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ALERT

CSR & Supply Chain Compliance

April 4, 2017

Case Closed! – The Conflict Minerals Rule Litigation Is Over, but the Drama Continues

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After 1,627 days and enough law firm memos to deforest a small country, the litigation relating to the Conflict Minerals Rule came to an end yesterday. In this Alert, we discuss what this means for calendar year 2016 compliance, as well as the many other moving pieces relating to the Rule.

The Court's Final Judgment

Yesterday, Judge Ketanji Brown Jackson, a District Court Judge in the District of Columbia, entered a final judgment in the Conflict Minerals Rule case. In a short three paragraph opinion, 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.

Judge Jackson's decision was expected. On March 10th, the parties submitted a Joint Status Report requesting that the Court enter a final judgment in accordance with the earlier decisions in the case by the Court of Appeals. The appellate court decision is discussed in our earlier Alert available here.

But the Uncertainty Continues

Although the litigation has come to a close, the uncertainty surrounding the Conflict Minerals Rule continues:

- The SEC is expected to publish a new Statement that supersedes its April 29, 2014 Statement, which was put out in response to the Court of Appeals' April 14, 2014 decision. In its 2014 Statement, the SEC indicated 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." In addition, the Statement indicated 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 April 2014 Statement is discussed in our Alert available here.

  The $64,000 question is whether the SEC will reinstate the mandatory audit requirement contemplated by the Conflict Minerals Rule. We think that the chances of this occurring for the upcoming calendar 2016 filing are nil. Looking further out, for various reasons, we think that the mandatory audit requirement is unlikely to be reinstated, but it is not impossible if the Rule survives.

- On January 31st, SEC Acting Chairman Piwowar published Statements directing the SEC staff to consider whether the SEC's 2014 guidance is still appropriate and whether any additional relief is appropriate in the interim, and opening up a comment period on the Rule, which closed during the middle of March. Putting aside form letters, the SEC received approximately 300 comment letters, both supporting and against the Rule, as well as letters taking the middle ground by advocating for modifications to the Rule.

Last week, four Democrats on the Senate Banking Committee sent a letter to the SEC's Inspector General asking him to conduct an investigation into whether this and other unrelated actions taken by Acting Chairman Piwowar were legally permissible.

Whether and when the SEC might modify the Rule in response to comments received and the lessons learned from four years of compliance by companies, and whether the letter to the IG might temper its appetite to do so, remain open questions.

- In early February, a draft of a purported Presidential Memorandum that would suspend the Conflict Minerals Rule began to circulate. Under Section 1502 of Dodd-Frank, the SEC is required to revise or temporarily waive the requirements of the Rule if the President transmits to the SEC a determination that doing so is in the national security interest of the United States and the President includes the reasons therefor. Under Section 1502, the revision or waiver can last for up to two years.

  The draft Memorandum contemplates a two-year waiver. The draft Memorandum also directs the Secretaries of State and Treasury to propose an alternative plan to address problems in the DRC region that takes a targeted approach focused on breaking the link between commodities and armed groups in the region. Thus far, the White House has not commented on the draft Memorandum in circulation.

  For more information on the draft Memorandum, please see the webinar hosted by Assent Compliance in which we participated, which is available here.

- On March 27th, the State Department announced that it, along with other agencies and departments, is seeking input from stakeholders to inform recommendations of how best to support responsible sourcing of 3TG. The Department will consider requests and comments received or postmarked by April 28th.

- The Financial Choice Act introduced during 2016 contemplated the repeal of Section 1502 of Dodd-Frank. The chances are high that repeal of Section 1502 will be sought in successor legislation.

- Finally, Jay Clayton, the President's nominee for SEC Chairman, is moving closer to being seated. The Senate Banking Committee is scheduled to vote today, after which he will move to confirmation by the full Senate. As SEC Chairman, he will drive many aspects of the SEC's agenda, including conflict minerals regulation.

Compliance in the Near Term

So where does all of the above leave companies? For the time being, the status quo is maintained. Except as modified by the SEC's April 2014 Statement, the Conflict Minerals Rule continues in effect and calendar year 2016 filings continue to be due on May 31st.

But, stay tuned. The roller coaster ride continues.

Meanwhile, in the EU

In other news, yesterday, the European Council voted to approve the pending EU conflict minerals regulation. The regulation was previously approved by the EU Parliament and follows on the November 22, 2016 political agreement reached by the Parliament and the Council.

The EU conflict minerals regulation, which places mandatory obligations on importers of 3TG but not product manufacturers and sellers, takes effect on January 1, 2021. Please see our earlier Alert for a summary of the EU regulation. More extensive commentary from Ropes & Gray on the final regulation will be forthcoming.

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With on-the-ground expertise in the United States, Europe and Asia, we are able to take a holistic, global approach to supply chain compliance and CSR, to help clients efficiently and effectively structure and implement their supply chain compliance and CSR programs and mitigate risk.

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