

April 10, 2017

SEC Issues Updated Statement on Conflict Minerals Rule

On Friday afternoon, the SEC's Division of Corporation Finance issued an Updated Statement on the Conflict Minerals Rule (the "Rule"). An updated Statement was widely anticipated. Earlier in the week, on April 3rd, the U.S. District Court for the District of Columbia entered its final judgment in the case and remanded to the SEC. This Alert discusses the Statement and other related developments, as well as short-term compliance considerations.

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The District Court Judgment – A Recap

In its final judgment, the District Court (1) declared that Section 1502 of Dodd-Frank, Rule 13p-1 thereunder and Form SD violate the First Amendment to the extent that the statute and the rule require companies to report to the SEC and state on their websites that any of their products "have not been found to be 'DRC conflict free,'" (2) held unlawful and set aside the Rule to the extent that it requires companies to report to the SEC and state on their websites that any of their products "have not been found to be 'DRC conflict free'" and (3) remands to the SEC, to take action in furtherance of the Court's decision. The judgment is discussed in our earlier [Alert](#).

The Division of Corporation Finance's Statement

According to the April 7th Statement of the SEC's Division of Corporation Finance, the Court's remand has presented significant issues for the SEC to address. In light of the uncertainty regarding how the SEC will resolve those issues and related issues raised by commenters in the recent open comment period on the Rule, the Division has indicated that it will not recommend enforcement action to the Commission if registrants, including those that are subject to paragraph (c) of Item 1.01 of Form SD, only file disclosure under the provisions of paragraphs (a) and (b) of Item 1.01 of Form SD.

Paragraph (a) of Item 1.01 requires a reasonable country of origin inquiry ("RCOI") if conflict minerals are necessary to the functionality or production of a product manufactured or contracted to be manufactured by a registrant. Paragraph (b) provides that, if, based on its RCOI, the registrant determines that its necessary conflict minerals did not originate in the DRC region or came from recycled or scrap sources, it has no reason to believe that its necessary conflict minerals may have originated in the DRC region, or it reasonably believes that its necessary conflict minerals did come from recycled or scrap sources, it must, in the body of its Form SD, disclose its determination and briefly describe the RCOI it undertook and the results of the inquiry it performed. For those registrants that are not able to stop at the RCOI, paragraph (c) of Item 1.01 generally requires the registrant to exercise due diligence and file a Conflict Minerals Report exhibit to its Form SD that contains enhanced disclosure on the registrant's due diligence measures, its in-scope products and the processing facilities and countries of origin of the necessary conflict minerals.

The Division's Statement indicates that it is subject to any further action that may be taken by the SEC, expresses the Division's position on enforcement action only and does not express any legal conclusion on the Conflict Minerals Rule.

Acting Chairman Piwowar's Statement

Also on Friday, SEC Acting Chairman Piwowar published a separate Statement. In his Statement, he indicated that he has instructed the SEC staff to begin work on a recommendation for future SEC action and that, in preparing its

recommendation, the Staff will consider, among other things, the public comments received in response to the January 31st request for comment on the Rule. Acting Chairman Piwowar, who has made it well known that he is opposed to the Rule, further indicated in his Statement that “[t]he primary function of the extensive and costly requirements for due diligence on the source and chain of custody of conflict minerals set forth in paragraph (c) of Item 1.01 of Form SD is to enable companies to make the disclosure found to be unconstitutional.” and that “[i]n light of the foregoing regulatory uncertainties, until these issues are resolved, it is difficult to conceive of a circumstance that would counsel in favor of enforcing Item 1.01(c) of Form SD.”

Early Reactions to the Statements

News sources have reported that SEC Commissioner Kara Stein, a Democratic Commissioner and currently the only other seated SEC Commissioner, has taken exception to Acting Chairman Piwowar’s action. She has accused him of acting beyond his authority to engage in de facto rulemaking.

As of Sunday afternoon when this Alert was prepared, the NGOs focused on this issue have not published statements, but we expect those to be forthcoming this week. We also would not be surprised to see another shot across the bow from Democrats on the Senate Banking Committee. On March 29th, four Democrats on the Senate Banking Committee sent a letter to the SEC’s Inspector General asking him to conduct an investigation into whether Acting Chairman Piwowar’s January 31st Statement opening up a comment period on the Rule and other unrelated actions taken by Acting Chairman Piwowar were legally permissible.

Near Term Steps for Registrants

The Statements will have little impact on the calendar year 2016 traceability process at most registrants. In most cases, that process has been completed or is close to completion. And, in any event, there is significant overlap between the RCOI and due diligence processes.

For most registrants, the most immediate considerations will be how much to say in the calendar year 2016 Form SD and whether to include a separate Conflict Minerals Report exhibit. As a result of the Division of Corporation Finance’s Statement, we expect that there will be more variation in disclosure this year relative to calendar year 2015 reporting. Among the factors that registrants will be considering in crafting their disclosure are NGO and socially responsible investor pressure around responsible minerals sourcing and disclosure rankings, messaging to commercial customers and consumers, internal corporate social responsibility values and their best guestimate as to where the Rule and market practice will be heading over the next year. Some of the factors that will determine the ultimate outcome of the Rule are discussed in this [Alert](#). In that Alert, we indicated that the drama around the Rule would continue, and, for now, it shows no sign of abating.

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