety of recommendations regarding the Conflict Minerals Provision and our rulemaking,[40] including those that discussed what the provision's definition of a "person described" should be construed to mean. Specifically, one industry group representative stated that the term was intended to apply solely to persons who file periodic reports under Section 13(a)(2) of the Exchange Act, although that representative indicates that the provision is unclear as written.[41] A separate individual who submitted a letter to us stated that the provision's definition of the term is broad and appears to cover more than only reporting issuers.[42] Finally, another issuer that submitted a letter to us indicated our rules should define a "person described" in the broadest possible sense so that it includes non-reporting companies.[43] This issuer stated that, because the provision's intent is to limit the exploitation and trade of conflict minerals so as to prevent human rights abuses, and

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[39] Exchange Act Section 13(p)(2)(B).

[40] To facilitate public input on the Act, the Commission has provided a series of e-mail links, organized by topic, on its website at http://www.sec.gov/spotlight/regreformcomments.shtml. The public comments we have received on the topic of the Conflict Minerals Provision are available on our website at http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-8.pdf.

[41] See letter from Jewelers Vigilance Committee.

[42] See letter from Stuart P. Seidel, Esq. (stating that a person described is "not the usual SEC 'issuer' requirement and appears much broader").

[43] See letter from Tiffany & Co.

the provision is not necessarily intended to protect investors, the scope of the provision should include more than just reporting issuers. Further, the issuer stated that applying our proposed rules only to reporting issuers would unfairly burden reporting issuers and damage their competitive position.

We recognize there is some ambiguity as to whom the Conflict Minerals Provision applies given that the Conflict Minerals Provision states that the Commission shall promulgate regulations for any "person described,"[44] and the provision states that a "person is described" if "conflict minerals are necessary to the functionality or production of a product manufactured by such person."[45] Therefore, the Conflict Minerals Provision could be interpreted to apply to a wide range of private companies not previously subject to our disclosure and reporting rules. However, given the provision's legislative background, its statutory location, and the absence of Congressional direction to apply these provisions to companies not previously subject to those rules,[46] we do not propose to extend the rules beyond reporting companies. Also, even if we were to interpret the provision in this manner, it is uncertain how the Commission could administer such a program. Therefore, our proposed rules would apply only to issuers that file reports with the Commission under Section 13(a) or Section 15(d) of the Exchange Act, although we

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[44] See Exchange Act Section 13(p)(1)(A).

[45] See supra note 12.

[46] See H.R. REP. No. 111-517, Joint Explanatory Statement of the Committee of Conference, Title XV, "Conflict Minerals," at 879 (Conf. Rep.) (June 29, 2010) ("The conference report requires disclosure to the SEC by all persons otherwise required to file with the SEC for whom minerals originating in the Democratic Republic of Congo and adjoining countries are necessary to the functionality or production of a product manufactured by such person.")

request comment on this question below.[47] Consistent with the statutory language, our rules would apply to domestic companies, foreign private issuers, and smaller reporting companies. The statutory language does not suggest an exemption for foreign private issuers or smaller reporting companies and our proposal, therefore, would cover those issuers, although we request comment on this question below.

Request for Comment

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

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[47] Section 13(a) requires issuers with classes of securities registered under Section 12 of the Exchange Act to file periodic and other reports. 15 U.S.C. 78l. Section 15(d) requires issuers with effective registration statements under the Securities Act of 1933 (the "Securities Act") to file reports similar to Section 13(a) for the fiscal year within which such registration statement became effective. 15 U.S.C. 77a et seq. Therefore, if our proposed rules did not include issuers required to file reports under Section 15(d), some issuers who file annual reports may not otherwise be required to comply with our proposed conflict minerals rules.

[48] See the petition attached to the memorandum of the November 18, 2010 meeting with Chairman Mary L. Schapiro and with John Prendergast and Darren Fenwick of The Enough Project, Sasha Lezhnev of Grassroots Reconciliation Group, and Deborah R. Meshulam of DLA Piper (calling on the Commission to promulgate rules that would require equal reporting standards for all the conflict minerals), available at, http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-80.pdf.

[49] 17 CFR 240.12g3-2(b). A foreign private issuer may claim that exemption as long as it meets a foreign listing requirement, publishes its material home country documents in English on its Internet website or through another electronic information delivery system that is generally available to the public in its primary trading market, and otherwise is not required to file Exchange Act reports. A foreign private issuer typically relies on the Rule 12g3-2(b) exemption in order to establish an unlisted American Depositary Receipt ("ADR") facility for the issuance and trading of ADRs through the over-the-counter market.

[50] The Commission has not considered Rule 12g3-2(b)-exempt companies to be subject to Exchange Act reporting and filing requirements. Prior to the amendment to Rule 12g3-2(b) in 2008, we required issuers

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

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claiming the Rule 12g3-2(b) exemption to furnish paper copies of their material home country documents to the Commission. The documents were deemed furnished and not filed under the Exchange Act because they were subject to their home country, and not Exchange Act, disclosure rules.

products, provide the conflict minerals disclosure and, if necessary, a Conflict Minerals Report? If so, how would we oversee such a broad reporting system?

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?

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?

2. "Manufacture" and "Contract to Manufacture" Products

The Conflict Minerals Provision applies to any person for whom conflict minerals are necessary to the functionality or production of a product manufactured by that person.[51] It appears, therefore, that the Conflict Minerals Provision was not intended to apply to all issuers, but was intended to apply only to issuers that manufacture products. In this regard, our proposed rules would likewise apply to reporting issuers that manufacture products.

We do not propose to define the term "manufacture" in our rules, since we believe it is generally understood.[52] We note that some of those submitting letters in advance of

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[51] See Exchange Act Section 13(p)(2)(B).

[52] For example, the Second Edition of the Random House Webster's Dictionary defines the term to include the "making goods or wares by hand or machinery, esp. on a large scale." RANDOM HOUSE WEBSTER'S DICTIONARY 403(2d ed. 1996).

this rulemaking have suggested our proposed rules should define the term "manufacturing" with greater specificity and have provided their views on this matter. One non-governmental organization ("NGO") stated that the term "manufactured" should be defined as the "production, preparation, assembling, combination, compounding, or processing of ingredients, materials, and/or processes such that the final product has a name, character, and use, distinct from the original ingredients, materials, and/or processes."[53] An industry group indicated that the term manufacture should exempt issuers involved in the "mining, processing, refining, alloying, fabricating, importing, exporting or sale" of gold and those engaged in "jewelry repairs or refurbishment,…setting or re-setting diamonds or gemstones into mountings or…[the] manufactur[ing of] individual custom jewelry pieces."[54] We are not proposing to define the term, but we request comment on that point below.

One section of the Conflict Minerals Provision defines a "person described" as one for which conflict minerals are "necessary to the functionality or production of a product manufactured by such a person,"[55] while another section of the provision requires issuers to describe "the products manufactured or contracted to be manufactured that are not DRC conflict free" [emphasis added] in their Conflict Mineral Reports.[56] The absence of the phrase "contract to manufacture" from the "person described" definition raises some question as to whether the requirements apply equally to those who

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[53] See letter from The Enough Project.

[54] See letter from Jewelers Vigilance Committee.

[55] Exchange Act Section 13(p)(2)(B).

[56] Exchange Act Section 13(p)(1)(A)(ii).

manufacture products themselves and those who contract to have their products manufactured by others. Based on the totality of the provision, however, it appears that the legislative intent was for the provision to apply both to issuers that directly manufacture products and to issuers that contract the manufacturing of their products for which conflict minerals are necessary to the functionality or production of those products. Our proposed rules, therefore, would apply equally to issuers that manufacture products and to issuers that "contract to manufacture" their products. We believe that this approach would allow the "contracted to be manufactured" language to have effect in the Conflict Minerals Report.

With regard to what it means to "contract to manufacture a product," an industry group expressed concern that our rules could include retailing issuers' private label goods.[57] Two of the Congressmen who sponsored Section 1502 have stated in a letter submitted to us that rules implementing the provision should "exempt pure retailers" from any reporting requirements.[58] In this regard, they suggested that the rules should clarify that retailers who sell "pure 'white label' products," products over which retailers have no influence regarding their manufacture, would not be required to provide information regarding any conflict minerals in those products. Also, they indicated that the rules should include products that a retailer "contracts to be manufactured or for which the retailer issues unique product requirements."[59]

We intend that our proposed rules would apply to issuers that contract for the

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[57] See letter from National Retail Federation.

[58] Letter from Senator Richard J. Durbin and Representative Jim McDermott, United States Congress.

[59] Id.

manufacturing of products over which they have any influence regarding the manufacturing of those products. They also would apply to issuers selling generic products under their own brand name or a separate brand name that they have established, regardless of whether those issuers have any influence over the manufacturing specifications of those products, as long as an issuer has contracted with another party to have the product manufactured specifically for that issuer. We do not, however, propose that our rules would apply to retail issuers that sell only the products of third parties if those retailers have no contract or other involvement regarding the manufacturing of those products, or if those retailers do not sell those products under their brand name or a separate brand they have established and do not have those products manufactured specifically for them.

Request for Comment

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

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?

3. Mining Issuers as "Manufacturing" Issuers

As a separate but related issue, our proposed rules would consider issuers that mine conflict minerals, including issuers that mine gold, to be manufacturing those minerals, and issuers contracting for the mining of conflict minerals to be contracting the manufacturing of those minerals. In this regard, we have received input that our proposed rules should not consider a gold mining issuer as manufacturing or contracting to manufacture gold.[60] Conversely, another view expressed to us by an NGO was that our proposed rules should consider mining commensurate with manufacturing or contracting to manufacture.[61] This NGO cited to and quoted from the United States Controlled Substances Act,[62] which includes mining under the definition of manufacturing. We are proposing in an instruction to our proposed rules[63] that mining issuers should be considered to be manufacturing conflict minerals when they extract

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[60] See letter from Jewelers Vigilance Committee (stating that our proposed "rules should make clear that the mining, processing, refining, alloying, fabricating, importing, exporting or sale of gold does not constitute 'manufacture'").

[61] See letter from The Enough Project.

[62] 21 U.S.C.A. 802(15), the United States Controlled Substances Act, which defines the term "manufacture" as the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly or by extraction from substances of natural origin").

[63] New Item 4(a) of Form 10-K (through new Instruction 1 to Item 104 of Regulation S-K), new Instruction 2 to Item 16 of Form 20-F, and new Instruction 2 to General Instruction B(16) of Form 40-F.

those minerals.[64] We do, however, request comment on this point below.

Request for Comment

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?
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?
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?

4. When Conflict Minerals Are "Necessary" to a Product

The Conflict Minerals Provision requires the Commission to promulgate regulations requiring that any "person described" disclose annually whether conflict minerals that are "necessary" originated in the DRC countries and, if so, submit to the Commission a Conflict Minerals Report.[65] The provision further states that a "person is described" if "conflict minerals are necessary to the functionality or production of a

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[64] See Industry Guide 7 [17 CFR 229.802(g)] (implying that companies may "produce" minerals from a mining reserve).

[65] Exchange Act Section 13(p)(1)(A).

product manufactured by such person."[66] The provision, however, provides no additional explanation or guidance as to the meaning of this phrase. Likewise, we do not propose to define when a conflict mineral is necessary to the functionality or production of a product. We are, however, requesting comment on whether our rules should define this phrase and, if so, how.

We have received differing input as to when a conflict mineral should be considered necessary to the functionality or production of a product for purposes of the Conflict Minerals Provision. One NGO stated that the term "necessary" should be interpreted broadly and, at a minimum, include conflict minerals that are "intentionally added," "closely related," or "directly essential" to the production of a product.[67] That NGO indicated also that a conflict mineral is necessary when it is "required for the financial success or marketability of the product."[68] Further, the NGO affirmed that it believes that our proposed rules should exempt any product that contains naturally occurring trace amount of conflict minerals.[69] Two of the Congressional sponsors of Section 1502 indicated that "it is the policy of Section 1502 to require transparency of all sourcing of conflict minerals" from the DRC countries, so they believe the provision was intended "to include all uses of conflict minerals coming from DRC – except those that are 'naturally occurring' or 'unintentionally included' in the product."[70]

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[66] Exchange Act Section 13(p)(2)(B).

[67] Letter from The Enough Project.

[68] Id.

[69] Id.

[70] Letter from Senator Richard J. Durbin and Representative Jim McDermott, United States Congress.

While we are not proposing to define "necessary to the functionality or production," we note that if a mineral is necessary, the product is covered without regard to the amount of the mineral involved.[71] Further, we intend our proposed rules to include products if the conflict mineral is intentionally included in a product's production process and is necessary to that process, even if that conflict mineral is not ultimately included anywhere in the final product.[72] On the other hand, conflict minerals necessary to the functionality or production of a physical tool or machine used to produce a product would not be considered necessary to the production of the product even if that tool or machine is necessary to producing the product. For example, if an automobile containing no conflict minerals is produced using a wrench that contains conflict minerals necessary to the functionality or production of that wrench, we would not consider the conflict minerals in that wrench necessary to the production of the automobile.

Request for Comment

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?
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

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[71] See discussion infra Part II.F.1.

[72] See letter from Senator Richard J. Durbin and Representative Jim McDermott, United States Congress ("All users of conflict minerals that originate from the Democratic Republic of the Congo an adjoining countries that are not naturally occurring…or are a purely unintentional byproduct…need to be subject to reporting and transparency.").

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 automobile's functionality even if the automobile's basic function is for transportation? 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?

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 support such a broad reading?
19. Should we define the phrase to indicate that, as one letter suggested, a conflict mineral should be considered necessary when "[t]he conflict mineral is intentionally added to the product; 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]

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 not 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]

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[73] See letter submitted by Patricia Jurewicz on November 18, 2010 (the "Multi-Stakeholder Group Letter") (representing a consortium of NGOs, large issuers, and socially responsible institutional investors).

