



# Conflict Minerals: Understanding the Final Rules and Preparing to Comply

Presented by

Practical Law Company

and

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# Overview



# The Final Rule in a Nutshell

- If conflict minerals are necessary to the functionality or production of a product a public company manufactures or contracts to be manufactured, the company must disclose annually in a new form – known as Form SD – whether the minerals originated in the DRC or an adjoining country
- If so, it generally must file a separate report detailing:
  - The diligence measures it took on the source and chain of custody of the minerals
  - The company’s products containing conflict minerals that the company has not determined are “DRC conflict free”
  - The processing facilities, country of origin and efforts to determine mine or location of origin of these minerals
- The report generally must be audited

**GOAL**

**“DRC conflict free” products**



# What Are Conflict Minerals?

Conflict minerals are used in a broad range of industries and applications

CONFLICT MINERAL	DERIVATIVE METAL	INDUSTRIES	APPLICATIONS
Cassiterite	Tin	Electronics Automotive Industrial equipment Construction	Solders for joining pipes and circuits Automobile parts Tin plating of steel Alloys (bronze, brass, pewter)
Columbite-tantalite	Tantalum	Electronics Medical equipment Industrial tools Aerospace	Capacitors Hearing aids and pacemakers Carbide tools Jet engine components
Gold	Gold	Jewelry Electronics Aerospace	Jewelry Electric plating and wiring Jet engine components
Wolframite	Tungsten	Electronics, lighting Industrial machinery	Metal wires, electrodes, electrical contacts Heating and welding



## What are the Covered Countries?

- The DRC
- Angola
- Burundi
- Central African Republic
- The Republic of the Congo
- Rwanda
- South Sudan
- Tanzania
- Uganda
- Zambia

## Percentages of Worldwide Conflict Minerals Production from Eastern DRC

Gold: less than 1%

Tantalum: 15-20%

Tin: 6-8%

Tungsten: 2-4%



# Who is Affected by the Rule?

- Every SEC reporting company must determine whether it uses conflict minerals in a way that triggers the rule
- Reporting companies that trigger the rule must conduct conflict minerals diligence and file Form SD, and may need to prepare a conflict minerals report (SEC estimates approximately 6,000 will need to conduct some diligence and file Form SD, and 75% of these companies will need to prepare a report)
- Non-SEC reporting companies worldwide in the supply chains of reporting companies will need to participate in reporting companies' diligence efforts



# When Does Disclosure Begin?

- The first Form SD must be filed no later than May 31, 2014 and will cover calendar year 2013
- Conflict minerals that are “outside the supply chain” before January 31, 2013 are exempt (smelted or refined or are outside of the covered countries before that date)
- Transition period for non-reporting acquired companies - reporting not required until the end of the first reporting calendar year that begins not less than eight months following the acquisition

