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CONFLICT MINERALS

NEW MOTION FOR STAY AND WHAT REPORTING COMPANIES SHOULD DO NOW

Conflict Minerals Rule

Section 1502 of the Dodd-Frank Act required the Securities and Exchange Commission (SEC) to promulgate new disclosure and reporting requirements concerning the use and sourcing of certain minerals originating in several central African countries because those minerals were helping to finance extraordinary violence in the Democratic Republic of the Congo. On August 22, 2012, the SEC promulgated the long-awaited Conflict Minerals Rule (Rule).

Legal Challenge

The legal challenge of the Rule that commenced in October 2012 is still ongoing, but it appears to be in its last stages. The initial challenge by the National Association of Manufacturers, the US Chamber of Commerce and the Business Roundtable was rejected by the US District Court for the District of Columbia on July 23, 2013. The trade association petitioners appealed that decision to the DC Circuit Court of Appeals.

Court of Appeals Decision

On April 14, 2014, the Court of Appeals upheld most elements of the Rule – but it did agree with the trade associations' First Amendment argument. After discussing the legal standard for its review of the First Amendment claim, the court concluded that portions of Section 1502 of the Dodd-Frank Act and the Rule violated the First Amendment when they required that reporting companies report to the SEC and state on their websites that any of their products have "not been found to be 'DRC conflict free.'" The Court of Appeals remanded the case to the district court for further proceedings.

It was the product description requirement that was the focus of the court's attention. In an often-quoted selection from the opinion, the majority stated "The label 'conflict free' is a metaphor that conveys moral responsibility for the Congo war.…By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment."

Impact of the Court of Appeals Decision

Despite the Court of Appeals' decision, uncertainty remained. It was not clear how reporting companies were to prepare and file their disclosure in light of the court's decision. It was unclear whether the SEC would, in fact, require the filings on the June 2 deadline. Finally, as she testified before the House Financial Services Committee on April 29, 2014, SEC Chair Mary Jo White indicated that the SEC would indeed push to implement the Rule. Later that day the SEC staff issued a Statement that clarified the SEC's position.

SEC Statement

On April 29, Keith Higgins, the Director of the Division of Corporation Finance, released the eagerly awaited Statement on the effect of the Court of Appeals decision on the Rule. Our blog post of April 29 summarizes the SEC Statement. The SEC staff noted that the Court of Appeals found that the Rule violated the First Amendment when it required reporting companies to report and post on their websites that any of their products have "not been found to be 'DRC conflict free.'" Further, the Statement pointed out that the court specifically noted that there was no "First Amendment objection to any other aspect of the conflict minerals report or required disclosures."

As a result of that reading of the court's decision, the SEC indicated that it expects companies to file reports by the June 2, 2014 filing date, and stated that those reports "should comply with and address those portions of Rule 13p-1 and Form SD that the Court upheld." According to the Statement, that means:

- Companies filing only the Form SD (without any Conflict Minerals Report) must disclose their reasonable country of origin in their Form SD and briefly describe their inquiry.
- Companies that are required to file the Conflict Minerals Report must describe their due diligence in their Conflict Minerals Report.
- No product descriptions are required in a Conflict Minerals Report. But, for products that would have been identified as either "DRC conflict undeterminable" or "not found to be 'DRC conflict free,'" companies are required to disclose the smelters/refiners, the country of origin, and the efforts to determine the mine or location of origin of the conflict minerals in those products.
- Although companies are not required to use product descriptions, they are permitted to do so if they wish.
- Until further notice, no independent private sector audit is required unless a company chooses to describe products as "DRC conflict free."

SEC's Partial Stay

On May 2, the SEC issued a partial stay (SEC's Partial Stay) of the Rule. The SEC's Partial Stay implemented the substance of the SEC Statement that was issued the week before. In the order, the SEC concluded that justice required a partial stay of the Rule for those portions of the Rule and the Form SD that the Court of Appeals held would violate the First Amendment. The SEC reasoned that limiting the stay to those offending disclosures would protect the reporting companies' First Amendment rights while furthering the public's interest in enforcing the rest of the Rule.

Petitioners' Motion for Stay

As they indicated they would, on May 5, the trade associations that challenged the Rule filed an emergency motion with the DC Circuit Court of Appeals seeking a stay of the Rule or at least of the June 2, 2014 initial filing date.

In their motion, the groups argue that modification of the Rule by the SEC's Partial Stay will not accomplish the objectives of Dodd-Frank Section 1502 because "the disclosure of the bottom-line information – whether the minerals come from mines controlled by armed groups" is no longer required. Arguing further that the SEC should have conducted "notice-and-comment rulemaking" to determine how the disclosure provisions should be modified, the groups requested that the Rule be stayed until the District Court acts on the remand of the case. The groups asked for a decision on their motion by May 26 – just seven days before the first conflict minerals disclosures must be filed with the SEC.

First Form SD and Conflict Minerals Report Filed

In the midst of this uncertainty, the first Form SD and Conflict Minerals Report were filed with the SEC on April 24, 2014. The filing by Siliconware Precision Industries Co., Ltd. immediately became the focus of much attention. However, observers quickly noted that the filing failed to meet the requirements of the Rule and did not take into account the guidance from the most recent SEC FAQs issued in early April. Also, of course, it did not reflect the SEC's Partial Stay which was issued after the Siliconware Form SD was filed. Although the filing garnered significant attention, it should not be used as a model for drafting Form SD's or Conflict Minerals Reports.

Possible Further First Amendment Consideration

And as if matters were not unsettled enough, the conflict minerals case could be consolidated into *American Meat Institute v. U.S. Department of Agriculture*, a case that is scheduled for oral argument on May 19. *American Meat Institute* is another First Amendment case in which the appropriate standard for review of compelled speech in a commercial context will be determined.

What Should Companies Do Now?

The requirements of the reasonable country of origin inquiry and due diligence are not impacted by the SEC's Partial Stay, and reporting companies' obligations with respect to such inquiry and diligence are unchanged. As the trade associations' Motion for Stay is considered by the Court of Appeals, we urge reporting companies to complete their inquiries, due diligence, and the drafting of any required reports so that they are ready to comply with the Rule as modified by the SEC's Partial Stay. In addition, the SEC's Partial Stay does not impact the work that non-reporting companies are being asked to do to respond to their customers' inquiries about sourcing and chain of custody in their supply chains.

Reporting companies should not file their disclosures too early as there might be additional guidance or resolution on the implications of the Court of Appeals decision. And, if they file before most other companies, their filings will be noticed (and possibly scrutinized). Before deciding to be an early filer, companies will want to weigh the consequences of the attention that will bring.

A decision by the Court of Appeals on the trade associations' Motion for Stay is likely to be handed down by May 26. Further, the *American Meat Institute* case is to be argued to the Court of Appeals on May 19. So, the final resolution of the legal challenge to the Rule may come soon. We invite you to visit our blog as we continue to follow each step of the legal challenge as we have since October 2012.

For questions or help is preparing your Form SD, Conflict Minerals Report, or in developing your program for compliance in 2014, please contact your principal Squire Sanders lawyer or a member of our Conflict Minerals team.

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