[74] See id.

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?

C. Step Two – Determining Whether Conflict Minerals Originated in the DRC Countries and the Resulting Disclosure

If conflict minerals are necessary to the functionality or production of a product manufactured by that issuer, the Conflict Minerals Provision requires an issuer to disclose whether those conflict minerals originated in the DRC countries.[75] If they did not originate in the DRC countries, the statute requires the issuer to make available that disclosure on its Internet website, but does not require the issuer to submit anything further to the Commission. If, however, any of the issuer's conflict minerals originated in the DRC countries, the provision requires the issuer to submit to the Commission a Conflict Minerals Report for the portion of its conflict minerals that originated in the DRC countries, and make that report available on its Internet website.

The rules we are proposing would require an issuer to disclose whether its conflict minerals originated in the DRC countries. Under our proposed rules, an issuer would be required to make a reasonable country of origin inquiry as to whether its conflict minerals originated in the DRC countries, but our proposed rules would not set forth what constitutes a reasonable country of origin inquiry. If, after a reasonable country of origin inquiry, an issuer concludes that any of its conflict minerals did not originate in the DRC countries, the issuer would be required to disclose this in the body of the annual report

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[75] Exchange Act Section 13(p)(1)(A).

and on its Internet website.[76] Also, the issuer would be required to disclose in the body of the annual report the Internet address on which the disclosure is posted and retain the information on the website at least until the issuer's subsequent annual report is filed with the Commission. Further, the issuer would be required to disclose in the body of its annual report the reasonable country of origin inquiry it undertook to determine that its conflict minerals did not originate in the DRC countries and maintain reviewable business records to support its determination.[77] The issuer, however, would not be required to make any other disclosures with regard to its conflict minerals that did not originate in the DRC countries.

Under our proposed rules, if an issuer determines through its reasonable country of origin inquiry that any of its conflict minerals originated in the DRC countries, or if the issuer is unable to determine after a reasonable country of origin inquiry that any such conflict minerals did not originate in the DRC countries, our proposed rules would require the issuer to disclose this in the body of the annual report and disclose that the Conflict Minerals Report is furnished as an exhibit to the annual report. Additionally, the issuer would be required to make available its Conflict Minerals Report on its Internet website, disclose in the body of its annual report that the Conflict Minerals Report is posted online, and disclose in the body of its annual report the Internet address on which the Conflict Minerals Report is located.[78] We note, however, that under our proposal

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[76] See Exchange Act Section 13(p)(1)(E). The issuer would be required to keep this information on its Internet website until it filed is subsequent annual report.

[77] See Multi-Stakeholder Group Letter (suggesting that entities subject to the Conflict Minerals Provision be required to maintain reviewable business records to support a negative determination).

[78] See Exchange Act Section 13(p)(1)(E).

such an issuer would only have to post the Conflict Minerals Report on its Internet website and would not have to post any of the disclosures it provides in the body of its annual report.[79]

1. Location of Disclosure

Our proposed rules would require disclosure about conflict minerals in an issuer's annual report on Form 10-K for a domestic issuer, Form 20-F for a foreign private issuer, and Form 40-F for an eligible Canadian issuer. Section 1502 requires issuers to disclose information about their conflict minerals annually, but does not otherwise specify where this disclosure must be located, either in terms of which form or in terms of where within a particular form. Our proposed rules would require this disclosure in the existing Form 10-K, Form 20-F, or Form 40-F annual report because issuers are already required to file these reports so this approach should be less burdensome than requiring a separate annual report to be filed. Further, to facilitate locating the conflict minerals disclosure within the annual report without over-burdening investors with extensive information about conflict minerals in the body of the report, our proposed rules would require issuers to include brief conflict minerals disclosure under a separate heading entitled, "Conflict Minerals Disclosure," and the more extensive, information in a separate exhibit to the annual report, if required.

To implement Section 1502 of the Act, we are proposing to add new Item 4(a) of

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[79] We recognize that there may be instances in which an issuer determines that its products contain a mixed assortment of conflict minerals, such that some did not originate in the DRC countries, some originated in the DRC countries, some have minerals that the issuer cannot determine did not originate in the DRC countries, or any combination thereof. If an issuer can determine which conflict minerals did not originate in the DRC countries, it would not have to provide a Conflict Minerals Report regarding those minerals. However, the issuer would still be required to file a Conflict Minerals Report for the minerals that originated in the DRC countries or that the issuer was unable to determine did not originate in the DRC countries.

Form 10-K (which references new Item 104(a) of Regulation S-K), new Item 16(a) of Form 20-F, and a new General Instruction B(16)(a) of Form 40-F. These rules would require that an issuer disclose in its annual report under a separate heading, entitled "Conflict Minerals Disclosure," its determination as to whether any of its conflict minerals originated in the DRC countries, based on its reasonable country of origin inquiry, and, for its conflict minerals that do not originate in the DRC countries, a brief description of the reasonable country of origin inquiry it conducted in making such a determination. Our proposed rules would not require an issuer who determines that its conflict minerals did not originate in the DRC countries, based on its reasonable country of origin inquiry, to provide any further disclosures.

We are also proposing that an issuer include brief additional disclosure in the body of the annual report if the issuer's conflict minerals originated in the DRC countries or if the issuer cannot determine that its conflict minerals did not originate in the DRC countries, based on its reasonable country of origin inquiry. We propose to add new Item 4(a) of Form 10-K, new Item 104(b)(2) of Regulation S-K, new Item 16(b)(2) of Form 20-F, and new General Instruction B(16)(b)(2) and Form 40-F to implement this additional disclosure. These proposed requirements would require an issuer to disclose that its conflict minerals originated in the DRC countries, or that it is unable to conclude that its conflict minerals did not originate in the DRC countries, that its Conflict Minerals Report has been furnished as an exhibit to the annual report, that the Conflict Minerals Report, including the certified independent private sector audit, is publicly available on the issuer's Internet website, and the issuer's Internet address on which the Conflict Minerals Report and audit report are located. As noted above, we are proposing this

approach to facilitate access to the conflict minerals information by placing it outside the body of the annual report.

The Conflict Minerals Provision requires that each issuer make its Conflict Minerals Report available to the public on the issuer's Internet website.[80] Consistent with the statute, we are proposing that new Item 104(b)(3) of Regulation S-K, new Item 16(b)(3) of Form 20-F, and new General Instruction B(16)(b)(3) of Form 40-F require an issuer to make such a report, including the certified audit report, available to the public by posting the text of the report on its Internet website. Our proposed rules would require that the text of the Conflict Minerals Report remain on the issuer's website at least until it files its subsequent annual report. Although we would require an issuer that furnishes a Conflict Minerals Report to provide some disclosures in the body of its annual report regarding that report, we would not require that issuer to post this disclosure on its website. We believe this is appropriate because any information disclosed in the body of the annual report would also be included in or the Conflict Minerals Report, which would be required to be posted on the issuer's Internet website.

Request for Comment

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

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[80] See Exchange Act Section 13(p)(1)(E)), which is entitled "Information Available to the Public" and states that "[e]ach person described under paragraph (2) shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A)."

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?

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

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?

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

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?

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?

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

[81] Sections 1502, 1503, and 1504 of the Act.

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?

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

2. Standard for Disclosure

We are proposing rules that would require issuers to disclose, based on their reasonable country of origin inquiry, whether their necessary conflict minerals originated

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[82] See letter from the Social Investment Forum.

in the DRC countries or that they are unable to determine, after such a reasonable country of origin inquiry, that their conflict minerals did not originate in the DRC countries. Our proposed rules would not specify what constitutes a reasonable country of origin inquiry. Instead, the proposed rules would require an issuer that determined its conflict minerals did not originate in the DRC countries to disclose its reasonable country of origin inquiry in making its determination.

Under our proposal, the reliability of any inquiry would be based solely on whether the information used provides a reasonable basis for an issuer to be able to trace the origin of any particular conflict mineral it uses.[83] For example, it would not satisfy our proposed rules for an issuer to conclude that it is unreasonable for it to attempt to determine the origin of its conflict minerals solely because of the large amount of conflict minerals it uses in its products or the large number of its products that include conflict minerals. Instead, that issuer would be required to make a reasonable country of origin inquiry as to the origin of all of its conflict minerals that are necessary to the functionality or production of its products that it manufactures or contracts to be manufactured to determine whether those conflict minerals originated in the DRC countries.

A multi-stakeholder group suggested a similar approach. This group recommended that our proposed rules require an issuer to make a reasonable inquiry into whether its conflict minerals originated in the DRC countries, provide a stated basis for any determination that the source and origin of the conflict minerals was not in the DRC

[83] This determination would not be based on whether an issuer considers it reasonable to undertake to determine the origin of all its conflict minerals as a whole.

countries, and maintain auditable business records to support a negative determination.[84] Similarly, in a separate submission, an NGO stated that our proposed rules should require issuers to conduct "a sufficient inquiry to enable them to have a reasonable basis to state whether necessary conflict minerals do or do not originate in the DRC or an adjoining country."[85] In this regard, that NGO also indicated that our proposed rules should require that the issuer "disclose the basis for any determination that necessary conflict minerals did not originate in the DRC or an adjoining country."[86]

Others who submitted letters, however, have suggested different standards for determining whether an issuer's conflict minerals originated in the DRC countries. A different NGO stated that our proposed rules should require issuers to "conduct sufficient due diligence to enable them to determine accurately whether conflict minerals do or do not originate from the DRC or an adjoining country."[87] An industry group indicated that our proposed rules should require issuers to use due diligence in determining whether their conflict minerals originated in the DRC countries.[88] The letter from that industry group stated, however, that it is not possible for issuers in every instance to determine definitively the origins of certain conflict minerals,[89] so it suggested that our proposed rules "should thus create a mechanism by which entities can make a disclosure stating 'no

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[84] See Multi-Stakeholder Group Letter.

[85] See letter from The Enough Project.

[86] Id.

[87] Letter from Global Witness.

[88] Letter from Jewelers Vigilance Committee.

[89] We note that the comments submitted by the Jewelers Vigilance Committee refer only to gold.

evidence of DRC or adjoining country origin.'"[90]

We recognize the possibility that issuers who have conducted a reasonable country of origin inquiry may nonetheless not be able to determine with absolute accuracy the origins of their conflict minerals. We do not believe, however, that it is appropriate for our rules to permit issuers to satisfy their country of origin disclosure requirement by concluding that there is "no evidence" that their conflict minerals originated in the DRC countries and, thereby, not be required to provide any further information regarding their conflict minerals. Such an allowance might encourage issuers to conduct poorly planned or executed inquiries. Therefore, under our proposed rules such an issuer would still be required to file a Conflict Minerals Report and, therefore, would be required to exercise a greater level of investigation into the source and chain of custody of its conflict minerals. As discussed in greater detail below, we would permit issuers who cannot determine the origins of their conflict minerals, based on their reasonable country of origin inquiry, to disclose that they are unable to determine that their conflict minerals did not originate in the DRC countries. This approach is similar to one recommended by a multi-stakeholder group, which indicated that, if an issuer "is unable to determine the origin of the minerals specified in the statute after making a reasonable country of origin inquiry, the [issuer] should be required to submit" a Conflict Minerals Report.[91]

We believe that conducting a reasonable country of origin inquiry before disclosing whether an issuer's conflict minerals originated in the DRC countries is

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[90] Letter from Jewelers Vigilance Committee.

[91] See Multi-Stakeholder Group Letter.

appropriate. However, our proposed rules would not state what that reasonable country of origin inquiry would entail because we believe that necessarily would depend on the issuer's particular facts and circumstances. In this regard, we note that the reasonable country of origin inquiry requirement is not meant to suggest that issuers would have to determine with absolute certainty whether their conflict minerals originated in the DRC countries, as the Commission has often stated that a reasonableness standard is not the same as an absolute standard.[92]

We note that conducting the reasonable country of origin inquiry could be less exhaustive than the due diligence discussed below. We believe that this disparity in how the standards are characterized reflects the language in the Conflict Minerals Provision. Initially, the provision requires issuers to determine whether their conflict minerals originated in the DRC countries. After making this determination, only issuers with conflict minerals that originated in the DRC countries or issuers that cannot determine their minerals did not originate in the DRC countries must submit to the Commission the Conflict Minerals Report, which describes, among other matters, the issuer's due diligence exercised on the source and chain of custody of its conflict minerals. It appears, therefore, that the provision was not intended to require the same investigation

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[92] See Management's Report on Internal Control Over Financial Reporting, Release No. 33-8762 (Dec. 20, 2006) [71 FR 77635] (stating that the "Commission has long held that 'reasonableness' is not an 'absolute standard of exactitude for corporate records'" (citing to Foreign Corrupt Practices Act of 1977, Release No. 34-17500 (Jan. 20, 1981) [46 FR 11544]) and that "the terms 'reasonable,' 'reasonably' and 'reasonableness' in the context of Section 404 [of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7262] implementation do not imply a single conclusion or methodology, but encompass the full range of appropriate potential conduct, conclusions or methodologies upon which an issuer may reasonably base its decisions"). This release also cites to the Foreign Corrupt Practices Act (the "FCPA"), 15 U.S.C. 78m(b)(7) and Exchange Act Section 13(b)(7), which states that "the terms 'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs." The release further cites to the conference committee report on amendments to the FCPA, CONG. REC. H2116 (daily ed. Apr. 20, 1988), which states the reasonableness "standard 'does not connote an unrealistic degree of exactitude or precision,'" but instead "'contemplates the weighing of a number of relevant factors, including the cost of compliance.'"

for determining whether conflict minerals originated in the DRC countries and for determining the source and chain of custody of those conflict minerals that originate in the DRC countries.

