Corporate

SEC Requires Conflict Minerals Filings to be Made by Existing Deadline

By Jerry J. Burgdoerfer, William L. Tolbert, Jr. and Elaine Wolff

On April 29, the SEC announced that it expects companies to meet the existing June 2 deadline for conflict minerals filings with few changes to those filings despite an April 14 decision by the D.C. Circuit Court finding a portion of the conflict minerals rules unconstitutional on free speech grounds. In general, these rules require public companies to report whether any of their products contain "conflict minerals," that is, gold, tantalum, tin and tungsten from the Democratic Republic of the Congo and adjacent countries ("DRC") where prolonged war and the associated humanitarian crisis have been funded by the revenue that armed groups derive from mining and trafficking in these conflict minerals. The D.C. Circuit Court's decision in *Nat'l Ass'n of Mfrs v. SEC*[1] held that the statute and rules implementing the conflict minerals requirements of Section 1502 of the Dodd-Frank Act[2] violate the First Amendment to the extent that they require companies to report to the SEC and state on their website that any of their products are "not found to be 'DRC conflict free'".

The SEC's key change to the current disclosure requirements as a result of the recent Circuit Court decision is that companies will not be required to publicly label their products as "DRC conflict free," "not found to be 'DRC conflict free'," or "DRC conflict undeterminable." Nevertheless, a company that must file a Form SD and a related Conflicts Minerals Report must continue to comply with almost all of the current disclosure requirements, including disclosing the facilities used to produce the conflict minerals contained in the company's products, the country of origin of the minerals and the efforts to determine the mine or location of origin.

Companies that have found their products to be "DRC conflict free" will be permitted to describe their products as conflict free only if they have obtained an independent private sector audit as required by the rule. For the few companies that are in a position to make this statement, it is likely they will volunteer to do so. While the SEC did not directly address whether companies will be permitted to describe their products as "DRC conflict undeterminable," companies may consider the "undeterminable" designation rather than risk the assumption that their silence means that their products are not conflict free.

The SEC stated that it will consider the need to provide *additional* guidance in advance of the June 2 filing date. This new guidance came one day after the SEC's two Republican Commissioners urged the SEC to delay implementing the entire rule until the issues raised by the Circuit Court's decision have been resolved.

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[1] No. 13-5252 (D.C. Cir. Apr. 14, 2014).

[2] Securities Exchange Act of 1934 ("Exchange Act") Section 13(p) and Exchange Act Rule 13p-1

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