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Executive Order on Conflict Minerals? Not Yet

As of midnight on February 14, 2017, no executive order relating to the SEC conflict minerals rule has been signed by President Trump. For an executive order not yet signed, it is getting a lot of attention, media coverage, even prompting webinars and law firm memos. All this attention has also created some confusion. So, while we wait for an executive order, let us review where we are.

Tucked away at the end of 2010's Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) is a provision that required the SEC to issue a rule requiring SEC reporting companies to disclose certain information about the source and chain of custody of the conflict minerals (tin, tantalum, tungsten and gold) in their products.

As required, the SEC issued the conflict minerals rule in August of 2012. And, contrary to what some recent news reports and many social media feeds have been reporting, the SECs conflict minerals rule does **not** prohibit or limit the use or sale of any minerals from any source – even if the mining or trade of those minerals finances or benefits armed groups in the Democratic Republic of the Congo (DRC) or adjoining countries. The rule merely requires relevant companies to gather information and make certain disclosures about the source and chain of custody of those minerals. Congress hoped that this "name and shame" regime would pressure companies to buy conflict minerals from legitimate sources that did not benefit armed groups in the DRC.

On February 8, 2017, rumors started circulating about President Trump's intent to sign an executive order to suspend the conflict mineral rule for two years. A draft executive order has been widely circulated on the internet. According to the draft, the executive order would be signed because of the unintended consequences of the rule, including a de facto embargo on minerals from the DRC and instability in the region which threatens the US national security interest. The draft executive order contemplates a two-year waiver of the rule and calls on the Secretary of State and the Secretary of Treasury to review ways to break the connection between the armed groups in the DRC and mining and trading of these minerals and, within six months, submit a plan to address these problems.

What to Do Now

While we wait for an executive order to be signed – and even after one is signed – before disbanding your conflict minerals team, shutting down your supplier engagement process and tossing out reporting requests from your customers, remember:

1. **Commercial Requests Will Continue** – In several sectors, companies will continue to require information from their suppliers about the origin of the conflict minerals in their products, they will continue to avoid smelters and refiners that are not "compliant" with certain assessment protocols, and they will continue to terminate (or put pressure on) suppliers that cannot follow suit. So, determine what your customers (at least your key customers) will do in light of any executive order.
2. **Likely Legal Challenge to Executive Order** – Any executive order will likely include claims and evidence of unintended negative consequences of the rule that contributed to instability in central Africa and threaten US national security interests. These claims and evidence are intended to fulfill the conditions to the waiver that are included in Section 1502. NGOs, activists and other interested parties believe strongly that the rule has been effective and beneficial, and will likely disagree that US national security interests are threatened by the rule. After the victory that President Trump's opponents had when the 9th Circuit Court of Appeals upheld the temporary restraining order on the President's "travel ban," it is likely that a conflict minerals executive order will be challenged as well. In fact, it could be the risk of legal challenge that is delaying the executive order – to allow time for the administration to develop more details and evidence to support the President's determination, because Section 1502 requires that the reasons for the President's determination be included in the order.
3. **Possible Amendment of the EU Regulation** – The EU's conflict minerals regulation was hotly debated in the European Parliament in 2014. In the end, the regulation ultimately proposed covered far fewer enterprises than many interested parties had hoped. One justification for the more narrow approach was that a narrower EU regulation was consistent with the US rule and would be a "complement" to it. The EU regulation process is almost completed, with final adoption likely to occur at the mid-February plenary European Parliament session. But, if the requirements of the US rule are waived for two years, NGOs and other stakeholders could argue for an amendment to the EU regulation to extend its scope to cover downstream companies as well. Those familiar with the EU regulation process, however, believe that such an amendment is unlikely.
4. **Possible New SEC Guidance** – On January 31, 2017, Acting SEC Chairman Michael Piwowar called for comments to the conflict minerals rule and the existing SEC guidance regarding the rule. Although the anticipated executive order would provide a two-year waiver of compliance, considering the probable legal challenge to any executive order, comments will continue to be gathered.

Comments to the rule are likely to include a request for confirmation that independent private sector audits (IPSAs) continue not to be required unless a company claims that a product is "DRC conflict-free," a request for confirmation that chemically distinct compounds are not within the scope of the rule, a request for clarification that companies are not required to provide the names of smelters or refiners unless they confirm that those facilities actually processed the minerals in their products, and a request for a discussion on how companies can appropriately avoid "hinting" that their products are "DRC conflict-free" (so that they can avoid having to provide an IPSA).

So, for now – and even right after any executive order is signed, you should continue your due diligence procedures and supplier engagement. And, continue to refer to the April 2014 SEC Guidance. Any executive order is likely not to be the last step in this process.

Looking Back – What Does Section 1502 of Dodd-Frank Act Say?

In 2010, because Congress believed that the mining and trade of conflict minerals from the DRC was helping to finance conflict and extreme violence in parts of the DRC, it included a provision in the Dodd-Frank Act that required the SEC to promulgate a rule that would require SEC reporting companies to disclose annually whether the conflict minerals that are necessary to the production or functionality of products that they manufacture or contract to be manufactured were sourced from the DRC or an adjoining country. If their products did contain conflict minerals sourced from those countries, then the company would have to go further and undertake due diligence on the source and chain of custody of those conflict minerals. The conflict minerals due diligence was intended to help the company determine whether its products were "DRC conflict-free" (meaning that the products did not contain minerals that benefitted armed groups in the DRC or adjoining countries). Further, Section 1502 required companies that performed this due diligence to obtain an IPSA of the company's disclosure about its due diligence.

Among other things, Section 1502 provided that the SECs conflict minerals rule would require the reporting company to disclose the facilities that processed the conflict minerals in their products, the country of origin of those conflict minerals, and the efforts the company used to determine the actual mine or location of origin of those conflict minerals. The Dodd-Frank Act provision only required disclosure and did not prohibit or limit the use of any minerals from any source.

Section 1502 also provided that that the SEC "**shall**" revise or temporarily waive the requirements of the conflict minerals rule, for up to two years, if the President determines that the revision or waiver is in the national security interest of the US. The President is required to describe the reasons for that determination.

According to Section 1502, "conflict minerals" means the below minerals (or their derivatives):

- Columbite-tantalite (coltan)(tantalum)
- Cassiterite (tin)
- Gold
- Wolframite (tungsten)

The rule covers these four minerals regardless of where they are sourced. For example, tin is a "conflict mineral" whether it is sourced from the DRC, Bolivia or Australia.

The Long and Winding Legal Challenge of the Conflict Minerals Rule

In August 2012, the SEC finally issued the rule (as Rule 13p-1 of Exchange Act) as required by Section 1502 of the Dodd-Frank Act. In October 2012, several industry groups filed a legal challenge to the rule. The US District Court of the DC Circuit ruled against the industry groups and upheld the rule as issued. In April 2014, the Court of Appeals for DC Circuit found the rule to be unconstitutional to the extent it required companies to label products as "not having been found to be DRC conflict-free." To address the resulting confusion regarding what would be required while the legal challenge continued, the SEC issued its April 2014 SEC Statement providing guidance to companies about what the SEC expected companies to do to comply with the rule in the meantime. In August 2015, the Court of Appeals for the DC Circuit re-affirmed its prior ruling. In October 2016, the case was assigned to District Court Judge Jackson for further proceedings. On February 10, 2017, perhaps in anticipation of the rumored executive order, Judge Jackson issued an order requiring the parties to file a joint status report by March 10, 2017, indicating whether further proceedings are necessary.

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