We believe that the steps necessary to constitute a reasonable country of origin inquiry will depend on the available infrastructure at a given point in time. Presently, we do not believe there is any single or exclusive manner for issuers to conduct this inquiry. However, one way we would view an issuer as satisfying the reasonable country of origin inquiry standard is if it received reasonably reliable representations from the facility at which its conflict minerals were processed that those conflict minerals did or did not originate in the DRC countries. These representations could come either directly from that facility or indirectly through the issuer's suppliers, but the issuer would have to reasonably believe these representations to be true based upon the facts and circumstances. For example, one way that an issuer could reasonably rely on a facility's representations regarding the source of its conflict minerals is if the smelter was identified as one that processes only "DRC conflict free" minerals under recognized national or international standards after receiving an independent third party audit of the source and chain of custody of the conflict minerals it processes. It is important to note, however, that although reliance on smelter certifications and supplier declarations may be sufficient now due to our understanding of the current information systems in place to discover conflict minerals' countries of origin, as these systems improve, the facts and circumstances surrounding what would be considered a reasonable country of origin inquiry may change. In other words, as systems improve, smelter certifications and supplier declarations may not satisfy a reasonable country of inquiry standard.

In this regard, we note a letter submitted to us by a multi-stakeholder group that discussed a similar approach, which referred to a "compliant smelter."[93] The multi-stakeholder group stated that it would prefer a "supplier declaration approach" to sourcing conflict minerals, which would "consist of having direct and component suppliers and others in the supply chain take reasonable means to assure that all the tin, tantalum, tungsten, and/or gold in their materials/products are sourced from a compliant smelter." The group stated further that a smelter would be "compliant" if it meets the requirements of an individual or industry wide audit process that stipulates the collection, disclosure, and efforts made to obtain certain information.[94]

Request for Comment

33. Is a reasonable country of origin inquiry standard 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?

34. Should we not require any type of inquiry? For example, would it be appropriate and

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[93] See Multi-Stakeholder Group Letter.

[94] Id.

consistent with the Conflict Minerals Provision to permit an issuer to make no inquiry, so long as it disclosed that fact?

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?

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?

D. Step Three – Conflict Minerals Report's Content and Supply Chain Due Diligence

The Conflict Minerals Provision requires any issuer determining that its necessary conflict minerals originated in the DRC countries to submit to the Commission a Conflict Minerals Report that includes, among other matters, a description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of its conflict minerals, which measures "shall include an independent private sector audit" of the Conflict Minerals Report.[95] In this regard, the Conflict Minerals Provision states that the

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[95] Exchange Act Section 13(p)(1)(A)(i).

issuer submitting the Conflict Minerals Report "shall certify the audit…that is included in such report" and such a certified audit "shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals."[96]

In order to implement these requirements, our proposed rules would require issuers that determined that their necessary conflict minerals originated in the DRC countries and those that are unable to determine that their conflict minerals did not originate in the DRC countries to exercise due diligence on the source and chain of custody of their conflict minerals and describe the due diligence they exercised. After exercising due diligence to make their Conflict Minerals Report determinations, issuers would be required describe their products that are not "DRC conflict free," the country of origin of those conflict minerals, the facilities used to process those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.[97] Additionally, our proposed rules would require all issuers furnishing a Conflict Minerals Report to certify that they obtained an independent private sector audit of the report and furnish as part of the Conflict Minerals Report the audit report of the independent private sector auditor.

1. Content of Conflict Minerals Report

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[96] Exchange Act Section 13(p)(1)(B).

[97] In this release, we refer to the issuer determinations required by Exchange Act Sections 13(p)(1)(A)(i) and (ii) regarding the source and chain of custody of the issuer's conflict minerals, its products manufactured or contracted to be manufactured that are not DRC conflict free, its conflict minerals' country of origin, the facilities used to process its conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity as the issuer's "supply chain determinations." We recognize, of course, that issuers that are unable to determine that their conflict minerals did not originate in the DRC countries would not know their minerals' country of origin and may not know their minerals processing facility.

As required by the Conflict Minerals Provision,[98] our proposed rules would require issuers to exercise due diligence on the source and chain of custody of their conflict minerals and to describe those due diligence measures in their Conflict Minerals Reports.[99] Moreover, consistent with the Conflict Minerals Provision,[100] we are proposing to require that the description of the measures taken by issuers to exercise due diligence on the source and chain of custody of their conflict minerals include a certified independent private sector audit conducted in accordance with the standards established by the Comptroller General of the United States.[101] The proposed rules also state that the audit would constitute a critical component of due diligence.[102] To implement the Conflict Minerals Provision's requirement that issuers "certify the audit,"[103] we are

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[98] See Exchange Act Section 13(p)(1)(A)(i).

[99] These rules would be included in proposed Item 104(b)(1)(i) of Regulation S-K, proposed Item 16(b)(1)(i) of Form 20-F, and proposed General Instruction B(16)(b)(1)(i) of Form 40-F.

[100] See Exchange Act Sections 13(p)(1)(A)(i) and 13(p)(1)(B).

[101] See Exchange Act Section 13(p)(1)(A). We note that, under the Conflict Minerals Provision, the Comptroller General establishes the appropriate standards for the independent private sector audit. Staff of the GAO has informed our staff that that they preliminarily believe no new standards need to be promulgated, but rather auditing standards that are part of the Government Auditing Standards, such as the standards for Attestation Engagements or the standards for Performance Audits will be applicable. See GAO-07-731G. The GAO staff has not indicated whether and, if so, what evaluation criteria are required for an Attestation Engagement.

[102] See new Item 4(a) of Form 10-K (referring to new Item 104(b)(1)(i) of Regulation S-K), new Item 16(b)(1)(i) of Form 20-F, and new General Instruction B(16)(b)(1)(i) of Form 40-F. Exchange Act Section 13(p)(1)(A)(i) states that a Conflict Minerals Report must include "a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with the rules promulgated by the Commission, in consultation with the Secretary of State." Exchange Act Section 13(p)(1)(B) defines the term "Certification" as follows: "The person submitting a report under subparagraph (A) shall certify the audit described in clause (i) of such subparagraph that is included in such report. Such a certified audit shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals."

[103] Exchange Act Section 13(p)(1)(B).

proposing that issuers be required to certify that they obtained an independent private sector audit of their Conflict Minerals Report,[104] and we are proposing that issuers provide this certification in that report.[105] Further, as required by the Conflict Minerals Provision,[106] we are proposing that our rules require descriptions, in the Conflict Minerals Report, of issuers' products that are not "DRC conflict free," the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.[107]

An issuer that is required to furnish a Conflict Minerals Report because it is unable to determine that its conflict minerals did not originate in the DRC countries must also provide this information. We recognize that such an issuer may not be able to determine with certainty whether any of its products are or are not "DRC conflict free," insofar as their initial efforts to determine the origin of the conflict minerals in those products under the reasonable country of origin inquiry was inconclusive and their subsequent due diligence on the source and chain of custody of such minerals was also inconclusive. Consistent with Section 13(p)(1)(A)(ii), we would require such an issuer to

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[104] Alternatively, one could interpret this language to mean that an issuer must ensure that the audit it obtained is accurate, but such an interpretation would appear to mean that an issuer must review the audit of its Conflict Minerals Report, which the issuer created originally. We are not proposing this approach since it appears redundant.

[105] These rules would be included under proposed Item 104(b)(1)(ii) of Regulation S-K, proposed Item 16(b)(1)(ii) of From 20-F, and proposed General Instruction B(16)(b)(1)(ii) of Form 40-F.

[106] See Exchange Act Section 13(p)(1)(A)(ii), which states that a Conflict Minerals Report must include, among other matters, "a description of the products manufactured or contracted to be manufactured that are not DRC conflict free…, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity."

[107] These rules would be included under proposed Item 104(b)(1)(iii) of Regulation S-K, proposed Item 16(b)(1)(iii) of From 20-F, and proposed General Instruction B(16)(b)(1)(iii) of Form 40-F.

describe all of its products that contain such conflict minerals and to identify these products as not "DRC conflict free"[108] since the issuer would not be able to establish that the minerals did not directly or indirectly finance or benefit armed groups in the DRC countries. Also, such issuers would be required to describe, to the extent known after conducting due diligence, the facilities used to process those conflict minerals and the efforts to determine the mine or location of origin with the greatest possible specificity.[109] An issuer may provide additional disclosure explaining, for example, that although these products are labeled as not "DRC conflict free" in compliance with our rules implementing the Conflict Minerals Provision, the issuer has been unable to determine the source of the conflict minerals, including whether the conflict minerals in these products benefited or financed armed groups in the DRC countries.

An issuer's description of any of its products that are not "DRC conflict free" should be based on its individual facts and circumstances so that the description sufficiently identifies the products or categories of products. For example, an issuer may disclose each model of a product containing conflict minerals that are not "DRC conflict free," each category of a product containing conflict minerals that are not "DRC conflict free," the specific products containing conflict minerals that are not "DRC conflict free" that were produced during a specific time period, that all its products contain conflict

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[108] If any products contain conflict minerals that did not originate in the DRC countries and conflict minerals that the issuer is unable to determine did not originate in the DRC countries, the issuer would be required to classify those products as not "DRC conflict free." Similarly, if any of an issuer's products contain conflict minerals that did not originate in the DRC countries, that the issuer is unable to determine did not originate in the DRC countries, or that originated in the DRC countries but did not directly or indirectly finance or benefit armed groups in the DRC countries, and also contain conflict minerals that originated in the DRC countries and that directly or indirectly financed or benefited armed groups in the DRC countries, the issuer must classify those products as not "DRC conflict free."

[109] We recognize that such issuers would not be able to provide the country of origin of those minerals.

minerals that are not "DRC conflict free," or another such description depending on the issuer's facts and circumstances.

The Conflict Minerals Provision uses the phrase "facilities used to process the conflict minerals," which would appear to refer to the smelter or refinery through which the issuer's minerals passed. We note also that the Conflict Minerals Provision states that products are "DRC conflict free" when those products do not contain conflict minerals that directly or indirectly finance or benefit armed groups.[110] Section 1502(e)(3) of the Act defines the term "armed group" as "an armed group that is identified as perpetrators 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,"[111] as it relates to the DRC countries.[112] Our proposed rule includes a cross reference to that definition to provide guidance to issuers.

Our proposed rules would require issuers to furnish, as part of their Conflict Minerals Report, the audit report prepared by the independent private sector auditor and to specifically identify that auditor.[113] While one might read the statutory language to suggest that only the issuer's certification of the audit, and not the audit report itself, is required to be submitted, we preliminarily believe that approach is not the better reading

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[110] See Exchange Act Sections 13(p)(1)(A)(ii) and 13(p)(1)(D).

[111] 22 U.S.C. 2151n(d) and 2304(b).

[112] Section 1502(e)(3) of the Act.

[113] These rules would be included in proposed Item 4(a) of Form 10-K (through Item 104(b)(1)(iv) of Regulation S-K), proposed Item 16(b)(1)(iv) of From 20-F, and proposed General Instruction B(16)(b)(1)(iv) of Form 40-F. Having our proposed rules require the issuer to identify the certified independent private sector auditor would satisfy Exchange Act Section 13(p)(1)(A)(ii), which states that the issuer must provide a description of "the entity that conducted the independent private sector audit in accordance with clause (i)."

of the Conflict Minerals Provision. As noted above, the Conflict Minerals Provision emphasizes that the independent audit is a "critical component of due diligence." In light of the importance of this audit report to our new reporting requirements and the statutory language, we are proposing to require that the audit report be furnished with the Conflict Minerals Report.

Although we are proposing that the audit report be furnished with the Conflict Minerals Report, new Item 4(a) of Form 10-K (referring to new Instruction 2 to Item 104 of Regulation S-K), new Instruction 3 to Item 16 of Form 20-F, and new Instruction 3 to General Instruction B(16) of Form 40-F would state that the Conflict Minerals Report, which would include the audit report, would 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. For example, if an issuer incorporates by reference its annual report into a Securities Act registration statement, that issuer would not be automatically incorporating the Conflict Minerals Report into the Securities Act document. Therefore, in such a situation, the independent private sector auditor would not assume expert liability and the issuer would not,[114] therefore, have to file a consent from that auditor unless the issuer specifically incorporates by reference the Conflict Minerals Report into the Securities Act registration statement.

Request for Comment

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

[114] See Rule 436 of Regulation C [17 CFR 230.436].

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?

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?

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?

40. Should our rules require issuers to disclose the mine or location of 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?

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?

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?

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?

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

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[115] See the petition attached to the memorandum of the November 18, 2010 meeting with Chairman Mary L. Schapiro and with John Prendergast and Darren Fenwick of The Enough Project, Sasha Lezhnev of Grassroots Reconciliation Group, and Deborah R. Meshulam of DLA Piper, available at, http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-80.pdf.

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 expert's reports for which consent is required under our rules?

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?

2. Location and Furnishing of Conflict Minerals Report

As noted above, we are proposing rules that require a Conflict Minerals Report to be furnished as an exhibit to an issuer's annual report on Form 10-K, Form 20-F, or Form 40-F, as applicable.[116] By requiring issuers to furnish their Conflict Minerals Report as an exhibit to the annual report, our proposed rules would enable anyone accessing the Commission's Electronic Data Gathering, Analysis, and Retrieval system (the "EDGAR" system)[117] to determine quickly whether an issuer furnished a Conflict Minerals Report with its annual report. Specifically, proposed Item 4(a) of Form 10-K (through Item 104 to Regulation S-K), Item 16 to Form 20-F, and General Instruction B(16) to Form 40-F would require an issuer to furnish its Conflict Minerals Report as an exhibit to its annual report. Also, our proposed rules would further revise Regulation S-K and Form 20-F to include a new Paragraph (96) of Item 601(b) and a new Paragraph 16 to the "Instructions as to Exhibits" section of Form 20-F to provide additional instructions specifically for

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[116] Our proposed rules would require that issuers furnish their Conflict Minerals Report as Exhibit 96 to their annual reports.