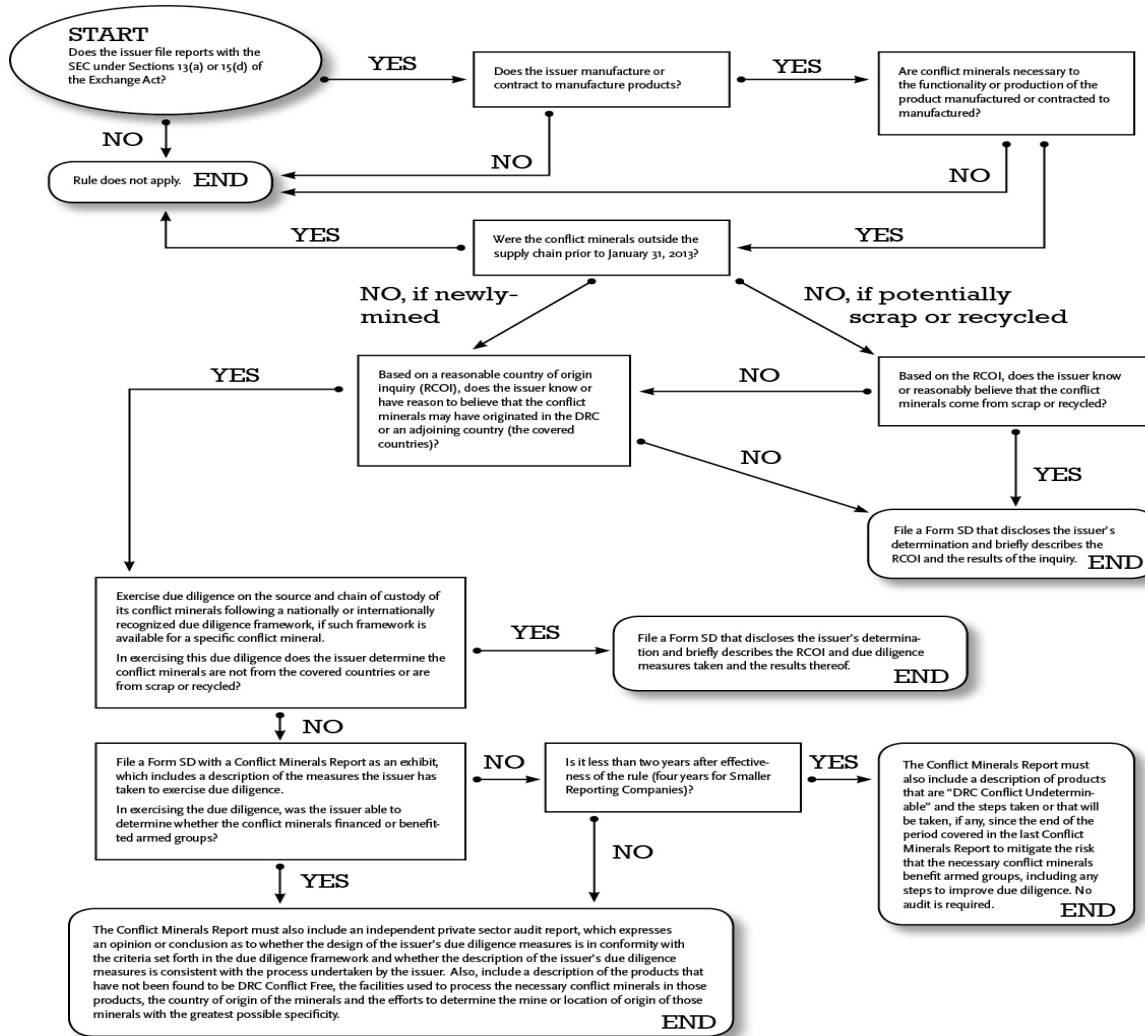


# Conflict Minerals Diligence and Disclosure





# Diligence Outcomes Overview





# Diligence Step 1

## Determine Use of Conflict Minerals

Are conflict minerals contained in the products manufactured or contracted to be manufactured by the company?

**If so:**

Are conflict minerals necessary to the functionality or production of the products?



# Diligence Step 1 (cont'd)

## “Contract to Manufacture”

A company does not “contract to manufacture” a product if it only:

- Specifies or negotiates contractual terms that do not directly relate to the manufacturing of the product
- Affixes its brand, marks, logo or label to a third party manufactured generic product
- Services, maintains or repairs a product manufactured by a third party

## Determining When Conflict Minerals are “Necessary”

No bright-line test, but a “facts and circumstances” determination is required. Companies should consider whether:

- Conflict mineral is intentionally added to the product or is a naturally occurring byproduct
- Conflict mineral is necessary to product’s generally expected function, use or purpose
- If conflict mineral is included for purposes of ornamentation, decoration or embellishment, whether the primary purpose of the product is ornamentation or decoration

No *de minimis* exception

Using tools that contain conflict minerals in the production process does not trigger the rule



## Diligence Step 2

# Determine Country of Origin

Requires “a reasonable country of origin inquiry” to determine whether the conflict minerals originated in a covered country or are from recycled or scrap sources

- What constitutes a reasonable inquiry will depend upon each company’s specific facts and circumstances, such as its size, products and relationship with suppliers and supply chain visibility at the time
- Reasonably reliable source and origin representations from processors or suppliers satisfy the inquiry, so long as the company has reason to believe the representations are true and correct given the circumstances
- Inquiry must be performed in good faith



## Diligence Step 2 (cont'd)

### Recycled and Scrap Sources

- Conflict minerals are considered to be from recycled or scrap sources if they are from recycled metals, which are reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing
- Recycled metal includes excess, obsolete, defective and scrap metal materials that contain refined or processed metals that are appropriate to recycle in the production of the three Ts and/or gold
- Minerals that are partially processed, unprocessed or a byproduct from another ore are not considered to be recycled



# Diligence Step 3

## Detailed Supply Chain Due Diligence

- Requires heightened diligence and disclosure if, based on the reasonable country of origin inquiry, the company either:
  - Knows that its conflict minerals originated in a covered country and are not from recycled or scrap sources
  - Has reason to believe its conflict minerals may have originated in a covered country and they may not be from recycled or scrap sources
- Nationally or internationally recognized due diligence standard required (to the extent available)
- Company must prepare a conflict minerals report, unless company determines that its conflict minerals did not originate in a covered country or that they came from recycled or scrap sources



# The Conflict Minerals Report

- Must disclose:
  - Measures taken to exercise due diligence on the source and chain of custody
  - Description of any products that have not been found to be “DRC conflict free”
  - The smelter or refiner used to process the conflict minerals, minerals’ country of origin, and efforts to determine the mine or location of origin with the greatest possible specificity
- Independent audit generally required



# DRC Conflict Undeterminable

- For an interim period (4 years for smaller reporting companies, 2 years for all other companies) companies may classify their products as “DRC conflict undeterminable” if they cannot determine source after supply chain diligence
- Companies that take advantage of this must:
  - Prepare and file a CMR, but an audit is not required to cover any conflict minerals that are “DRC conflict undeterminable”
  - Disclose in CMR the steps taken to mitigate risks that the conflict minerals benefit armed groups, including any steps to improve due diligence





