

December 15, 2010

## **SEC PROPOSES DISCLOSURE RULES FOR CONFLICT MINERALS, MINE SAFETY AND PAYMENTS BY RESOURCE EXTRACTION ISSUERS**

To Our Clients and Friends:

On December 15, 2010, the Securities and Exchange Commission (the "SEC") proposed rules to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") relating to: (1) conflict minerals; (2) mine safety matters; and (3) resource extraction issuer payments to governments. Each of the proposed rules was approved by the SEC without questions. Comments on the proposed rules must be submitted to the SEC by January 31, 2011.

This Alert is based upon information from the SEC open meeting and related press releases of December 15, 2010.

### **1. Conflict Minerals Disclosure**

Section 1502 of the Dodd-Frank Act requires an issuer that uses "conflict minerals" from the Democratic Republic of the Congo or its adjoining countries (the "DRC countries") to provide an annual report to the SEC (the "Conflict Minerals Report") that includes, with respect to the period covered, a description of the measures taken to exercise due diligence on the source and chain of custody of the conflict minerals. "Conflict minerals" are defined in the Dodd-Frank Act to include columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives or any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the DRC countries.

The statute provides that the Conflict Minerals Report must include a description of the products manufactured or contracted to be manufactured with conflict minerals from the DRC countries, the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts undertaken to identify the mine or location of origin with the greatest possible specificity. The report must undergo an independent private sector audit before submission to the SEC. The auditor must be identified in the report and the audit must be certified by the issuer. Further, the report must be published on the issuer's website.

The rules proposed by the SEC to implement Section 1502 are applicable to domestic and foreign issuers and to smaller reporting companies. The proposed rules establish a three-step process for determining whether, and to what extent, the rules apply to an issuer:

1. The issuer must determine if conflict minerals are necessary to the functionality or production of a product it manufactures or has contracted to manufacture. If not, no report is required.

2. If the issuer uses conflict minerals, it must conduct a "reasonable" country of origin inquiry to determine if the conflict minerals originate from the DRC countries. If it determines that the minerals it uses do not originate from those countries, the issuer must: (A) describe the inquiry it undertook in its annual report; (B) make disclosure regarding the determination on its website; and (C) maintain records demonstrating that its conflict minerals did not originate in the DRC countries.
3. If the issuer is unable to determine that its conflict minerals originated from somewhere other than the DRC countries, it must: (A) file the Conflict Minerals Report as an exhibit to the issuer's annual report; and (B) post the Conflict Minerals Report on its website.

If an issuer determines that its conflict minerals are derived from recycled or scrap sources rather than from mined sources, the rules permit the issuer to file a Conflict Minerals Report stating that its conflict minerals are recycled or scrap and providing the basis for the issuer's determination. The issuer would still be required to exercise due diligence in its determination, and the Conflict Minerals Report would be subject to the independent private sector audit requirement.

## **2. Mine Safety Disclosure**

Section 1503 of the Dodd-Frank Act requires each issuer that files reports with the SEC pursuant to Sections 13(a) or 15(d) of the Securities Exchange Act of 1934 and is an operator, or has a subsidiary that is an operator, of a mine to include the following information in its periodic reports, as applicable to the reporting period: (1) a tabulation of certain violations under the Federal Mine Safety and Health Act of 1977 (the "Mine Act"); (2) the total dollar value of proposed assessments from the Mine Safety and Health Administration ("MSHA"); (3) the total number of mining-related fatalities; (4) a list of mines that have received notice from MSHA of an actual or potential pattern of certain violations; and (5) any pending legal actions before the Federal Mine Safety and Health Review Commission (the "FMSHRC").

The proposed rules apply to both U.S. companies and foreign private issuers and would require disclosure in each Form 10-K, Form 10-Q, Form 20-F and Form 40-F filed with the SEC, as applicable. In addition to the disclosures required by the statute, the proposed rules require that issuers describe the categories of violations, orders and citations they are reporting, so that the information can be understood without referencing the Mine Act and MSHA rules. The proposed rules also provide the following:

- The proposed disclosures apply to mines that are subject to the Mine Act.
- The disclosed total dollar value of proposed MSHA assessments would include all assessed amounts during the reporting period and all outstanding assessments as of the last date of the period being reported on, even if such assessments were being contested.
- All legal actions initiated before the FMSHRC during the reporting period would be disclosed, with additional disclosure in reports covering periods during which there was a material development. Disclosure would include the date the legal action was initiated,

identification of the party initiating the action, identification of the mine that is the subject of the action, and a brief description of the action.

