

# KIRKLAND ALERT

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## “Conflict Minerals” Provisions in Financial Reform Legislation Impose New Reporting Requirements

On July 21, 2010, President Obama signed into law the “Dodd-Frank Wall Street Reform and Consumer Protection Act” (“Dodd-Frank Act” or “Act”). Virtually unnoticed among the sweeping financial regulatory reforms embodied in the statute were provisions squarely aimed at discouraging the use of “conflict minerals” in the manufacture of a wide array of electronic devices, including laptop computers, smart phones, digital cameras, and gaming consoles. Specifically, as detailed below, the Dodd-Frank Act mandates annual reporting to the U.S. Securities and Exchange Commission (“SEC” or “Commission”) regarding the use of such minerals in manufactured goods and the efforts being undertaken by the manufacturer to exercise due diligence on the source and chain of custody of such minerals. While certain aspects of the “conflict minerals” provisions require greater clarity, undoubtedly the Act will trigger increased compliance burdens as companies now will be forced to analyze whether the reporting obligation applies and, if so, how to comply with the requirement.

In enacting this legislation, Congress acknowledged growing public sentiment, largely driven by human rights watchdogs, 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.” Accordingly, while not banning the use of such minerals outright, the legislation seeks to expose their use to public scrutiny.<sup>1</sup> To that end, Section 1502 of the Act amended Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. § 78m) (“Exchange Act”) to require issuers<sup>2</sup> to disclose on an annual basis, beginning with the first full fiscal year commenced after the Commission’s promulgation of regulations, whether “conflict minerals”<sup>3</sup> that are “necessary<sup>4</sup> to the functionality or production” of a manufactured product originated in the Democratic Republic of the Congo (“DRC”) or any adjoining country, defined to mean a country that shares an internationally recognized border with the DRC. If so, the disclosure is required to be accompanied by a report that includes the following:

- A description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals. Such measures must include an independent private sector audit of the report to be conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the SEC, in consultation with the Secretary of State; and
- A description of the products manufactured or contracted to be manufactured that are not “DRC conflict free” (meaning products that do not contain minerals that directly or indirectly finance or benefit armed groups in the DRC or an adjoining country), the entity that conducted the independent private sector audit, 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.

In addition to disclosing this information to the SEC, the Act requires the posting of this information on the Internet website of the reporting company. We note that the SEC is authorized by the Act to revise or waive the above-described reporting requirements if the President transmits to the Commission a determination that (i) such revision or waiver is in the national security interest of the United States and the President includes the

reasons therefor; and (ii) establishes a date, not later than two years after the initial publication of such exemption, on which such exemption shall expire. We further note that the above-described reporting requirements are terminable if the President determines and certifies to the appropriate congressional committees, but in no case sooner than five years from the date of enactment, that no armed groups continue to be directly involved and benefiting from commercial activity involving “conflict minerals.”

Section 1502 of the Dodd-Frank Act directs the SEC to promulgate implementing regulations by April 17, 2011. We would be pleased to assist any interested party in the preparation and submission of comments and in the eventual implementation of internal measures to survey the supply chain and to prepare the required reports, as necessary.

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- <sup>1</sup> The Act does not expand existing U.S. trade sanctions that prohibit doing business with designated Congolese individuals and entities.
  - <sup>2</sup> While the “conflict minerals” provisions of the Act almost universally are understood to apply to issuers that are subject to the reporting requirements of the Exchange Act, there is some ambiguity within the Act itself that requires clarification during the SEC’s rulemaking process.
  - <sup>3</sup> The “conflict minerals” identified in the statute are 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 Democratic Republic of the Congo or an adjoining country. The Act requires the Secretary of State to publish in the *Federal Register* a notice of intent to declare a mineral as a “conflict mineral” not later than one year before such declaration.
  - <sup>4</sup> The SEC likely will be called upon to clarify the meaning of the term “necessary” as employed in the Act.

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If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Laura L. Fraedrich  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005-5793  
[www.kirkland.com/lfraedrich](http://www.kirkland.com/lfraedrich)  
+1 (202) 879-5990

Daniel J. Gerkin  
Kirkland & Ellis LLP  
655 Fifteenth Street, N.W.  
Washington, D.C. 20005-5793  
[www.kirkland.com/dgerkin](http://www.kirkland.com/dgerkin)  
+1 (202) 879-5948

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