[117] See the Securities and Exchange Commission's Internet website, "Researching Public Companies Through EDGAR: A Guide for Investors," available at: http://www.sec.gov/investor/pubs/edgarguide.htm.

their exhibits under Item 601 and Paragraph 16, respectively. The text of Item 601(b)(96) and Paragraph 16 would be substantially similar and only would reference Item 104 and Item 16, respectively.[118]

Under our proposed rules, an issuer's Conflict Minerals Report, which would include the independent private sector audit report, would not be "filed" for purposes of Section 18 of the Exchange Act and would, thus, not be subject to the liability of that section of the Exchange Act unless the issuer states explicitly that the Conflict Minerals Report and the independent private sector audit report are filed under the Exchange Act. Instead, these documents would only be furnished to the Commission. These documents, therefore, would be treated in the same manner as other furnished disclosures, such as the certifications required to be submitted as exhibit 32[119] to Exchange Act documents under Rule 13a-14(b)[120] or Rule 15d-14(b)[121] and Section 1350 of Chapter 63 of Title 18 of the United States Code,[122] the Audit Committee Report required by Item 407(d) of Regulation S-K,[123] and the Compensation Committee Report required by Item 407(e)(5) of Regulation S-K.[124] Similarly, our proposed rules would not consider the Conflict

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[118] Item 601(96) of Regulation S-K would state, "The report required by Item 104(b) of Regulation S-K, if applicable." Also, Paragraph 16 in the "Instructions as to Exhibits" section to Form 20-F would state, "The Conflict Minerals Report required by Item 16 of this Form, if applicable." Further, our proposed rules would revise the Exhibit Table in Item 601 of Regulation S-K.

[119] Item 601(32)(ii) of Regulation S-K [17 CFR 229.601(b)(32)].

[120] 17 CFR 240.13a-14(b).

[121] 17 CFR 240.15d-14(b).

[122] 18 U.S.C. 1350.

[123] 17 CFR 229.407(d).

[124] 17 CFR 229.407(e)(5).

Minerals Report and the independent private sector audit report incorporated by reference into any filing under the Securities Act or the Exchange Act, except to the extent that the issuer specifically incorporates them by reference into the documents.

We believe this approach is not inconsistent with the Conflict Minerals Provision, which provides that an issuer must "submit" the Conflict Minerals Report, and does not otherwise mandate that the information be filed with the Commission.[125] Further, we preliminarily believe this approach is appropriate in light of the nature and purpose of this disclosure as set forth in Section 1502(a) of the Act.[126] It appears that the nature and purpose of the Conflict Minerals Provision is for the disclosure of certain information to help end the emergency humanitarian situation in the eastern DRC that is financed by the exploitation and trade of conflict minerals originating in the DRC countries,[127] which is qualitatively different from the nature and purpose of the disclosure of information that has been required under the periodic reporting provisions of the Exchange Act.[128] Finally, we note that we have received input indicating that our proposed rules should allow issuers to furnish their conflict minerals disclosures and Conflict Minerals Reports, as applicable.[129]

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[125] See Exchange Act Section 13(p)(1)(A).

[126] See supra note 11. A co-sponsor of the Conflict Minerals Provision stated that the disclosure of an issuer's conflict minerals information would help investors make a more informed decision. See 156 CONG. REC. S3865-66 (statement of Sen. Feingold) (daily ed. May 18, 2010) (stating that "[c]reating these mechanisms to enhance transparency will help the United States and our allies more effectively deal with these complex problems, at the same time that they will also help American consumers and investors make more informed decisions.")

[127] Id.

[128] 15 U.S.C. 78b.

[129] See letter from the American Bar Association.

Although the Conflict Minerals Report would not be subject to Section 18 liability,[130] we note that under Exchange Act Section 13(p)(1)(C), failure to comply with the Conflict Minerals Provision would deem the issuer's due diligence process "unreliable" and, therefore, the Conflict Minerals Report "shall not satisfy" our proposed rules.[131] In this regard, issuers that fail to comply with our proposed rules would be subject to liability for violations of Exchange Act Sections 13(a) or 15(d), as applicable.[132]

Request for Comment

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?
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)?
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 thereunder 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

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[130] 15 U.S.C. 78r.

[131] See Exchange Act Section 13(p)(1)(C).

[132] 15 U.S.C. 78m(a) and 15 U.S.C. 78o(d).

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?

49. Should the Conflict Minerals Report be furnished annually on Form 8-K.[134] Would that approach be consistent with Exchange Act Section 13(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?

3. Due Diligence Standard in the Conflict Minerals Report

Our proposed rules would require issuers to use due diligence regarding the supply chain determinations in their Conflict Minerals Report.[135] Our proposed rules would not, however, dictate the standard for, or otherwise provide guidance concerning, due diligence that issuers must use in making their supply chain determinations. Instead,

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[133] Exchange Act Section 18(a).

[134] See, e.g., letter from American Bar Association.

[135] See new Item 4(a) of Form 10-K (as through new Item 104(b)(1) of Regulation S-K), new Item 16(b)(1) of Form 20-F, and a new General Instruction B(16)(b)(1) of Form 40-F.

our proposed rules would require issuers to disclose the due diligence they used in making their determinations, such as whether they used any nationally or internationally recognized standards or guidance of supply chain due diligence.

The Conflict Minerals Provision requires issuers to conduct due diligence based on the provision's requirement that issuers describe their due diligence on the source and chain of custody of their conflict minerals.[136] Also, the provision states that issuers shall include an independent private sector audit of the Conflict Minerals Report as a critical component of due diligence.[137] Further, under Exchange Act Section 13(p)(1)(C), the Commission may determine an issuer's independent private sector audit or other due diligence processes to be unreliable and, under the terms of the Conflict Minerals Provision, any Conflict Minerals Report that relies on such an unreliable due diligence process would not satisfy our proposed rules.[138] In light of these statutory provisions, our proposed rules provide that an issuer's Conflict Minerals Report must include reliable due diligence processes, and that due diligence is required in making the supply chain determinations in the Conflict Minerals Report.

We note that we have received suggestions that due diligence is required in making the supply chain determinations. One letter received stated that a due diligence obligation "needs to be extended to the supply chain."[139] Two of the Congressional sponsors of Section 1502 of the Act have indicated their belief that the due diligence

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[136] Exchange Act Section 13(p)(1)(A)(i).

[137] Exchange Act Section 13(p)(1)(B).

[138] Exchange Act Section 13(p)(1)(C).

[139] Letter from Howland Greene Consultants LLC.

requirement should not be limited to determining whether the smelter uses due diligence.[140] An NGO submitted to us a description of its model supply chain due diligence processes, which would require issuers to perform due diligence on all aspects of their supply chain, including the supply chain determinations in their Conflict Minerals Reports.[141] In addition, an industry group from the precious metals industry indicated that it would not be opposed to conducting due diligence of its supply chains and, in fact, that due diligence is already part of its current business practice.[142] We note, however, that another industry group submitted a letter to us expressing concern about the feasibility of implementing a due diligence requirement, particularly with regard to gold.[143] This industry group pointed out that applying due diligence requirements to the gold supply chain would be especially challenging because the supply chain often begins with a bullion produced by a refiner that incorporates both newly mined and recycled gold.[144]

We believe that the statutory provision contemplates that issuers must use due diligence in their supply chain determinations. We do not believe, however, that it would be appropriate to prescribe any particular guidance for conducting due diligence because

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[140] See letter from Senator Richard Durbin and Representative Jim McDermott.

[141] See attached materials to the memorandum of the September 15, 2010 meeting of the staff of Division of Corporation Finance met with Corinna Gilfillan, Jonathan Grant, and Annie Dunnebacke of Global Witness, available at, http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-18.pdf.

[142] See letter from International Precious Metals Institute.

[143] See letter from Tiffany & Co.

[144] Letter from Jewelers Vigilance Committee.

the conduct undertaken by a reasonably prudent person may vary and evolve over time.[145] Although we are not proposing to establish any particular conduct requirements, we believe that due diligence must be performed and information about what conduct an issuer performed in its due diligence regarding its supply chain determinations is relevant. Our proposed rules, therefore, would require issuers to describe the due diligence used in making these determinations. In particular, we expect that an issuer whose conduct conformed to a nationally or internationally recognized set of standards of, or guidance for, due diligence regarding conflict minerals supply chains[146] would provide evidence that the issuer used due diligence in making its supply chain determinations.

If an issuer is unable to determine, after a reasonable country of origin inquiry, that its conflict minerals did not originate in the DRC countries, that issuer still would be required to submit a Conflict Minerals Report and obtain an independent private sector audit of that Conflict Minerals Report. We note that in such instances an issuer may not be able to provide all the information required by the Conflict Minerals Report, such as its conflict minerals' country of origin. We would, however, expect such an issuer to provide as much of the required information as possible, such as a description of the

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[145] For instance, the Organisation for Economic Cooperation and Development (the "OECD") is developing due diligence guidance for conflict mineral supply chains. See Organisation for Economic Cooperation and Development (the "OECD"), Draft Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2010), available at, http://www.oecd.org/dataoecd/13/18/46068574.pdf. Also, on November 30, 2009, the United Nations Security Council adopted Resolution 1896 that, among other matters, extended and expanded the mandate of the United Nations Group of Experts for the Democratic Republic of the Congo to create recommendations on due diligence guidelines for minerals originating in the DRC. See United Nations Security Council Resolution 1896 (2009) [S/RES/1896 (2009)].

[146] See, e.g., OECD, Draft Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2010), available at, http://www.oecd.org/dataoecd/13/18/46068574.pdf.

measures it took to exercise due diligence on the source and chain of custody of its conflict minerals.

In this regard, if an issuer is unable to determine after a reasonable country of origin inquiry that its conflict minerals did not originate in the DRC countries, the issuer would be required to exercise due diligence in making its supply chain determinations. Therefore, such an issuer would be required to describe its due diligence efforts regarding the facilities used to process the conflict minerals, the conflict minerals' country of origin, if it can be determined, and the efforts to determine the mine or location of origin with the greatest possible specificity.

Request for Comment

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?
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?
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

[147] In the industry, tantalite-columbite, cassiterite, and wolframite are "smelted" into their component metals whereas gold is "refined." Even so, both processes are substantially similar. When we refer to "smelting" those references are intended to include the "refining" of gold as well.

is a reasonable basis to believe the representations of the smelters or other parties?

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

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

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?

E. Time Periods

1. Furnishing of the Initial Disclosure and Conflict Minerals Report

The Conflict Minerals Provision requires issuers to provide their initial conflict minerals disclosure and, if necessary, their initial Conflict Minerals Report after their first full fiscal year following the promulgation of our final rules.[148] Assuming we adopt rules in April 2011, as required by the statutory provision, a December 31 fiscal year-end issuer would first have to provide conflict minerals disclosure or a Conflict Minerals Report after the end of its December 31, 2012 fiscal year. An issuer with a May 31 fiscal

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[148] See Exchange Act Section 13(p)(1)(A) (stating that an issuer must "disclose annually, beginning with the [issuer's] first full fiscal year that begins after the date of promulgation of [our] regulations").

year-end, however, would have to provide the conflict minerals disclosure or a Conflict Minerals Report in its annual report for the fiscal year that encompasses the period from June 1, 2011 through May 31, 2012.

Request for Comment

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?

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?

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)?

2. Time Period in which Conflict Minerals Must be Disclosed or Reported

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[149] 17 CFR 210.3-09.

[150] See letter from the American Bar Association.

The Conflict Minerals Provision requires issuers to disclose whether their necessary conflict minerals originated in the DRC countries "in the year for which such reporting is required."[151] We believe the date that the issuer takes possession of a conflict mineral would determine which reporting year an issuer would have to provide the required disclosure or Conflict Minerals Report for its conflict minerals. For example, if a December 31 fiscal year-end issuer takes possession of the conflict minerals, or product containing the conflict minerals, on December 31, the issuer would have to provide the required disclosure or a Conflict Minerals Report for the current year. However, if that same issuer did not take possession of the minerals until January 1, the issuer would not have to provide the disclosure or a report until the end of the year beginning that day and ending on the subsequent December 31.

In an instance in which an issuer contracts the manufacturing of a product in which a conflict mineral is necessary to the production of that product, but the conflict mineral is not included in the product, the issuer may use the date it takes possession of the product to determine which reporting year the issuer would have to provide the required disclosure or Conflict Minerals Report for the conflict mineral used to produce the product. For example, if a December 31 fiscal year-end issuer takes possession on December 31 of the product for which a conflict mineral was necessary to produce but that did not end up in the product, the issuer would have to provide the required disclosure or a Conflict Minerals Report for the year ended on that December 31. However, if that same issuer did not take possession of the product until the subsequent day, January 1, the issuer would not have to provide the disclosure or a report until the

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[151] Exchange Act Section 13(p)(1)(A).

end of the year beginning that January 1 and ending on the subsequent December 31.

Request for Comment

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?
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?
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?

F. Thresholds, Alternatives, Termination, Revisions, and Waivers

1. Materiality Threshold

As discussed above, the Conflict Minerals Provision's only limiting factor is that the conflict minerals must be "necessary to the functionality or production" of an issuer's products.[152] The provision has no materiality thresholds for disclosure based on the amount of conflict minerals an issuer uses in its production processes. Therefore, we are not proposing to include a materiality threshold for the disclosure or reporting requirements in our proposed rules.

Request for Comment

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]

2. Recycled and Scrap Minerals

Our proposed rules would allow for different treatment of conflict minerals from recycled and scrap sources than from mined sources due to the difficulty of looking through the recycling or scrap process to determine the origin of the minerals. As suggested in a letter, we would consider conflict minerals "recycled" that are reclaimed end-user or post-consumer products, but we would not consider those minerals "recycled" if they are partially processed, unprocessed, or a byproduct from another

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[152] Exchange Act Section 13(p)(2)(B).

