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Update on the Conflict Minerals Rule

Since May 2014, reporting companies, both domestic and foreign private issuers, have been required to identify and disclose to the U.S. Securities and Exchange Commission (SEC) the source of 3TG minerals (tin, tantalum, tungsten and gold) used in their products when those minerals originate from or around the war-torn region of the Democratic Republic of the Congo (DRC). The requirement to make an inquiry into whether conflict minerals originated in the DRC or the surrounding area and to state that their products have not been found to be DRC conflict free is known as the "Conflicts Minerals Rule," a product of Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. This rule engendered many comments and several law suits sought to invalidate the Conflict Minerals Rule. As explained below, this disclosure requirement may be nearing its demise.

In April 2014, in an action brought against the SEC, the Court of Appeals for the D.C. Circuit, citing First Amendment grounds, invalidated *parts* of the Conflict Minerals Rule.[1] However, the decision did not invalidate the entire rule, as many reporting companies and commentators wished for. The court held that the Conflict Minerals Rule violated the First Amendment to the extent that both the statute and the rule required regulated entities to state that their products have not been found to be DRC conflict free. Specifically as a result, companies were exempt from disclosing whether they had products which had not been found to be DRC-conflict free, or that the DRC conflict status was undeterminable.

Importantly, the partial invalidation *did not relieve* reporting companies of having to go through all the effort and expense in preparing a reasonable country of origin inquiry as to those conflict minerals used in their products, performing due diligence and preparing a Conflict Minerals Report and filing a Form SD with the SEC. The Form SD prescribes the nature of the due diligence inquiry. SEC guidance following the 2014 decision clarified that only if a company voluntarily elects to describe any of its products as "DRC-conflict free", it must obtain an independent private sector audit (IPSA) on its due diligence.

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[1] Nat'l Ass'n of Mfrs. v. SEC (*NAM*), 748 F.3d 359, 371 (D.C. Cir. 2014), *aff'd on reh'g*, 800 F.3d 518 (D.C. Cir. 2015)

Following an appeal by the SEC, in August 2015, a divided D.C. Circuit panel upheld the 2014 ruling, saying that nothing in the past year of litigation has convinced it to overturn its initial opinion. In March 2016, the SEC decided not to appeal the case further and not to file a petition for writ of certiorari to the US Supreme Court. On March 15, 2017, the parties to the legal challenge by the SEC officially requested a final judgment in accordance with the decision of the D.C. Circuit panel, which brings the litigation chapter to an end.

The Trump Administration however was widely expected to reexamine and recommend rescinding the Conflict Minerals Rule as part of the campaign promises of deregulation.

On January 31, 2017, acting SEC Chair Michael Piwowar stated that he has directed the SEC to reconsider the "misguided" rule on conflict minerals. The underlying reasons given were the substantial compliance costs borne by reporting companies and the ineffectiveness and unintended consequences of the rule that have negatively affected communities in the DCR and surrounding areas. A purported leaked White House memorandum in February 2017 [2] also called for an executive order that would temporarily suspend the Conflict Minerals Rule entirely. It is expected that Jay Clayton, the nominee for SEC Chairman, will support some sort of change or repeal.

Following the January 31, 2017 statement, the SEC sought public comments[3] on the Conflict Minerals Rule (comments were officially due on March 17, 2017). Several manufacturing firms have written to the SEC to express their support for changing or repealing the Conflict Minerals Rule. Other companies subject to the Conflict Minerals Rule have stated support for it and even claimed that they plan to uphold the various conflict minerals' reporting obligations regardless of whether or not the law requires them to.[4]

Congress had acted on its own to diminish or repeal the Conflict Minerals Rule. In July 2016, the U. S. House of Representatives passed H.R. 5485, the Financial Services and General Government Appropriations Act (for fiscal year 2017), which included a provision to defund the implementation or enforcement of the Conflict Minerals Rule. The bill was not passed by the Senate. Provisions of the bill were incorporated into other bills. H.R. 5983, or the Financial CHOICE Act of 2016, introduced in the U.S. House of Representatives would have repealed the Conflict Minerals Rule entirely. The bill did not move past the committee stage.

On February 14, 2017, President Trump approved a joint resolution of Congress, passed pursuant to the Congressional Review Act, repealing Rule 13q-1 of the Securities Exchange Act of 1934. Rule 13q-1 would

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[2] https://www.documentcloud.org/documents/3457048-Document-Final.html#document/p1
[3] https://www.sec.gov/comments/statement-013117/statement013117.htm
[4] http://www.intel.com/content/www/us/en/corporate-responsibility/conflict-free-minerals.html

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have required domestic and foreign public companies engaged in the commercial development of oil, natural gas or minerals to publicly disclose any payments to the US or foreign governments related to the development of those resources for fiscal years ending on or after September 30, 2018. This repeal of a related compliance disclosure may be a further indication to where the Trump Administration stands on the continuation of the Conflict Minerals Rule.

The European Union adopted its own version of a conflict minerals law. In November 2016, the EU took a different approach by focusing on certain European smelters and refiners that process conflict minerals to conduct due diligence if they are sourcing from certain areas. In addition, the regulation will require direct importers of conflict minerals into the European Union to conduct due diligence if they are sourcing materials from such areas. The European Parliament approved the regulation on March 16, 2017 by a large majority, and the final regulation is expected to enter into law by the end of May 2017. Small-volume importers will be exempted under this regulation and the regulation itself will not apply until January 2021.

May 31, 2017 is the next due date for compliance with the Conflict Minerals Rule by filing the Form SD. While all current indications point to some type of rescission of the Conflict Minerals Rule, the nature and the timing of the rescission are uncertain. Public companies, either themselves or through counsel, should continue to monitor developments, and also determine the extent of their present due diligence review.

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