

U.S. State Department Seeking Comments on Conflict Minerals as Administration Considers Effectiveness of Conflict Minerals Rule



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Wednesday, April 12, 2017

The **U.S. State Department** [announced on March 27, 2017](#) that it is seeking input from stakeholders on recommendations on how to best support responsible sourcing of tin, tantalum, tungsten and gold from the Democratic Republic of Congo and other countries in the Great Lakes Region of Africa. This latest development highlights the administration's current review of the **Securities and Exchange Commission ("SEC")** conflict minerals rule, which the administration feels may have had unintended negative effects on these African countries.

Section 1502 of the **Dodd-Frank** Wall Street Reform and Consumer Protection Act (the "Conflict Minerals Provision") and Section 13(p) of the Securities Exchange Act of 1934 (the "Exchange Act") set forth reporting requirements for entities using minerals known as "Conflict Minerals" in their manufacturing activities. Conflict Minerals are defined as cassiterite, columbite-tantalite, gold, wolframite, and their derivatives, which are limited to tantalum, tin, and tungsten, as well as any other derivative and/or mineral that the U.S. Secretary of State determines to be financing conflict in the "Covered Countries". These Covered Countries include the Democratic Republic of the Congo ("DRC") or an adjoining country (which currently includes

Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia). The SEC has indicated that Congress enacted the Conflict Minerals Provision because of concerns that the trade of Conflict Minerals by armed groups is helping to finance conflict in the DRC region. By requiring such disclosures, the intent is that companies utilizing such Conflict Minerals will be more accountable to their shareholders for their impact on social policy.

Pursuant to the Conflict Minerals Provision and Section 13(p) of the Exchange Act, a company is required to file an annual conflict minerals report with the SEC (i) if such company is required to file reports with the SEC pursuant to the Exchange Act and (ii) if such company uses Conflict Minerals which are necessary to the functionality or production of an item manufactured or contracted to be manufactured by such company.

Implementation of the Conflicts Minerals reporting requirements has not been without controversy. On April 14, 2014, the D.C. Circuit upheld the majority of Section 13(p)(1) and Rule 13p-1, but found that the portion of the rule requiring regulated entities to report to the SEC and state on their website that products have “not been found to be DRC conflict free” compels speech in violation of the First Amendment. Accordingly, on April 29, 2014 the SEC issued [guidance modifying the Conflict Minerals reporting requirements](#) and on May 2, 2014 the SEC issued an [order staying the effect of the compliance date](#) for those portions of the rule found to be unconstitutional while the case was subsequently remanded to the district court for further consideration. On January 31, 2017 acting SEC Chairman Michael S. Piwowar [noted in comments](#) that such guidance and the stay remain in effect as such litigation is ongoing. Chairman Piwowar further noted that the temporary transition period provided for in the rule has expired and he has therefore directed his staff to consider whether the 2014 guidance is still appropriate.

Chairman Piwowar’s recent statements reflect the administration’s doubts concerning the effectiveness of the rule, as [he noted](#) that “The disclosure requirements have caused a de facto boycott of minerals from portions of Africa, with effects far beyond the Congo-adjacent region. Legitimate mining operators are facing such onerous costs to comply with the rule that they are being put out of business. It is also unclear that the rule has in fact resulted in any reduction in the power and control of armed gangs or eased the human suffering of many innocent men, women, and children in the Congo and surrounding areas. Moreover, the withdrawal from the region may undermine U.S. national security interests by creating a vacuum filled by those with less benign interests.” This latest request for comments from the U.S. State Department signals a major shift in the approach to combat the underlying issues that led to the Conflict Minerals Provisions. However, there is no clear alternative policy put forward at this time.

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