[153] See letter from Senator Richard J. Durbin and Representative Jim McDermott, United States Congress (stating that a de minimis rule would create an overly generous loop-hole because the weight of essential conflict minerals in many products is very small).

ore.[154] Given the difficulty of looking through the recycling or scrap process, we expect that issuers generally will not know the origins of their recycled or scrap conflict minerals, so we believe it would be appropriate for our proposed rules to require that issuers using recycled or scrap conflict minerals furnish a Conflict Minerals Report subject to special rules. Under our proposed rules, [155] if issuers obtain conflict minerals from a recycled or scrap source, they may consider those conflict minerals to be DRC conflict free.[156] We believe that including this alternative approach in our proposed rules is consistent with the Conflict Minerals Provision because issuers purchasing conflict minerals from recycled or scrap sources would not implicate the concerns of the provision.[157]

Issuers whose conflict minerals originated from recycled or scrap sources would be required to disclose in their annual report, under the "Conflict Minerals Disclosure" heading, that their conflict minerals were obtained from recycled or scrap sources and

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[154] See Multi-Stakeholder Group Letter.

[155] See new Items 104(b)(2) and (c)(4) of Regulation S-K, new Items 16(b)(2) and (c)(4) of Form 20-F, and new General Instructions B(16)(b)(2) and (c)(4) of Form 40-F.

[156] Because our proposed rules would automatically classify recycled or scrap conflict minerals DRC conflict free, issuers with products containing such minerals would not need to provide in the Conflict Minerals Report a description of the recycled or scrap conflict minerals' processing facilities or country of origin, nor would they be required to describe their efforts to determine the mine or location of origin with the greatest possible specificity.

[157] See Section 1502(a) of the Act. See also, 156 Cong. Rec. S3816-17 (daily ed. May 17, 2010) (statement of Sen. Durbin) ("We can't begin to solve the problems of eastern Congo without addressing where the armed groups are receiving their funding, mainly from the mining of a number of key conflict minerals. We, as a nation of consumers as well as industry, have a responsibility to ensure that our economic activity does not support such violence. That is why I join with Senators Brownback and Feingold to support the Congo conflict minerals amendment, which is now pending on this bill."). One of the provision's sponsors, however, indicated that the Conflict Minerals Provision was intended, in part, to allow investors to make informed decisions. See 156 CONG. REC. S3865-66 (statement of Sen. Feingold) (daily ed. May 18, 2010) (stating that the provision would "enhance transparency [and] will help the United States and our allies more effectively deal with these complex problems, at the same time that they will also help American consumers and investors make more informed decisions" [emphasis added]).

that they furnished a Conflict Minerals Report regarding those recycled or scrap minerals. Under our proposed rules, issuers would state in their Conflict Minerals Report that their recycled or scrap minerals are considered DRC conflict free. In addition, such issuers would describe the measures taken to exercise due diligence in determining that their conflict minerals were recycled or scrap. Again, however, our proposed rules would not specify the due diligence required of such issuers. Further, our proposed rules would not define when a conflict mineral is recycled or scrap. Instead, any issuer seeking to use this alternative approach would provide its reasons for believing that the conflict mineral is from recycled or scrap sources in its Conflict Minerals Report, which would include due diligence on the source of the mineral.

A number of those that have submitted letters indicated that our rules should allow conflict minerals from recycled or scrap sources to be considered as not originating in the DRC countries or as DRC conflict free.[158] A number of these letters primarily discussed recycled gold.[159] Other letters, however, stated that our proposed rules should exempt all recycled or reclaimed conflict metals.[160] Additionally, most of the letters that expressed a view on a recycled and scrap alternative approach indicated that the approach

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[158] See, e.g. letters from Jewelers Vigilance Committee, Howland Greene Consultants LLC, International Precious Metals Institute, and the National Association of Manufacturers.

[159] See letters from Jewelers Vigilance Committee (stating that recycled gold would be impossible to trace, making an exemption appropriate) and International Precious Metals Institute (stating that "[w]e also believe that recycled gold waste and scrap should be deemed to be a conflict-free source").

[160] See letters from Howland Greene Consultants LLC (stating that "[r]ecycling should be encouraged and recognized as a legitimate way to classify a listed metal as DRC Conflict Free") and the National Association of Manufacturers (stating that our proposed rules should exempt recycled or scrap minerals because it "is impossible to track" the source of these minerals "due to the various forms of recycling and thousands of consolidators, reclaims, and scrap dealers both domestic and foreign" and because exempting recycled or scrap minerals "does not contradict the congressional intent" of the Conflict Minerals Provision).

should include a certain level of due diligence in determining that the conflict minerals were derived from recycled or scrap sources.[161]

Our proposed rules regarding recycled and scrap conflict minerals would apply to all conflict minerals. If recycled or scrap minerals are mixed with new minerals, the recycled and scrap alternative approach would apply only to the portion of the minerals that are recycled or scrap and the issuer would be required to furnish a Conflict Minerals Report regarding at least the recycled or scrap minerals. If the issuer's new conflict minerals did not originate in the DRC countries, that Conflict Minerals Report would contain only information regarding the recycled or scrap minerals. If, however, the new conflict minerals originated in the DRC countries, or the issuer was unable to determine that its new conflict minerals did not originate in the DRC countries, the Conflict Minerals Report would include information regarding both the new conflict minerals and the recycled or scrap conflict minerals.

Request for Comment

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

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[161] See letters from Howland Greene Consultants LLC (stating that recycled minerals should be classified as DRC Conflict Free only "if specific criteria are met") and International Precious Metals Institute (stating that recycled gold waste and scrap should be deemed to be a conflict-free source only "in the absence of particular geographical risk or other red flags").

from these sources? If not, why not?

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?

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?

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

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?

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?

3. Termination, Revisions, and Waivers

The Conflict Minerals Provision states that the Commission shall revise or temporarily waive its conflict minerals rules if the President transmits to the Commission a determination that a revision or waiver is in the national security interest of the United States and the President provides reasons for this determination.[162] However, any exemption to the Conflict Minerals Provision may last no longer than two years from the date of the exemption's initial publication.[163] Also, the Conflict Minerals Provision's disclosure and reporting requirements shall terminate when the President determines and certifies to the appropriate congressional committees that "no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals."[164] The Conflict Minerals Provision may not, however, terminate earlier than five years after the Act was enacted.[165] We plan to act in accordance with these provisions should any of the situations they describe occur. Our proposed rules, however, would not include these sections of the Conflict Minerals Provision because we do not believe that a rule to implement this section is necessary at this time.

Request for Comment

69. Should our rules address specifically the Conflict Minerals Provision's revision,

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[162] See Exchange Act Section 13(p)(3).

[163] Id.

[164] Section 1502(e)(4) of the Act defines the term "appropriate congressional committees" as the Committee on Appropriations, the Committee on Foreign Affairs, the Committee on Ways and Means, and the Committee on Financial Services of the House of Representatives and the Committee on Appropriations, the Committee on Foreign Relations, the Committee on Finance, and the Committee on Banking, Housing, and Urban Affairs of the Senate.

[165] See Exchange Act Section 13(p)(4).

waiver, or termination requirements? If so, how should our rules address this?

G. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

III. PAPERWORK REDUCTION ACT

A. Background

The proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (the "PRA").[166] We are submitting the proposed amendments to the Office of Management and Budget (the "OMB") for review in accordance with the PRA.[167] The title for the collection of information is:

(1) "Regulation S-K" (OMB Control No. 3235-0071);[168]

(2) "Form 10-K" (OMB Control No. 3235-0063);

(3) "Form 20-F" (OMB Control No. 3235-0288); and

(4) "Form 40-F" (OMB Control No. 3235-0381).

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[166] 44 U.S.C. 3501 et seq.

[167] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[168] The paperwork burden from Regulation S-K is imposed through the forms that are subject to the disclosures in Regulation S-K and is reflected in the analysis of those forms. To avoid a Paperwork Reduction Act inventory reflecting duplicative burdens, for administrative convenience we estimate the burdens imposed by Regulation S-K to be a total of one hour.

The regulation and forms were adopted under the Securities Act and the Exchange Act. The regulation and forms set forth the disclosure requirements for periodic reports and registration statements filed by companies to help shareholders make informed investment and voting decisions. The hours and costs associated with preparing and filing the form constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The proposed rules and form amendments would implement Section 13(p) of the Exchange Act, which was added by Section 1502 of the Act. As discussed in detail above, the proposed rules and form amendments would require an issuer to provide statutorily-mandated information regarding conflict minerals that are necessary to the functionality or production of a product manufactured or contracted to be manufactured by such an issuer. In this regard, we are proposing to add new disclosure and reporting requirements to the above forms, which would be substantially the same in each form.[169] The same conflict minerals disclosure requirements would apply to U.S. and foreign issuers.

The proposed rules would require any issuer filing reports under the Exchange Act to disclose in its annual reports whether conflict minerals that are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the issuer originated in the DRC countries. If so, the issuer would be required to furnish as an exhibit to its annual report a Conflict Minerals Report that includes a

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[169] New Item 4(a) in the Form 10-K would require issuers to furnish in the Form 10-K the information located in new Item 104 of Regulation S-K, which would set forth the new disclosure and reporting requirements to be included in the Form 10-K. For Forms 20-F and 40-F, the new disclosure and reporting requirements are contained within the form itself.

description of the measures taken by the issuer to exercise due diligence on the source and chain of custody of those minerals, which measures shall include an independent private sector audit of the Conflict Minerals Report that is certified by the issuer. Also, the Conflict Minerals Report would include a description of the issuer's products manufactured or contracted to be manufactured that are not DRC conflict free, the identity of the independent private sector auditor, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

These proposed rules would increase the amount of information that certain issuers must compile and disclose in their forms and would increase the disclosure burden in annual reports for certain issuers. Issuers filing reports under the Exchange Act that do not have conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by those issuers would have no disclosure or reporting requirements under the rules, but they would have the burden of determining whether conflict minerals are necessary to the functionality or production of products they manufacture or contract to manufacture. Under our proposed rules implementing the Conflict Minerals Provision, issuers that have conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by those issuers must determine whether those conflict minerals originated in the DRC countries. Our proposed rules would require issuers to conduct a reasonable country of origin inquiry in determining whether their conflict minerals originated in the DRC countries. This reasonable country of origin inquiry could vary among issuers, but we believe that issuers would generally have to conduct a relatively thorough

investigation to meet this standard. Therefore, we believe that the burden on issuers to determine the origin of their conflict minerals could be significant. If an issuer determines, however, that its conflict minerals did not originate in the DRC countries, its subsequent disclosure burden would be relatively insignificant. Such an issuer would be required to disclose in its annual report and on its website only that its conflict minerals did not originate in the DRC countries and disclose in its annual report the reasonable country of origin inquiry it used to make this determination.

Issuers with conflict minerals that originated in the DRC countries, or issuers that were unable to determine that their conflict minerals did not originate in the DRC countries, would be required to furnish a Conflict Minerals Report and would be required to use due diligence in determining the information required in that Conflict Minerals Report. Our proposed rules would require issuers to disclose, in their Conflict Minerals Report, the measures they took to exercise due diligence on the source and chain of custody of their conflict minerals. Additionally, issuers would have to disclose, based on their due diligence, whether any of the products they manufactured or contracted to be manufactured are not DRC conflict free. Also, issuers would be required to disclose the facilities used to process their conflict minerals, the country from which their conflict minerals originated, and the efforts to determine the mine or location of origin with the greatest possible specificity. Further, issuers would have to obtain an independent private sector audit of their Conflict Minerals Report and include in the Conflict Minerals Report a certification that they obtained such an audit, the identity of the auditor, and the audit report. Finally, the issuer would be required to post the Conflict Minerals Report, including the audit report, on its Internet website.

The type of reasonable country of origin inquiry and the due diligence standard for determining this information could vary among issuers. Regardless, we expect that all issuers with conflict minerals that originated in the DRC countries, or issuers that were unable to determine that their conflict minerals did not originate in the DRC countries, would have to conduct a thorough investigation to meet the reasonable country of origin inquiry and due diligence standards, which could be another significant burden on these issuers. The burden would be greater on issuers whose products contained conflict minerals that were not "DRC conflict free" because these issuers would have to determine which of their products contain conflict minerals that are not "DRC conflict free," whereas issuers with only "DRC conflict free" minerals would not have make such a determination. Compliance with the proposed amendments by affected issuers would be mandatory. The disclosure and reports submitted by issuers would not be kept confidential and there would be no mandatory retention period for the information disclosed.

B. Burden and Cost Estimates Related to the Proposed Amendments

The proposed rules and form amendments would require, if adopted, additional disclosure for an annual report filed on Form 10-K, Form 20-F, or Form 40-F by an issuer with necessary conflict minerals, which would increase the burden hour and cost estimates for each of those forms. For purposes of the PRA, we estimate the total annual increase in the paperwork burden for all affected companies to comply with our proposed collection of information requirements to be approximately 153,864 of company personnel time and to be approximately $71,243,000 for the services of outside professionals. These estimates include the time and cost of collecting the information,

preparing and reviewing disclosure, filing documents, and retaining records.

In deriving our estimates, we recognize that the burdens will likely vary among individual companies based on a number of factors, including the size and complexity of their operations and the number of products they manufacture or contract to manufacture and the number of those products that contain conflict minerals. We believe that some issuers will experience costs in excess of this average in the first year of compliance with the proposals and some issuers may experience less than these average costs.[170]

We have based our estimates of the effect that the adopted rules and form amendments, if adopted, would have on those collections of information as a result of the required due diligence process and independent private sector audit of the Conflict Minerals Report primarily on information that we have obtained from various stakeholder groups.