# Form SD

- Form SD disclosure is provided on a calendar year basis
- The form is required to be filed by May 31 of following year
- The form and any exhibits (including the CMR) are treated as “filed” for the purposes of the Exchange Act, but not automatically incorporated into Securities Act registration statements
- Inclusion of information is keyed off of completion of the manufacture of the applicable product. If the product is contract manufactured, the date of manufacture, not the date of delivery, applies



# Company Action Items



# Companies Starting the Compliance Process

- Create an internal conflict minerals compliance team
- Consider whether additional internal hires are needed to manage the company's conflict minerals rule compliance
- Consider retaining outside legal and other consultants to help develop and implement the conflict minerals rule compliance program
- Become familiar with the OECD conflict minerals due diligence framework, other NGO recommendations and relevant industry initiatives
- Determine on a preliminary basis the products that may be implicated by the conflict minerals rule
- Catalogue the company's current procurement policies and practices, diligence practices and internal reporting and data gathering practices and capabilities relating to conflict minerals
- Construct a work plan, timeline and budget for conflict minerals rule compliance
- Assemble a database of supplier personnel that should receive conflict minerals compliance materials
- Adopt and communicate to suppliers and other relevant constituencies a supply chain policy setting forth the principles against which the company will assess itself and its suppliers
- Develop a risk management plan that includes procedures for suspending or terminating suppliers that do not comply with the company's procurement policies, as well as alternative sources for conflict minerals



# Companies with Existing Programs

- Send an initial written communication to suppliers educating them on the final rule and the company's compliance obligations
- Develop questionnaires and certifications for suppliers and determine any additional supplier documentation, diligence and compliance requirements
- Incorporate relevant elements of conflict minerals rule compliance, such as the company's supply chain policy, diligence process, inspection rights and supplier disclosure requirements, into contracts with suppliers



# All Companies

- Consider participating in the continuing development of industry supply chain initiatives
- Consider whether a conflict minerals risk factor should be included in the company's next periodic report



# Diligence Resources



# OECD Diligence Guidance

*Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas*

**OECD published supplements for the three Ts and gold**

**Advocates a five-step diligence framework:**

- Establish strong company management systems
- Identify and assess risks in the supply chain
- Design and implement a strategy to respond to identified risks
- Carry out independent third-party audit of supply chain due diligence at identified points in the supply chain
- Report on supply chain due diligence



# OECD Tin, Tantalum and Tungsten Supplement and Gold Supplements

- Contain recommendations tailored to the three Ts or gold, respectively, for both upstream and downstream companies
- Aims at providing recommendations to companies that are sourcing minerals from high-risk areas
- Use of a chain of custody or traceability system highlighted as an important action to combat sourcing issues from high-risk areas





# Industry Initiatives

- EICC/GeSI Reporting Template and Conflict-Free Smelter Program
- World Gold Council Conflict-Free Gold Standard
- London Bullion Market Association Responsible Gold Guidance
- ITRI Tin Supply Chain Project
- Responsible Jewellery Council Chain-of-Custody Standard
- Association Connecting Electronics Industries (IPC) data exchange standard (not yet introduced)

*Learn more about these and other initiatives in PLC's conflict minerals resources*



# Other Considerations



# Other Supply Chain Legislation

## Keep other supply chain legislation in mind when establishing a conflict minerals compliance program

- **California Transparency in Supply Chains Act**
  - Requires disclosure of efforts to ensure supply chain is free from slavery and human trafficking
  - Applies to companies “doing business” in California with over \$100 million in worldwide revenue
  - Applies to public and private companies
- **Business Transparency on Trafficking and Slavery Act**
  - Pending in US House of Representatives
  - Would require public companies with over \$100 million in worldwide revenue to disclose annually steps taken to identify and address child and forced labor in the supply chain
- **California and Maryland conflict minerals legislation**
  - Limits companies that violate the SEC’s conflict minerals rule from providing certain services to those states



# Potential Legal Challenges

- Several constituencies have indicated that they might seek to challenge the final rule in court
- Lawsuit on the SEC's mandatory proxy access rule was filed within a matter of days after rule's adoption and that rule ultimately was struck down by the court
- A court challenge could result in a stay of the effectiveness of the conflict minerals rule while the case is pending



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## Related Resources at [practicallaw.com](http://practicallaw.com)

- [Conflict Minerals Diligence](#)
- [Preparing for Conflict Minerals Compliance: Company Action Items Checklist](#)
- [Conflict Minerals Disclosure Requirements Checklist](#)
- [What's Market: Disclosure on Conflict Minerals Risks 2012](#)

## Related Resources at [www.srz.com](http://www.srz.com)

- [Conflict Minerals Resource Center](#)