THE
NATIONAL LAW REVIEW

Possible Future Stay of SEC's Conflict Minerals Rules - Securities and Exchange Commission

Monday, May 12, 2014

Stay of conflict minerals disclosure may be decided by May 26, 2014.

On May 7, the U.S. Court of Appeals for the District of Columbia Circuit ordered the briefing schedule that was requested by the National Association of Manufacturers, the U.S. Chamber of Commerce, and the Business Roundtable (the appellants) in an emergency motion for a stay of the Securities and Exchange Commission's (SEC's) conflict minerals rules, Rule 13p-1, and Form SD, pending a decision by the district court on remand regarding the appropriate remedy. Because the court ordered the filing of opposition briefs by May 9 and the reply brief by May 13, but did not address the appellants' request that the court rule by May 26, it is not clear whether the court will act by May 26. Accordingly, we recommend that companies continue to prepare their reports on Form SD but wait to file the reports until immediately before the June 2, 2014 due date in case the court stays the effectiveness of the conflict minerals disclosure requirements.

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The appellants asked the court for expedited action given the three-judge panel's April 14 order to withhold the issuance of its mandate that the conflict minerals disclosure requirements are unconstitutional as a violation of the First Amendment until seven days after the disposition of a timely petition for rehearing or petition for rehearing en banc. The panel's April 14 opinion held that the conflict minerals disclosure rules violate the First Amendment to the extent they 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."[1]

In their emergency motion for a stay of the SEC's conflict minerals rules, filed on May 2, the appellants noted that the delay of the effectiveness of the panel's mandate would deny any relief for the initial Form SD filing obligation because the mandate could not be effective any earlier than June 5, 2014—three days after the due date for the conflict minerals disclosures on Form SD. In addition, the appellants criticized the SEC's actions in response to the April 14 decision, calling them inconsistent with the notice and comment rulemaking procedure required by the Administrative Procedure Act. On April 29, the Director of the SEC's Division of Corporation Finance (the Division Director) issued a statement[2] providing that, pending further SEC or court action, companies need not say in their reports on Form SD that products are "DRC conflict undeterminable," have "not been found to be 'DRC conflict free,'" or are "conflict free," but that the SEC expects companies to file their conflict minerals disclosures on Form SD by the June 2, 2014 deadline. In the statement, the Division Director hinted that the SEC may provide additional guidance in advance of the filing due date. On May 2, the SEC issued an order that stayed "the effective date for compliance with those portions of Rule 13p-1 and Form SD that would require the statements by issuers that the Court of Appeals held would violate the First Amendment."

The appellants' most significant argument in their motion is that the elimination of the constitutionally protected language would no longer create any benefits to the disclosure requirement, "even assuming the Rule ever did." Quoting the SEC's adopting release for the conflict minerals disclosure requirements, the appellants observed that the remaining language in Form SD would "no longer 'create incentives' by shaming companies" and would "no longer 'enhance transparency' by purportedly informing the public whether an issuer sourced minerals from armed groups in the DRC."[3]

Companies are now grappling with the challenges of drafting Form SD. The elimination of the constitutionally protected language puts additional focus on some of the other disclosure requirements of Form SD. In this regard, the Division Director's statement provides as follows:

If the company has products that fall within the scope of Items 1.01(c)(2) or 1.01(c)(2)(i) of Form SD, it would not have to identify the products as "DRC conflict undeterminable" or "not found to be 'DRC conflict free," but should disclose, for those products, the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin.

The Division Director also reminded companies that they must submit the independent private sector audit report required by the rule if they voluntarily elect to describe any of their products as "DRC conflict free" in the conflict minerals report.

It is highly likely that a company that has been unable to determine whether its products are DRC conflict free will not have been able to identify the facilities used to produce the conflict minerals or the country of origin of the minerals. Therefore, the company will only be able to describe its efforts to determine the mine or location of origin. It is far from clear whether the disclosure about a company's due diligence efforts as well as its reasonable country of origin inquiry will accomplish Congress's goals.

We will continue to monitor the court's actions to determine if it issues a stay prior to the due date for reports on Form SD

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[1]. *Nat'l Assoc. of Mfrs. v. Sec. & Exch. Comm'n*, No. 13-5252 (D.C. Cir. Apr. 14, 2014) at 23, *available* here.

[2]. View the statement here

[3]. Appellants' Emergency Motion for Stay at 1, *Nat'l Assoc. of Mfrs. v. Sec. & Exch. Comm'n*, No. 13-5252 (D.C. Cir. filed May 5, 2014),*available* here.