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ALERT

CSR & Supply Chain Compliance

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Court Denies Petitions for Rehearing in Conflict Minerals Rule Case (But the Litigation Isn't Over Yet)

Attorneys
Michael R. Littenberg

Yesterday afternoon, the U.S. Court of Appeals for the D.C. Circuit denied the petitions of the SEC and Amnesty International seeking rehearing en banc of the court's Aug. 18, 2015 decision in the Conflict Minerals Rule litigation.[1] In its August decision, a divided three-judge panel reaffirmed its April 2014 majority decision that the requirement under the Conflict Minerals Rule to describe products as having "not been found to be DRC conflict free" is compelled speech that violates the First Amendment.

We and many others were surprised by both the speed with which the court ruled on the petitions, which were filed on Oct. 2, 2015, as well as the court's decision. In any event, the litigation continues at least for the time being. The SEC has 90 days from yesterday's denial of the petitions for rehearing en banc to file a petition for a writ of certiorari seeking U.S. Supreme Court review of the appellate court decision.

Yesterday's order of the court preserves the status quo that has existed since Aug. 18. For various reasons, we continue to believe that the status quo is likely to be maintained for at least the current compliance period (i.e., calendar year 2015 and the related filing due on May 31, 2016) and that it therefore continues to be unlikely that an independent private sector audit ("IPSA") will be required for calendar year 2015. However, we continue to recommend that registrants take steps to be audit-ready if and when an IPSA is required, in particular adequately documenting their due diligence design framework to be able to satisfy the first audit objective under the Conflict Minerals Rule (whether the design of the registrant's due diligence measures as set forth in, and with respect to the period covered by, the registrant's Conflict Minerals Report, is in conformity with, in all material respects, the OECD Guidance framework).

Registrants — and their direct and indirect suppliers — must of course continue with their other conflict minerals compliance and traceability initiatives. Except as modified by the SEC's April 29, 2014 Statement in response to the court decision earlier that month, the Conflict Minerals Rule remains very much in effect. To recap, in the April 2014 Statement, the SEC indicated that registrants are not required to identify products as "DRC conflict free," having "not been found to be 'DRC conflict free' or "DRC conflict undeterminable." In the Statement, the SEC also indicated that, pending further action, an IPSA will not be required unless a registrant voluntarily elects to describe a product as "DRC conflict free" in its Conflict Minerals Report. Yesterday's decision does not modify the requirements of the Conflict Minerals Rule to conduct supply chain inquiries and to file a Form SD and a Conflict Minerals Report that contain the other disclosures contemplated by the Conflict Minerals Rule.

We will of course continue to monitor developments and provide updates as they occur.

[1] Our earlier Alerts on the April 2014 and August 2015 decisions and the SEC's April 2014 Statement referred to in this Alert, as well as key court documents, are available on our Supply Chain Compliance and Corporate Social Responsibility Resource Center.

For Further Information

If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney.

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