Section 1503 of the Dodd-Frank Act additionally requires a Form 8-K filing in connection with (1) the receipt of an imminent danger order issued under Section 107(a) of the Mine Act, (2) receipt of written notice from MSHA of a pattern of violations under Section 104(e) of the Mine Act or (3) receipt of written notice from MSHA of a potential pattern of violations under Section 104(e) of the Mine Act. The proposed rules require that the Form 8-K filing specifies the type of order or notice, the date of the order or notice, and the name and location of the mine involved. Foreign private issuers would not be required to file current reports under the proposed rules. Further, a late filing of the Form 8-K would not affect an issuer's eligibility to use a Form S-3 short-form registration.

### **3. Disclosure of Payments by Resource Extraction Issuers**

Section 1504 of the Dodd-Frank Act states that each issuer that is required to file an annual report with the SEC and that is engaged in the commercial development of oil, natural gas, or minerals ("resource extraction") must disclose in an annual report any payments that the issuer, or a subsidiary or entity under control of the issuer, made to a foreign government or the U.S. federal government for the purpose of resource extraction. Section 1504 requires the disclosure to include the type and total amount of such payments for each project and the type and total payments made to each government.

The proposed rules are applicable to domestic and foreign issuers and to smaller reporting companies that meet the definition of "resource extraction issuer" under the Dodd-Frank Act. The proposed rules provide the following:

- The determination of whether an entity is under the control of an issuer will be based upon consideration of the particular facts and circumstances.
- Disclosure will be required in connection with payments made to subnational foreign governments.
- Payments to a "foreign government" include payments made to an entity that is majority owned by a foreign government.
- Payments include taxes paid on profits from commercial development of oil, natural gas and minerals, however, they do not include taxes paid on the consumption of such resources or value added taxes.
- Disclosure will be required to include the currency used to make the payments, identification of the financial period during which the payments were made, the business segment making the payments, and the project to which the payments relate.

Additional rules were proposed to (1) establish Item 105 of Regulation S-K, specifying the disclosure required pursuant to Section 1504 of the Dodd-Frank Act, (2) amend Item 601, to provide that information required pursuant to the new Item 105 be included as an exhibit to

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annual reports, and (3) amend Form 20-F and Form 40-F to make clear that the disclosure rules apply to filings on such forms.



*Gibson, Dunn & Crutcher lawyers are available to assist in addressing any questions you may have regarding these developments. If you have any questions, please contact Gibson Dunn lawyer with whom you work or one of the Gibson Dunn lawyers listed below:*

*[John F. Olson](mailto:jolson@gibsondunn.com) - Washington, D.C. (202-955-8522, [jolson@gibsondunn.com](mailto:jolson@gibsondunn.com))*

*[Brian J. Lane](mailto:blane@gibsondunn.com) - Washington, D.C. (202-887-3646, [blane@gibsondunn.com](mailto:blane@gibsondunn.com))*

*[Ronald O. Mueller](mailto:rmueller@gibsondunn.com) - Washington, D.C. (202-955-8671, [rmueller@gibsondunn.com](mailto:rmueller@gibsondunn.com))*

*[Amy L. Goodman](mailto:agoodman@gibsondunn.com) - Washington, D.C. (202-955-8653, [agoodman@gibsondunn.com](mailto:agoodman@gibsondunn.com))*

*[James J. Moloney](mailto:jmoloney@gibsondunn.com) - Orange County (949-451-4343, [jmoloney@gibsondunn.com](mailto:jmoloney@gibsondunn.com))*

*[Elizabeth Ising](mailto:eising@gibsondunn.com) - Washington, D.C. (202-955-8287, [eising@gibsondunn.com](mailto:eising@gibsondunn.com))*

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