

Securities Alert

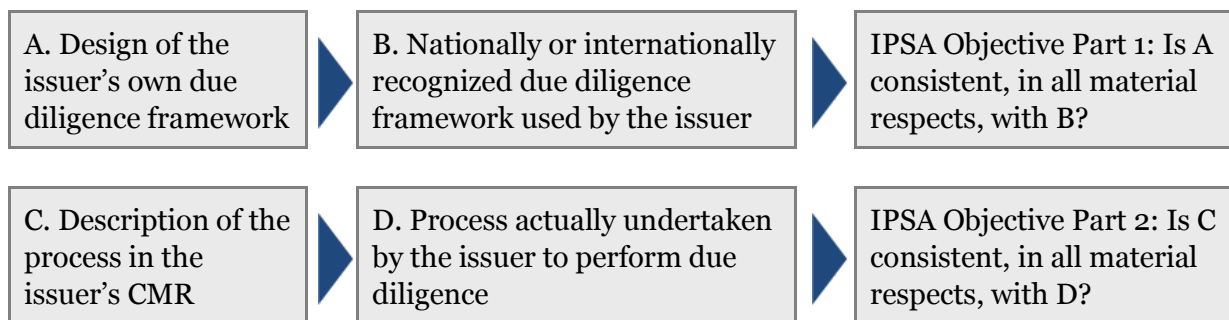
SEC Staff Issues FAQs Regarding Conflict Minerals Disclosure

On April 7, 2014, the SEC's Division of Corporation Finance issued a set of FAQs to provide guidance on various aspects of the rules governing disclosure requirements applicable to the use of conflict minerals from the Democratic Republic of the Congo or adjoining countries (Conflict Mineral Rules).

The [FAQs](#) provide a number of useful interpretations pertaining to the Conflict Mineral Rules (originally discussed in our September 2012 alert, "[SEC Adopts Disclosure Rules on Conflict Minerals](#)") and are summarized below:

- An auditor that is not a certified public accountant may perform the Independent Private Sector Audit (IPSA) of an issuer's Conflict Minerals Report (CMR) pursuant to the Performance Audit provisions in the U.S. Government Accountability Office's Government Auditing Standards (Yellow Book), if the applicable requirements are met. Auditors may use either the provisions for Attestation Engagements or Performance Audits. Although Attestation Engagements require that auditors be licensed certified public accountants, Performance Audits allow auditors other than certified public accountants to perform audits if they meet the applicable requirements under the Yellow Book.
- If, after exercising due diligence, an issuer determines that at least one of its products may be described as "DRC conflict undeterminable," the issuer is not required to obtain an IPSA of its CMR during the temporary transition period (four years for smaller reporting companies and two years for all other issuers).

- If an issuer does not obtain an IPSA of its CMR because one of its products is “DRC conflict undeterminable,” it may not describe any of its other products as “DRC conflict free” in its CMR. The FAQs note that an issuer is not required to describe any qualifying products as “DRC conflict free” in its CMR, but may choose to describe its products with conflict minerals sourced from the DRC or its adjoining countries as “DRC conflict free” *if* the issuer is able to determine, based on its due diligence, that the conflict minerals in those products did not finance or benefit armed groups in that region. The applicable rules define due diligence as including an IPSA of the CMR. Therefore, an issuer must have obtained an IPSA to be able to describe qualifying products in its CMR as “DRC conflict free.”
- During the temporary transition period, if an issuer has a product that would qualify as “DRC conflict free” except that it contains a conflict mineral that the issuer is unable to determine did not originate in the DRC or an adjoining country, or is unable to determine it did not directly or indirectly finance or benefit armed groups in those countries, the issuer may not describe that product as “DRC conflict free.” If an issuer determines that a product contains a conflict mineral that *did* finance or benefit armed groups in the DRC or an adjoining country, however, it must describe that product as “having not been found to be ‘DRC conflict free’” both during and after the temporary transition period.
- The scope of the IPSA does not include the completeness or reasonableness of the issuer’s due diligence. The objective of the IPSA is to express an opinion or conclusion as to whether the design of the issuer’s due diligence measures is in conformity, in all material respects, with the criteria set forth in the nationally or internationally recognized due diligence framework used by the issuer, and whether the issuer’s description of the due diligence measures it performed is consistent with the due diligence process that the issuer undertook. The FAQs include the following diagram to demonstrate the two distinct parts of the IPSA objective:



The objective is to compare A to B and C to D. Any other comparison would be outside the IPSA scope.

- The IPSA need not include the reasonable country-of-origin inquiry. The auditor need only opine on whether: (i) the design of the issuer’s due diligence framework is in accordance

with the portion of the nationally or internationally recognized due diligence framework beginning after the country-of-origin determination; and (ii) the issuer actually performed the due diligence measures described in the report after the issuer determined it had reason to believe its conflict minerals may have originated in the DRC or an adjoining country.

- If an issuer determines that *any* conflict minerals in its products came from recycled or scrap sources, it must include the required disclosures for those conflict minerals in the body of its Form SD. The issuer must also file a CMR as an exhibit thereto that includes the required disclosures about its conflict minerals that are not from recycled or scrap sources (the CMR need not include disclosures for the conflict minerals from recycled or scrap sources). In addition, an issuer is only required to obtain an IPSA of its CMR and not of the disclosures contained in the body of its Form SD.
- An issuer's due diligence measures must apply to the conflict minerals in products manufactured during the calendar year. This does not imply that due diligence measures must be carried out throughout the calendar year, however, such measures may begin before or extend beyond the calendar year.
- Although an issuer need not include a full description of the design of its due diligence in its CMR, the due diligence measures undertaken must be described in the CMR in sufficient detail for the IPSA auditor to be able to form an opinion or conclusion about whether the description in the CMR is consistent with the process the issuer actually performed.

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