We do not expect all issuers' conflict minerals to have originated in the DRC countries. The DRC accounts for approximately 15% to 20% of the world's tantalum, and for considerably smaller percentage of the other three conflict minerals.[171] Therefore, for the purposes of the PRA, we assume that only 20% of the 5,994 affected issuers[172] will have to furnish an audited Conflict Minerals Report, which would be 1,199

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[170] See letter from the National Association of Manufacturers (suggesting that any change to an issuer's supply chain computer systems "is likely to range from $1 million to $25 million" per issuer "depending on the size and complexity of the supply chain"). We expect that the internal collection burden will vary from company to company depending on each company's needs and circumstances.

[171] See Jessica Holzer, Retailers Fight to Excape 'Conflict Minerals' Law, THE WALL STREET JOURNAL, Dec. 2, 2010, at B1. The DRC also accounts for approximately 4% of the world's tin, see id., and approximately 0.3% of global gold mine production, see letter from Jewelers Vigilance Committee (citing to GFMS Gold Survey 2010).

[172] We estimate that approximately 5,551 Forms 10-K, 377 Forms 20-F, and 66 Forms 40-F will be affected by the proposed amendments.

issuers.

Although no entity has yet conducted due diligence for its conflict minerals supply chain or obtained an audit of this due diligence, we obtained estimates from one entity that works with NGOs and one industry group of possible costs associated with conducting the due diligence and the audit based on the preliminary information they currently have. The entity that works with NGOs has estimated that the annual cost of conducting the due diligence for the four conflict minerals ranges between $20 million and $25 million. An industry group provided a much lower range of between $8 million and $10 million to set up a mineral source validation scheme. Although our rules do not require issuers to use an industry-wide due diligence process to comply with their due diligence obligations, we expect that most affected issuers will contribute to and rely on an industry wide due diligence process as part of their overall compliance.[173] Therefore, for purposes of the PRA, we have averaged the highest and the lowest estimates we received of the due diligence costs to obtain an aggregate estimate of $16.5 million[174] for the 1,199 issuers estimated to be required to file Conflict Minerals Reports.

Issuers that are required to file Conflict Minerals Reports must also obtain and certify an audit of the Conflict Minerals Report. One industry group indicated that it preliminarily estimates that each independent private sector audit of the Conflict Minerals Report will cost approximately $25,000 on average. We estimate that the 1,199 affected issuers' $25,000 cost would result in to an industry wide audit of approximately

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[173] See Multi-Stakeholder Group Letter (stating that, although individual issuers are responsible for their own due diligence, an issuer "may rely on an industry wide process where applicable and appropriate").

[174] ($25 million + $8 million)/2 = $16.5 million.

$29,975,000. Therefore, based on these figures, we estimate the PRA burden for the audit and due diligence requirements to the industry would be approximately $46,475,000.[175] We expect that the rules' effect will be higher during the first year of their effectiveness, due to the initial costs of creating minerals tracking systems, and diminish in subsequent years.

We have derived the burden hour and cost estimates for preparing the required disclosure in the annual reports and for determining when a registrant has conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant by estimating the total amount of time it will take the company to prepare the disclosure and make the determination. We estimate that the disclosure preparation for all affected registrants will take 36 hours per Form 10-K (27 hours in-house personnel time and a cost of approximately $3,600 for professional services). We estimate that for Forms 20-F and 40-F, the disclosure preparation will also take 36 hours (9 hours in-house personnel time and a cost of approximately $10,800 for professional services).

We derived the above estimates by estimating the average number of hours it would take an issuer to prepare and review the proposed disclosure requirements. These estimates represent the average burden for all companies, both large and small.

When determining these estimates, we have assumed that:

- for Form 10-K, 75% of the burden of preparation is carried by the company internally and that 25% of the burden of the preparation is carried by outside

[175] $16,500,000 + $29,975,000 = $46,475,000.

professionals retained by the company at an average cost of $400 per hour; and

- for Forms 20-F and 40-F, 25% of the burden of preparation is carried by the company internally and that 75% of the burden of preparation is carried by outside professionals retained by the company at an average cost of $400 per hour.

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

1. Form 10-K

For purposes of the PRA, we estimate that, of the 13,545 Form 10-Ks filed annually, approximately 5,551 are filed by companies that would be affected by the proposed rules and form amendments.[176] We further estimate that the annual incremental paperwork burden for the Forms 10-K as a result of the proposed rule and form amendments would be 27 burden hours per affected form associated with the company's preparation of the disclosure, and $19,983,600[177] associated with the cost of hiring professionals to help prepare the disclosure. In addition, we estimate for these purposes that those issuers required to submit a Conflict Minerals Report would also expend a total of $43,040,161[178] associated with the cost of hiring professionals to conduct the due diligence and the independent private sector audit of the Conflict Minerals Report.

2. Regulation S-K

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[176] We arrived at this number by estimating the number of issuers that fall under all the SIC codes that our staff believes most likely to manufacture or contract to manufacture products with conflict minerals necessary to the functionality or production of products manufactured or contracted to be manufactured by those issuers, and subtracted from that figure the number of issuers that file reports on Form 20-F and Form 40-F.

[177] $3,600 x 5,551 = $19,983,600.

[178] $46,475,000 x (5551/5994) = $43,040,161

While the proposed rule and form amendments would make revisions to Regulation S-K, the collection of information requirements for that regulation are reflected in the burden hours estimated for Form 10-K. The rules in Regulation S-K do not impose any separate burden. Consistent with historical practice, we are proposing to retain an estimate of one burden hour to Regulation S-K for administrative convenience.

3. Form 20-F

For purposes of the PRA, we estimate that, of the 942 Form 20-F annual reports, approximately 377 are filed each year by companies that would be affected by the proposed rule and form amendments.[179] We estimate that the annual incremental paperwork burden for the Forms 20-F as a result of the proposed rule and form amendments would be nine burden hours per affected form associated with the company's preparation of the disclosure, and $4,071,600[180] associated with the cost of hiring professionals to help prepare the disclosure. In addition, we estimate for these purposes that those issuers required to prepare a Conflict Minerals Reports would also expend a total of $2,923,102[181] associated with the cost of hiring professionals to conduct the due diligence and the independent private sector audit.

4. Form 40-F

For purposes of the PRA, we estimate that, of the 205 Form 40-F annual reports filed each year, approximately 66 are filed by companies that would be affected by the

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[179] We arrived at this estimate by determining the number of issuers that fall under all the SIC codes that our staff believes are most likely to manufacture or contract to manufacture products with conflict minerals necessary to the functionality or production of products manufactured or contracted to be manufactured by those issuers that file reports on Form 20-F.

[180] $10,800 x 377 = $4,071,600.

[181] $46,475,000 x (377/5994) = $2,923,102.

proposed rule and form amendments.[182] We estimate that the annual incremental paperwork burden for the Forms 40-F as a result of the proposed rule and form amendments would be nine burden hours per affected form associated with the company's preparation of the disclosure, and $712,800[183] associated with the cost of hiring professionals to help prepare the disclosure. In addition, we estimate for these purposes that those issuers required to prepare a Conflict Minerals Report would also expend a total of $511,737[184] associated with the cost of hiring professionals to conduct the due diligence and the independent private sector audit.

C. Summary of Proposed Changes to Annual Compliance Burden in Collection of Information

The following table illustrates the estimated changes in annual compliance burden in the collection of information in hours and costs for Exchange Act annual reports as a result of the proposed rule and form amendments.

Table 1

Form	Number of Responses[185]	Incremental Company	Incremental Professional Cost
10-K	5,551	149,877	$63,023,761
20-F	377	3,393	$6,994,702
40-F	66	594	$1,224,537

Table 2

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[182] We arrived at this estimate by determining the number of issuers that fall under all the SIC codes that our staff believes are most likely to manufacture or contract to manufacture products with conflict minerals necessary to the functionality or production of products manufactured or contracted to be manufactured by those issuers that file reports on Form 40-F.

[183] $10,800 x 66 = $712,800.

[184] $46,475,000 x (66/5994) = $511,737.

[185] This number corresponds to the estimated number of forms expected to be affected by the proposed rules and form amendments.

Form	Current Annual Response [186]	Current Burden Hours (A)	Increase in Burden Hours (B)	Proposed Burden Hours (C)=(A)+(B)	Current Professional Costs (D)	Increase in Professional Costs (E)	Proposed Professional Costs (F)=(D)+(E)
10-K	13,545	21,363,548	149,877	21,513,425	$2,848,473,000	$63,023,761	$2,911,496,761
20-F	942	622,907	3,393	626,300	$743,089,980	$6,994,702	$750,084,682
40-F	205	21,884	594	22,478	$26,260,500	$1,224,537	$27,485,037

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.

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

[186] The proposed rules and form amendments would not change the number of annual responses.

- 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.

IV. COST-BENEFIT ANALYSIS

Section 1502 of the Act amends the Exchange Act by adding new Section 13(p),[187] which requires the Commission to promulgate disclosure and reporting

[187] See Exchange Act Section 13(p).

regulations regarding the use of conflict minerals from the DRC countries. In response to the requirements of Exchange Act Section 13(p) as set forth in Section 1502 of the Act, the Commission is proposing new rules and form amendments that would provide for the disclosure and reporting of the use of conflict minerals from the DRC countries. The proposed rules and form amendments implement the requirements in Section 1502 of the Act and, as necessary or appropriate, require additional disclosure in a manner that we believe is consistent with Congress's intent.

First, Section 13(p)(1)(A) indicates that the Conflict Minerals Provision applies to a "person described," who is defined in Section 13(p)(2)(B) as one for whom conflict minerals are necessary to the functionality or production of a product manufactured by that person.[188] This provision could be read quite broadly to apply to any business, including individuals and companies that are not subject to SEC reporting, so long as conflict minerals are necessary to the functionality or production of a product manufactured by that entity or individual. We believe that such a broad reading of the provision is not warranted, however, given the provision's background and its location in the section of the Exchange Act that pertains to reporting issuers.[189] As a result, our proposed rules would apply only to issuers that file reports with the Commission under the Exchange Act, provided that conflict minerals are necessary to the functionality or production of a product manufactured by any such an issuer.

While our proposed amendments would not define specifically when a conflict mineral is "necessary to the functionality or production of a product," we intend our

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[188] See supra note 12.

[189] See supra note 38.

proposed rules to provide that a conflict mineral is "necessary to the production of a product" if a conflict mineral is intentionally included in a product's production process and the conflict mineral is necessary to that process, even if that conflict mineral is not ultimately included anywhere in the final product. Our proposed amendments would specify that, although a conflict mineral is necessary to the functionality or production of a product manufactured or contracted to be manufactured by the issuer, if that conflict mineral was obtained from recycled or scrap minerals, that mineral would be considered DRC conflict free. This approach for recycled or scrap minerals is not included in the Conflict Minerals Provision, but we believe it is appropriate because such conflict minerals would not be implicating the concerns that prompted the enactment of this statutory provision.[190]

Third, Section 13(p)(1)(A) indicates that issuers must disclose whether their necessary conflict minerals originated in the DRC countries.[191] The Conflict Minerals Provision, however, is silent as to how issuers would determine whether their conflict minerals originated in the DRC countries. Our proposed amendments would indicate that an issuer's determination of whether or not any of its necessary conflict minerals originated in the DRC countries would be required to be based on a reasonable country of origin inquiry into the minerals' origins and, if the issuer determines its necessary conflict minerals did not originate in the DRC countries, that the issuer would have to disclose in the body of its annual report the reasonable country of origin inquiry it undertook to make its determination and would have to maintain reviewable business records to

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[190] See supra note 157.

[191] See Exchange Act Section 13(p)(1)(A).

support this determination.

Fourth, our proposed amendments would specify where the Conflict Minerals report required by Section 13(p)(1)(A) of the Exchange Act should be provided.[192] The statutory provision does not indicate how issuers should submit their Conflict Minerals Reports to the Commission. Our proposed amendments would require issuers with necessary conflict minerals that originated in the DRC countries to furnish their Conflict Minerals Reports as an exhibit to their annual report on Form 10-K, Form 20-F, or Form 40-F, as applicable. In addition, although the Conflict Minerals Provision indicates that the Conflict Minerals Report must include an independent private sector audit of such report submitted through the Commission, it is unclear what record of that independent private sector audit an issuer must submit to the Commission and how it must do so, if at all. Our proposed amendments would require issuers to furnish an audit report of the independent private sector audit as part of and in the same exhibit to the annual report as the issuer's Conflict Minerals Report. Our proposed amendments also specify the required certification of the independent private sector audit. Our proposed amendments would require an issuer that furnishes a Conflict Minerals Report to include a statement in the body of its annual report that the Conflict Minerals Report is furnished as an exhibit to the annual report, that the Conflict Minerals Report and the certified audit report are available on its Internet website, and the Internet address of the website where the Conflict Minerals Report and audit report are located. Our proposed amendments would also require that the disclosure be posted on the issuer's Internet website at least until the issuer files its subsequent annual report.

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[192] Id.

Finally, our proposed amendments would require that the Conflict Minerals Report be furnished with the Commission, rather than filed. The Conflict Minerals Provision indicates that the report should be "submitted" to us,[193] but it does not indicate whether the report should be filed or furnished. Information that is furnished, rather than filed, with us is not subject to liability under Section 18 of the Exchange Act. By requiring the Conflict Minerals Report to be furnished with us, we are subjecting such reports to less liability than would exist if the reports were filed with us. However, under Exchange Act Section 13(p)(1)(C), failure to comply with the Conflict Minerals Provision would deem the issuer's due diligence process "unreliable" and, therefore, the Conflict Minerals Report "shall not satisfy" our proposed rules.[194] Also, issuers that fail to comply with our proposed rules would be subject to liability for violations of Exchange Act Sections 13(a) or 15(d), as applicable.[195]

The Commission is sensitive to the costs and benefits imposed by the proposed rules and form amendments. The discussion below focuses on the costs and benefits of the proposals made by the Commission to implement the Act within its permitted discretion, rather than the costs and benefits of the Act itself.

