
May 2, 2014

SEC Provides Guidance Following Court of Appeals Ruling in Conflict Minerals Case

On April 29, 2014, the staff of the SEC's Division of Corporation Finance issued a [statement](#) on the effect of the recent court of appeals [decision](#) regarding the SEC's conflict minerals rule. Subject to an accommodation made in light of the court decision—namely, that no company will be required to describe its products as “DRC conflict free,” having “not been found to be ‘DRC conflict free,’” or “DRC conflict undeterminable”—the Division indicated that it expects companies to file any reports required under Rule 13p-1 on or before the June 2, 2014 due date.

Background

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which added Section 13(p) to the Securities Exchange Act of 1934 (the “Exchange Act”), directed the SEC to promulgate rules requiring reporting issuers to disclose their use of coltan, cassiterite, gold and wolframite if those minerals (i) originated in the Democratic Republic of the Congo (the “DRC”) or an adjoining country and (ii) are necessary to the functionality or production of their products. As a result, the SEC adopted Rule 13p-1 in August 2012, which requires companies to prepare and file annually a Form SD and, in some circumstances, a Conflict Minerals Report.

The National Association of Manufacturers, the Chamber of Commerce, and the Business Roundtable (collectively, the “Plaintiffs”) challenged Rule 13p-1 on several grounds, raising claims under the Administrative Procedures Act (the “APA”), the Exchange Act, and the First Amendment. In July 2013, the District Court for the District of Columbia granted summary judgment in favor of the SEC, rejecting all of the Plaintiffs’ claims. The Plaintiffs then appealed.

On April 14, 2014, the U.S. Court of Appeals for the D.C. Circuit issued its opinion, in which it rejected all of the Plaintiffs’ APA and Exchange Act claims. However, the court held that Section 13(p) of the Exchange Act and Rule 13p-1 thereunder violate the First Amendment by unconstitutionally compelling speech to the extent they require issuers to report to the SEC and state on their website that any of their products have “not been found to be ‘DRC conflict free.’”

Division Statement and Partial Stay

In its statement on the effect of the decision of the Court of Appeals, the Division of Corporation Finance stated that, as a result of the decision, no company is required to describe its products as “DRC conflict free,” having “not been found to be ‘DRC conflict free,’” or “DRC conflict undeterminable.” If a company voluntarily elects to describe any of its products as “DRC conflict free” in its Conflict Minerals Report, it would be permitted to do so provided it had obtained an independent private sector audit (“IPSA”) as required by the rule. Pending further action, an IPSA will not be required unless a company voluntarily elects to describe a product as “DRC conflict free” in its Conflict Minerals Report.

Subject to the above, and to any further action that may be taken either by the Commission or a court, the Division indicated that it expects companies to file any reports required under Rule 13p-1 on or before the due date of June 2, 2014. Form SD, and any related Conflict Minerals Report, should comply with and address those portions of Rule 13p-1 and Form SD that the Court of Appeals upheld. According to the statement, this means:

- Companies that do not need to file a Conflict Minerals Report should disclose their reasonable country of origin inquiry and briefly describe the inquiry they undertook.
- For those companies that are required to file a Conflict Minerals Report, the report should include a description of the due diligence that the company undertook.
- If a company has products that fall within the scope of Item 1.01(c)(2) or 1.01(c)(2)(i) of Form SD, it would not have to identify the products as “DRC conflict undeterminable” or “not found to be ‘DRC conflict free,’” but should disclose, for those products, the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin.

In keeping with the guidance contained in the statement, on May 2, 2014, the Commission issued an order staying the effective date for compliance with the portions of Rule 13p-1 and Form SD that would require statements by issuers that the Court of Appeals held would violate the First Amendment. In its order, the SEC denied the motion filed by the Plaintiffs for a stay of the entire rule.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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