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ALERT

CSR & Supply Chain Compliance

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SEC Publishes Statement on Conflict Minerals Reporting - Important New Guidance on Timing, Product Labeling and Audit Requirements

Late yesterday, the SEC's Division of Corporation Finance released a public Statement on the effect of the recent Court of Appeals decision on the Conflict Minerals Rule.

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Events of the Last Couple of Weeks

To recap, on April 14, the Court of Appeals for the D.C. Circuit held that the requirement under the Conflict Minerals Rule that companies indicate that their products have "not been found to be DRC conflict free" violates the First Amendment. The Court concluded that this labeling requirement is impermissible compelled speech and equated the disclosure requirement to a company's having to "confess blood on its hands." The Court rejected all of the other challenges to the Conflict Minerals Rule.

Since the Court's decision, there have been public and behind-the-scenes efforts to influence the SEC's course of action. On April 22, 11 Senators and House members wrote to the SEC urging it to continue with the implementation of the Conflict Minerals Rule.

On April 28, in what was widely viewed as a foreshadowing of yesterday's Statement, the two Republican SEC Commissioners, Daniel Gallagher and Michael Piwowar, released a joint statement advocating a full stay of the Conflict Minerals Rule until the legal challenge is resolved. They felt that "[m]arching ahead with some portion of the rule that might ultimately be invalidated is a waste of the Commission's time and resources - far too much of which have been spent on this rule already - and a waste of vast sums of shareholder money."

The Division of Corporation Finance Statement

In yesterday's Statement, the Division of Corporation Finance indicated that companies are expected to file any reports required under the Conflict Minerals Rule on or before the existing June 2 deadline.

The Division's Statement indicates that any filed Form SD and related Conflict Minerals Report should comply with the upheld portions of the Conflict Minerals Rule and Form SD. Companies that do not need to file a Conflict Minerals Report should disclose in their Form SD their reasonable country of origin inquiry and briefly describe the inquiry they undertook. Companies that are required to file a Conflict Minerals Report should include a description of the due diligence that they undertook in the Conflict Minerals Report.

The Division's Statement indicates that companies are not required to identify products as "DRC conflict free," having "not been found to be 'DRC conflict free'" or "DRC conflict undeterminable."

Although companies with products that are "DRC conflict undeterminable" or "not found to be 'DRC conflict free'" do not have to identify their products as such, they should disclose for those products the facilities used in the production of the conflict minerals, their country of origin and the efforts made to determine the mine or location of origin.

A company still may voluntarily elect to describe any of its products as "DRC conflict free" in its Conflict Minerals Report. However, in what may be a substantial cost savings for many companies, the Statement indicates that, pending further action, an independent private sector audit will not be required unless a company voluntarily elects to describe a product as "DRC conflict free" in its Conflict Minerals Report.

The Road Ahead

Notwithstanding this latest development, we are not yet at the end of the road on the legal challenge to the Conflict Minerals Rule. Yesterday, the petitioners filed a Motion for a Stay of the entire rule with the SEC. They have indicated that if the SEC denies the stay, they will consider filing a stay request with the D.C. Circuit. Even if the stay is denied, the Court of Appeals has remanded the case to the District Court for further proceedings. Furthermore, in its Statement, the Division of Corporation Finance also indicated that it will consider the need to provide additional guidance in advance of the filing due date. Accordingly, there still may be further developments under the Conflict Minerals Rule.

However, in light of yesterday's Statement, it will come as no surprise that companies should continue to press ahead with the preparation of their filings.

Unfortunately, yesterday's Statement will have little impact on the amount of work required to complete the upcoming filing. Although it is a relatively short filing, as companies have gotten into the details, they have in many cases been surprised by its nuances and the level of work involved. Among other things, companies are wrestling with: (1) the level of detail to include in their disclosure; (2) how to best break out information between the Form SD and the Conflict Minerals Report; (3) the organization of the Conflict Minerals Report; and (4) how to present smelter and refiner data. Many companies also are struggling to validate the smelter and refiner data that they have received from their suppliers and have significant concerns with the accuracy and reliability of the data. In addition, many companies are unclear as to exactly what they must do under the OECD framework. Assuming that the Conflict Minerals Rule survives, with experience and as market practice evolves, like other SEC requirements, this one will become easier for companies to address.

But, for now, for most companies dealing with the filing requirement, as a first-time effort, much work remains to be done. Therefore, it's full steam ahead. June 2 is coming up quickly.

For Further Information

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