A. Benefits

Overall, we expect that our proposed rules will have the benefit of furthering Congress's goal of deterring the financing of armed groups in the DRC countries through commercial activity in conflict minerals. The proposed rules, if adopted, would specify

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[193] See Exchange Act Section 13(p)(1)(A).

[194] See Exchange Act Section 13(p)(1)(C).

[195] 15 U.S.C. 78m(a) and 15 U.S.C. 78o(d).

which companies are covered by the disclosure and reporting requirements in Section 1502 of the Act and the alternative approach to disclosure for recycled or scrap minerals. The proposed rules would also specify the information that reporting companies with necessary conflict minerals would be required to disclose. This specification would benefit reporting companies by reducing uncertainty about their compliance with Commission rules.

Our proposal specifies the location of the initial disclosure of conflict minerals' origin and the location of the Conflict Minerals Report and should make it easier for interested parties to locate this information. In addition, our proposal to require reporting companies to furnish the independent private sector audit report would make the report easily accessible to interested parties. Thus, market participants and observers may benefit from the increased disclosure and improved reporting to the extent that they find information about conflict mineral use relevant to their decision making.

Additionally, our decision to require issuers to furnish with the Commission the independent private sector audit report instead of filing it would free the independent private sector auditors preparing these reports from assuming expert liability. Relative to the filing option that we could have proposed, this should decrease the cost to independent private sector auditors of providing such audits to conflict minerals-reporting companies. Depending on the state of competition in the market for independent private sector audits, the lower costs due to auditors not being required to assume expert liability could result in lower audit fees, which in turn should decrease conflict minerals-reporting companies' cost of compliance with the statute.

We are proposing that reporting companies covered by Section 1502 of the Act

use a reasonable country of origin inquiry in determining whether their conflict minerals originated in the DRC countries and use due diligence in making their supply chain determinations. We have chosen not to provide guidance on what would constitute a "reasonable country of origin inquiry." Similarly, we have chosen not to propose a specific standard for due diligence. We believe that these decisions should benefit reporting issuers by allowing them the flexibility to use the reasonable country of origin inquiry and due diligence standards that are best suited to their circumstances. We believe that disclosure of the inquiry performed and the due diligence undertaken may benefit market participants if they are interested in learning such information.

In addition, our proposed rules and form amendments would provide that conflict minerals obtained from recycled or scrap sources would be considered DRC conflict free. This should benefit issuers by providing an alternative approach for recycled or scrap minerals and reduce their compliance costs with the disclosure requirements in Section 1502 of the Act, particularly for recycled or scrap minerals, the origins of which are difficult to trace.

B. Costs

We anticipate that reporting companies would incur costs in meeting the additional disclosure required for their Exchange Act annual reports under Section 13(p) and the proposed rules and form amendments. The Commission's proposal to require an exhibit for the Conflict Minerals Report and that reporting companies furnish with the Commission the independent private sector audit report as an exhibit to their annual reports will result in costs related to the preparation of such exhibits. In addition, including manufacturing companies, companies contracting to manufacture products,

companies contracting for the manufacture of products to sell under their own brand name or a separately established brand name, and mining companies as "persons described" would result in a larger number of companies incurring the disclosure compliance costs, compared to an interpretation that excluded some of these companies. Not requiring auditors to assume expert liability could increase the costs to market participants and other observers because auditors may not have as strong incentives to ensure their determinations are correct. Also, the Commission's proposal would require issuers that determine following a reasonable country of origin inquiry that their conflict minerals did not originate in the DRC countries must keep reviewable records, which will result in costs related to obtaining and maintaining these records. Further, such issuers would also incur costs in disclosing the reasonable country of origin inquiry in their annual reports. However, as described above, we believe these approaches are consistent with the Conflict Minerals Provision.

If a reporting company chose to incorporate by reference its independent private sector audit report into a Securities Act document, the independent private sector auditor would assume expert liability, if the auditor consented to the inclusion of its report. This would not be required under our proposals but, if an issuer chose to do so, this might increase the cost to independent private sector auditors of providing such audits to issuers furnishing Conflict Minerals Reports. Depending on the state of competition in the market for independent private sector audits, the additional cost stemming from the assumption of expert liability could be passed on to issuers furnishing Conflict Minerals Reporting in the form of higher audit fees, which in turn would increase these companies' cost of compliance with the statute, although, as noted, issuers could avoid such costs by

not incorporating the audit report into their Securities Act filings. In any event, since this audit market is still in its nascence, and issuers presumably would not choose to incorporate the report by reference, the above effects are difficult to assess but are likely insignificant.

C. Request for Comment

We request comment on the disclosures and accuracy of our estimates in this section.

V. CONSIDERATION OF BURDEN ON COMPETITION AND PROMOTION OF EFFICIENCY, COMPETITION AND CAPITAL FORMATION

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine if an action is necessary or appropriate in the public interest, also to consider whether the action will promote efficiency, competition, and capital formation.[196] Section 23(a)(2) of the Exchange Act also requires the Commission, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition.[197] In addition, Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[198]

The Commission is proposing the new rules and form amendments discussed in this release to implement the requirements of Exchange Act Section 13(p) as set forth in

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[196] 15 U.S.C. 78c(f).

[197] 15 U.S.C. 78w(a)(2).

[198] Id.

Section 1502 of the Act. We believe that our proposed rulemaking would have a different impact on competition in different industries. In industries where most or all companies are subject to disclosure or reporting requirements under the statute, we believe anti-competitive effects to be unlikely. In industries where not all or only a few companies are subject to the disclosure or reporting requirements, issuers that must provide disclosure or furnish Conflict Mineral Reports would incur competitive costs because of our disclosure and reporting requirements and clarifications.

Although the costs to perform the investigative work required and, if necessary, the independent private sector audit fees could increase the disclosure and reporting compliance costs for issuers that provide disclosure or furnish Conflict Minerals Reports versus companies who do not provide disclosure or furnish such reports, the net effect on competition would depend on how these costs compare to the benefits that companies obtain by using conflict minerals from the DRC countries, such as lower input costs.

Anti-competitive effects might be of larger magnitude in industries where the proportion of companies not covered by the Exchange Act Section 13(p) is larger. For instance, mining issuers might suffer a competitive disadvantage with respect to mining companies that are not required to provide disclosure or Conflict Minerals Reports but use DRC minerals, such as U.S. private mining companies or foreign mining companies, because the issuers would be required to incur investigative, disclosure, and reporting costs as a result of the statute and our rules.

We are proposing to require issuers to furnish the Conflict Minerals Report with the Commission instead of filing it and have it included in Exchange Act reports and Securities Act registration statements. This requirement may limit the costs to, and the

potential negative impact on, capital formation. We are not currently aware of any effects on efficiency or capital formation, but we seek comment on whether there are any such effects.

Request for Comment

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.

VI. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

This Initial Regulatory Flexibility Act Analysis[199] relates to proposed rules and form amendments to implement Section 13(p) of the Exchange Act, which concerns certain disclosure and reporting obligations of issuers with conflict minerals necessary to the functionality or production of any product manufactured or contracted to be manufactured by those issuers. As set forth by Section 13(p), an issuer with such necessary conflict minerals must disclose whether those minerals originated in the DRC countries and, if so, must submit to the Commission a Conflict Minerals Report.

A. Reasons for, and Objectives of, the Proposed Action

The proposed rule and form amendments are designed to implement the requirements of Section 1502 of the Act. Specifically, the proposed rules and form amendments would require all issuers with necessary conflict minerals to disclose in their annual reports whether those conflict minerals originated in the DRC countries. Issuers with necessary conflict minerals that originate in the DRC countries, or that are unable to

[199] This analysis has been prepared in accordance with 5 U.S.C. 603.

determine that their necessary conflict minerals did not originate in the DRC countries, must provide the conflict minerals disclosure specified by our rules in their Exchange Act annual reports.

Any issuer with necessary conflict minerals that did originate in the DRC countries, or that is unable to determine that its necessary conflict minerals did not originate in DRC countries, also must furnish as an exhibit to its Exchange Act annual reports a Conflict Minerals Report, which requires the issuer to describe the measures it has taken to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an certified independent private sector audit that shall constitute a critical component of due diligence. The Conflict Minerals Report must include a description of the products manufactured or contracted to be manufacture that are not DRC conflict free, the identification of the independent private sector auditor, and the disclosure of the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity. Also, issuers shall make available to the public on their Internet websites their Conflict Minerals Reports.

B. Legal Basis

We are proposing the rule and form amendments contained in this document under the authority set forth in Sections 6, 7, 10, and 19(a) of the Securities Act, and Sections 12, 13, 15, and 23(a) of the Exchange Act.

C. Small Entities Subject to the Proposed Amendments

The proposals would affect small entities that file annual reports with the Commission under the Exchange Act, and that have conflict minerals necessary to the

functionality or production of products they manufacture or contract to manufacture. Exchange Act Rule 0-10(a)[200] defines an issuer to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We believe that the proposals would affect small entities with necessary conflict minerals as defined under Section 13(p). We estimate that there are approximately 793 companies to which conflict minerals are necessary and that may be considered small entities.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule and form amendments would add to the annual disclosure requirements of companies with necessary conflict minerals, including small entities, by requiring them to comply with the disclosure and reporting obligations under Section 13(p) and provide certain additional disclosure in their Exchange Act annual reports. Among other matters, that information must include, as applicable:

- disclosure as to whether conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufacture by an issuer did originate in the DRC countries; and, if so,
- a Conflict Minerals Report furnished as an exhibit to the annual report, which includes a certified independent private sector audit report.
- reviewable business records regarding any determination that an issuer's conflict minerals did not originate in the DRC countries.

The same disclosure and reporting requirements would apply to U.S. and foreign issuers. We are proposing to amend Form 10-K and Regulation S-K to require domestic

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[200] 17 CFR 240.0-10(a).

issuers to provide the conflict minerals information. Because Regulation S-K does not directly apply to Forms 20-F and 40-F,[201] we propose to amend those forms to include the same disclosure requirements for issuers that are foreign private issuers.[202]

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe there are no federal rules that duplicate, overlap or conflict with the proposed rules.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish the stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

(1) Establishing different compliance or reporting requirements which take into account the resources available to smaller entities;

(2) Exempting smaller entities from coverage of the disclosure requirements, or any part thereof;

(3) The clarification, consolidation, or simplification of disclosure for small entities; and

(4) Use of performance standards rather than design standards.

We believe that separate disclosure requirements for small entities that would differ from the proposed reporting requirements, or exempting them from those

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[201] While Form 20-F may be used by any foreign private issuer, Form 40-F is only available to a Canadian issuer that is eligible to participate in the U.S.-Canadian Multijurisdictional Disclosure System ("MJDS").

[202] Proposed Item 16 under Part II of Form 20-F and proposed General Instruction B(16) of Form 40-F.

requirements, would not achieve the disclosure objectives of Section 13(p). The proposed rules are designed to implement the conflict minerals disclosure and reporting requirements of Section 13(p). That statutory section applies to all issuers with necessary conflict minerals, regardless of size. However, the reasonable country of origin inquiry standard for determining whether conflict minerals originated in the DRC countries and the due diligence standard necessary for making the supply chain determinations in the Conflict Minerals Report are performance standards and would vary based on the facts and circumstances of each individual issuer. We have requested comment as to whether we should provide an exemption for smaller reporting companies and whether doing so would be consistent with the statute.

The proposed rules would require clear disclosure about the source and chain of custody of an issuer's necessary conflict minerals, which may result in increased transparency about the origin of those minerals. The proposed requirement to disclose the information in the body of and as an exhibit to an issuer's Exchange Act annual report may simplify the process of submitting the proposed conflict minerals disclosure and Conflict Minerals Reports. In addition, furnishing the Conflict Minerals Reports and the audit reports as exhibits would simplify the search and retrieval of this information regarding issuers, including small entities, for investors and other interested persons.

We have otherwise used design rather than performance standards in connection with the proposed amendments because, based on our past experience, we believe the proposed amendments would be more useful if there were specific disclosure requirements. In addition, the specific disclosure requirements in the proposed amendments would promote consistent and comparable disclosure among all issuers with

necessary conflict minerals.

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.

VII. SMALL BUSINESS REGULATORY ENFORCEMENT FAIRNESS ACT

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[203] a rule is "major" if it has resulted, or is likely to result in:

- an annual effect on the economy of $100 million or more;

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[203] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

- a major increase in costs or prices for consumers or individual industries; or
- significant adverse effects on competition, investment or innovation.

Request for Comment

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.

VIII. STATUTORY AUTHORITY AND TEXT OF THE PROPOSED AMENDMENTS

The amendments described in this release are being proposed under the authority set forth in Sections 6, 7 10, 19(a), and 28 of the Securities Act, as amended, and Sections 12, 13, 15(d), 23(a), and 36 of the Exchange Act, as amended.

List of Subjects

17 CFR Parts 229 and 249

Reporting and recordkeeping requirements, Securities.

TEXT OF THE PROPOSED AMENDMENTS

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229 - STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975 - REGULATION S-K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z-2, 77z-3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u-5, 78w, 78ll, 78mm, 80a-8, 80a-9, 80a-20, 80a-29, 80a-30, 80a-31(c), 80a-37, 80a-38(a), 80a-39, 80b-11, and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Add §229.104 to read as follows:

§229.104 (Item 104) Conflict minerals disclosure.

(a) If any conflict minerals, as defined by paragraph (c)(3) of this section, are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant in the year covered by the annual report, the registrant must disclose in its annual report under a separate heading entitled "Conflict Minerals Disclosure" whether any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, as defined by paragraph (c)(1) of this section or that the registrant is not able to determine that its conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country. The registrant's determination of whether or not any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, or its inability to determine that these conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, must be based on its reasonable country of origin inquiry. If the registrant determines that its conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by it did not

originate in the Democratic Republic of the Congo or an adjoining country, the registrant must make that disclosure available on its Internet website and must also disclose this determination in its annual report under the separate "Conflict Minerals Disclosure" heading along with the reasonable country of origin inquiry it undertook to make its determination, that its disclosure is located on its Internet website, and the address of that Internet website. The disclosure must remain on the registrant's Internet website at least until the registrant files its subsequent annual report. Also, the registrant must maintain reviewable business records to support any such negative determination.

(b) If any conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant originated in the Democratic Republic of the Congo or an adjoining country, if the registrant is unable to determine that such conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, or if such conflict minerals came from recycled or scrap sources, the registrant must:

(1) Furnish a Conflict Minerals Report as an exhibit to its annual report with the following information:

(i) A description of the measures taken by the registrant to exercise due diligence on the source and chain of custody of the conflict minerals or to exercise due diligence in determining that the conflict minerals came from recycled or scrap sources, which shall include but not be limited to a certified independent private sector audit of the Conflict Minerals Report, conducted in accordance with standards established by the Comptroller General of the United States, that shall constitute a critical component of the registrant's due diligence in establishing the source and chain of custody of the conflict

minerals or that the conflict minerals came from recycled or scrap sources;

(ii) A certification by the registrant that it obtained such an independent private sector audit;

(iii) A description of any of the registrant's products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free," as defined in paragraph (c)(4) of this section, the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity; and

(iv) The audit report prepared by the independent private sector auditor, which identifies the entity that conducted the audit.

(2) In addition to the disclosures required by paragraph (a) of this section, disclose under the separate "Conflict Minerals Disclosure" heading in the annual report that the registrant has furnished a Conflict Minerals Report as an exhibit to the annual report; that the Conflict Minerals Report and the certified independent private sector audit report are available on its Internet website; and the Internet address of its Internet website where the Conflict Minerals Report and audit report are located.

(3) Make the Conflict Minerals Report, including the certified audit report, available to the public by posting the text of the report on its Internet website. The text of the Conflict Minerals Report must remain on the registrant's Internet website

at least until the registrant files its subsequent annual report.

(c) For the purposes of this section, the following definitions apply:

(1) Adjoining country. The term adjoining country means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) Armed group. The term armed group means an armed group that is identified as a perpetrator of serious human rights abuses in the most recently issued annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country for the year the annual report is due.

(3) Conflict mineral. The term conflict mineral means:

(i) Columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(ii) Any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(4) DRC conflict free. The term DRC conflict free means that a product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Conflict minerals that a registrant is unable to determine did not originate in the Democratic Republic of the Congo or an adjoining country are not "DRC conflict free." Conflict minerals that a registrant obtains from recycled or scrap sources are considered DRC conflict free.

Instructions to Item 104

(1) A registrant that files reports with the Commission under Sections 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act, for whom conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that registrant, shall provide the information required by this item. A registrant that mines conflict minerals would be considered to be

manufacturing those minerals for the purpose of this item.

(2) The information required by this Item shall not be deemed to be "filed" with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Item need not be provided in any filings other than an annual report on Form 10-K (§249.310 of this chapter). Such information will 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 registrant specifically incorporates it by reference.

3. Amend §229.601 in the exhibit table to add entry (96) and add paragraph (b)(96) to read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

Exhibit Table * * *

EXHIBIT TABLE														
	Securities Act Forms								**Exchange Act Forms**				
	S-1	**S-3**	**S-4[3]**	**S-8**	**S-11**	**F-1**	**F-3**	**F-4[3]**	**10**	**8-K[5]**	**10-D**	**10-Q**	**10-K**
* * * * *													
(36) through (95) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(96) Conflict Minerals Report	---	---	---	---	---	---	---	---	---	---	---	---	X
(97) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

(98) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	

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(b) * * *

(96) Report on conflict minerals from the Democratic Republic of the Congo or an Adjoining Country. The report required by Item 104(b)(1) of Regulation S-K, if applicable.

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PART 249 -- FORMS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a et seq. and 7201 et seq.; and 18 U.S.C. 1350, unless otherwise noted.

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5. Amend Form 20-F (referenced in §249.220f) by adding Item 16 and by adding paragraph 16 to the Instructions as to Exhibits.

The addition reads as follows:

Note: The text of Form 20-F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 20-F

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PART II

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Item 16. Conflict Minerals Disclosure

(a) If any conflict minerals, as defined by paragraph (c)(3) of this Item, are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant in the year covered by the annual report, the registrant must disclose in its annual report under a separate heading entitled "Conflict Minerals Disclosure" whether any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, as defined by paragraph (c)(1) of this Item, or that the registrant is not able to determine that its conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country. The registrant's determination of whether or not any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, or its inability to determine that these conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, must be based on its reasonable country of origin inquiry. If the registrant determines that its conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by it did not originate in the Democratic Republic of the Congo or an adjoining country, the registrant must make that disclosure available on its Internet website and must also disclose this determination in its annual report under the separate "Conflict Minerals Disclosure" heading along with the reasonable country of origin inquiry it undertook to make its determination, that its disclosure is located on its Internet website, and the address of that Internet website. The disclosure must remain on the registrant's Internet website at least

until the registrant files its subsequent annual report. Also, the registrant must maintain reviewable business records to support any such negative determination.

(b) If any conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant originated in the Democratic Republic of the Congo or an adjoining country, if the registrant is unable to determine that such conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, or if such conflict minerals came from recycled or scrap sources, the registrant must:

(1) Furnish a Conflict Minerals Report as an exhibit to its annual report with the following information:

(i) a description of the measures taken by the registrant to exercise due diligence on the source and chain of custody of the conflict minerals or to exercise due diligence in determining that the conflict minerals came from recycled or scrap sources, which shall include but not be limited to a certified independent private sector audit of the Conflict Minerals Report, conducted in accordance with standards established by the Comptroller General of the United States, that shall constitute a critical component of the registrant's due diligence in establishing the source and chain of custody of the conflict minerals or that the conflict minerals came from recycled or scrap sources;

(ii) a certification by the registrant that it obtained such an independent private sector audit;

(iii) a description of any of the registrant's products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free," as defined in paragraph (c)(4) of this Item, the facilities used to process those

conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity; and

(iv) the audit report prepared by the independent private sector auditor, which identifies the entity that conducted the audit.

(2) In addition to the disclosures required by paragraph (a) of this Item, disclose under the separate "Conflict Minerals Disclosure" heading in the annual report that the registrant has furnished a Conflict Minerals Report as an exhibit to the annual report; that the Conflict Minerals Report and the certified independent private sector audit report are available on its Internet website; and the Internet address of its Internet website where the Conflict Minerals Report and audit report are located.

(3) Make the Conflict Minerals Report, including the certified audit report, available to the public by posting the text of the report on its Internet website. The text of the Conflict Minerals Report must remain on the registrant's Internet website at least until the registrant files its subsequent annual report.

(c) For the purposes of this Item, the following definitions apply:

(1) Adjoining country. The term adjoining country means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) Armed group. The term armed group means an armed group that is identified as a perpetrator of serious human rights abuses in the most recently issued annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country for the year the annual report is due.

(3) Conflict mineral. The term conflict mineral means:

(i) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(ii) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(4) DRC conflict free. The term DRC conflict free means that a product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Conflict minerals that a registrant is unable to determine did not originate in the Democratic Republic of the Congo or an adjoining country are not "DRC conflict free." Conflict minerals that a registrant obtains from recycled or scrap sources are considered DRC conflict free.

Instructions to Item 16

(1) Item 16 applies only to annual reports, and does not apply to registration statements on Form 20-F. A registrant must provide the information required in Item 16 beginning with the annual report that it files for its first full fiscal year beginning after **[April 15, 2011].**

(2) A registrant that files reports with the Commission under Sections 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act, for whom conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that registrant, shall provide the information required by this item. A registrant that mines conflict minerals would be considered to be manufacturing those minerals for the purpose of this item.

(3) The information required by this Item shall not be deemed to be "filed"

with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Item need not be provided in any filings other than an annual report on Form 20-F (§249.220f of this chapter). Such information will 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 registrant specifically incorporates it by reference.

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INSTRUCTIONS AS TO EXHIBITS

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16. The Conflict Minerals Report required by Item 16 of this Form, if applicable.

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6. Amend Form 40-F (referenced in §249.240f) by adding paragraph (16) to General Instruction B as follows:

Note: The text of Form 40-F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 40-F

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GENERAL INSTRUCTIONS

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B. Information to be Filed on this Form

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(16) Conflict Minerals Disclosure

(a) If any conflict minerals, as defined by paragraph (c)(3) of this Instruction, are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant in the year covered by the annual report, the registrant must disclose in its annual report under a separate heading entitled "Conflict Minerals Disclosure" whether any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, as defined by paragraph (c)(1) of this Instruction, or that the registrant is not able to determine that its conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country. The registrant's determination of whether or not any of these conflict minerals originated in the Democratic Republic of the Congo or an adjoining country, or its inability to determine that these conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, must be based on its reasonable country of origin inquiry. If the registrant determines that its conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by it did not originate in the Democratic Republic of the Congo or an adjoining country, the registrant must make that disclosure available on its Internet website and must also disclose this determination in its annual report under the separate "Conflict Minerals Disclosure"

heading along with the reasonable country of origin inquiry it undertook to make its determination, that its disclosure is located on its Internet website, and the address of that Internet website. The disclosure must remain on the registrant's Internet website at least until the registrant files its subsequent annual report. Also, the registrant must maintain reviewable business records to support any such negative determination.

(b) If any conflict minerals necessary to the functionality or production of a product manufactured or contracted to be manufactured by the registrant originated in the Democratic Republic of the Congo or an adjoining country, if the registrant is unable to determine that such conflict minerals did not originate in the Democratic Republic of the Congo or an adjoining country, or if such conflict minerals came from recycled or scrap sources, the registrant must:

(1) Furnish a Conflict Minerals Report as an exhibit to its annual report with the following information:

(i) a description of the measures taken by the registrant to exercise due diligence on the source and chain of custody of the conflict minerals or to exercise due diligence in determining that the conflict minerals came from recycled or scrap sources, which shall include but not be limited to a certified independent private sector audit of the Conflict Minerals Report, conducted in accordance with standards established by the Comptroller General of the United States, that shall constitute a critical component of the registrant's due diligence in establishing the source and chain of custody of the conflict minerals or that the conflict minerals came from recycled or scrap sources;

(ii) a certification by the registrant that it obtained such an independent private sector audit;

(iii) a description of any of the registrant's products manufactured or contracted to be manufactured containing conflict minerals that are not "DRC conflict free," as defined in paragraph (c)(4) of this Instruction, the facilities used to process those conflict minerals, the country of origin of those conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity; and

(iv) the audit report prepared by the independent private sector auditor, which identifies the entity that conducted the audit.

(2) In addition to the disclosures required by paragraph (a) of this Instruction, disclose under the separate "Conflict Minerals Disclosure" heading in the annual report that the registrant has furnished a Conflict Minerals Report as an exhibit to the annual report; that the Conflict Minerals Report and the certified independent private sector audit report are available on its Internet website; and the Internet address of its Internet website where the Conflict Minerals Report and audit report are located.

(3) Make the Conflict Minerals Report, including the certified audit report, available to the public by posting the text of the report on its Internet website. The text of the Conflict Minerals Report must remain on the registrant's Internet website at least until the registrant files its subsequent annual report.

(c) For the purposes of this Instruction, the following definitions apply:

(1) Adjoining country. The term adjoining country means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) Armed group. The term armed group means an armed group that is identified as a perpetrator of serious human rights abuses in the most recently issued annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of

the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country for the year the annual report is due.

(3) Conflict mineral. The term conflict mineral means:

(i) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(ii) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(4) DRC conflict free. The term DRC conflict free means that a product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country. Conflict minerals that a registrant is unable to determine did not originate in the Democratic Republic of the Congo or an adjoining country are not "DRC conflict free." Conflict minerals that a registrant obtains from recycled or scrap sources are considered DRC conflict free.

Notes to Paragraph (16) of General Instruction B

(1) Paragraph (16) of General Instruction B applies only to annual reports, and does not apply to registration statements on Form 40-F. A registrant must provide the information required in paragraph (16) beginning with the annual report that it files for its first full fiscal year beginning after **[April 15, 2011].**

(2) A registrant that files reports with the Commission under Sections 13(a) (15 U.S.C. 78m(a)) or 15(d) (15 U.S.C. 78o(d)) of the Exchange Act, for whom conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by that registrant, shall provide the information required

by this Instruction. A registrant that mines conflict minerals would be considered to be manufacturing those minerals for the purpose of this Instruction.

(3) The information required by this Instruction shall not be deemed to be "filed" with the Commission or subject to the liabilities of section 18 of the Exchange Act (15 U.S.C. 78r), except to the extent that the registrant specifically incorporates the information by reference into a document filed under the Securities Act or the Exchange Act. The disclosure required by this Instruction need not be provided in any filings other than an annual report on Form 40-F (§249.240f of this chapter). Such information will 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 registrant specifically incorporates it by reference.

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7. Amend Form 10-K (referenced in §249.310) by adding Item 4(a) as follows:

Note: The text of Form 10-K does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K

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PART I

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Item 4. Specialized Disclosures

(a) Furnish the information required by Item 104 of Regulation S-K (§ 229.104 of this chapter).

Instruction

A registrant must provide the information required in Item 4 beginning with the annual report that if files for its first full fiscal year beginning after **[April 15, 2011].**

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By the Commission.

Elizabeth M. Murphy

Secretary

Dated: December 15, 2010