

D.C. District Court Upholds Dodd-Frank Conflict Minerals Rule

Article By:

Dudley W. Murrey

Eric R. Markus

On July 23, 2013, the U.S. District Court for the District of Columbia [denied](#) the plaintiffs' summary judgment motion in a lawsuit seeking to invalidate the conflict minerals rule promulgated by the Securities and Exchange Commission (SEC).¹ The court rejected the plaintiffs' contentions (1) that the SEC ignored its obligations under the Exchange Act by failing to conduct an adequate cost/benefit analysis of the Rule, (2) that various aspects of the SEC's rulemaking were arbitrary and capricious under the Administrative Procedure Act, and (3) that the requirement of the Rule and Dodd-Frank Section 1502 that an issuer post its conflict minerals disclosure on its website violates the First Amendment. In concluding that the plaintiffs' claims "lack merit," the court also granted the SEC's cross-motion for summary judgment, finding "no problems" with the SEC's rulemaking and that the Rule's disclosure scheme did not transgress the First Amendment. The outcome of the conflict minerals challenge stands in stark contrast to the recent decision by another D.C. District Court judge, who vacated and remanded the resource extraction payment disclosure rule adopted by the SEC as required by a different Dodd-Frank provision.²

As a result of the court's decision regarding the Rule, the Rule remains in effect and companies required to file reports under Exchange Act Section 13(a) or 15(d) (reporting issuers) that manufacture or contract to manufacture products containing any conflict mineral (generally gold, tantalum, tin and tungsten) that are necessary to the production or functionality of such products must file a Form SD, along with a conflict minerals report (under certain circumstances), for calendar year 2013 by May 31, 2014. Notwithstanding the imminent filing deadline, a recent survey of approximately 900 separate respondents from 16 different industries showed that many issuers had not yet implemented the programs necessary to ensure the issuers' compliance with the Rule. For example:

- approximately 16 percent of the respondents had not done much to gather information about their conflict minerals supply chain and/or were waiting on the outcome of the legal challenge to the Rule;
- approximately one-third were still in the process of determining how the Rule applies to their company (for example, identifying products that contain conflict minerals and identifying

related suppliers of those conflict minerals); and

- approximately 26 percent were not sure if the Rule was applicable to them.³

The plaintiffs may appeal the decision to the U.S. Court of Appeals for the District of Columbia Circuit, which has a recent history of vacating SEC rules (for example, the SEC's proxy access rule). Without any certainty that the district court's decision will be reversed and the Rule vacated on appeal, reporting issuers whose circumstances could require them to file a report under the Rule and are not actively preparing to comply with the Rule's disclosure requirements are best advised not to wait for the outcome of any possible appeal to do so.

As the Rule requires a reporting issuer to file by no later than May 31, 2014 its report or reports regarding each product containing a conflict mineral necessary to such product's functionality or production and the manufacturing of which is completed during calendar year 2013, reporting issuers (to the extent they have not yet done so) should begin assessing now the Rule's applicability to them, gathering the information necessary for compliance with the Rule, performing all necessary country of origin inquiries and due diligence investigations and preparing to file any reports they may be required to file under the Rule. Among the actions that a reporting issuer should take are:

- identifying each product that the issuer will manufacture or which it will be deemed to have contracted to have manufactured for it and the manufacture of which will be completed at any time during calendar year 2013;
- identifying each of those products that contains any conflict mineral that is necessary to the functionality or production of that product;
- examining the availability of the Rule's "outside the supply chain" exemption for its products;⁴
- identifying the suppliers of the conflict minerals the issuer or its contract manufacturers use to manufacture any such product and conducting outreach to determine whether the raw materials, components and other products provided by such suppliers contain conflict minerals and, if so, identifying the sources of the conflict minerals;
- determining how best to conduct any required reasonable country of origin inquiries (for example, by using supplier questionnaires and certifications to determine a conflict mineral's country of origin) and any required due diligence on the source and chain of custody of conflict minerals consistent with the *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* of the Organisation for Economic Co-Operation and Development and making the necessary country of origin inquiries and due diligence investigations;
- reviewing product purchase, supply and manufacturing contracts to ensure that each of those contracts adequately addresses the sources of conflict minerals sold to, or contained in components sold to, the issuer pursuant to those contracts or contained in products (or components) the issuer contracts to have manufactured for it;
- developing and implementing a conflict minerals policy and compliance procedures;

-
- identifying and vetting potential auditors and engaging an auditor to perform any required independent private sector audit of a conflict minerals report the issuer expects to have to file with the SEC;
 - understanding the standards for due diligence and preparation of the conflicts minerals report the issuer must meet for the auditor to issue a favorable audit report on such conflict minerals report;
 - documenting all compliance steps taken;
 - establishing disclosure controls and procedures to address the Rule's requirements; and
 - determining which executive officer will sign any required Form SD, to allow that officer to be involved in the numerous judgment calls necessary in preparing any required reports.

Reporting issuers waiting until 2014 (or even later in 2013) to determine the Rule's applicability to them and to perform any necessary country of origin inquiries and due diligence investigations may find themselves without the information necessary to prepare their reports in a timely fashion or even to assess their need to comply with the Rule. In addition, such issuers may find themselves without sufficient time to complete the necessary country of origin inquiries and supply chain due diligence and prepare the required report or reports before the filing deadline. Worse still, reporting issuers that cannot obtain accurate and complete information about the conflict minerals in some or all of their products (for whatever reason) could find they have to prepare and file a conflict minerals report when, in fact, the accurate and complete information about those conflict minerals would have revealed that the country of origin or source of those conflict minerals was such that the issuer was not required to file a conflict minerals report, at least as to some of those conflict minerals.

Those reporting issuers who may have to file a conflict minerals report and have it audited as described above should keep in mind that many other issuers requiring audits of conflict mineral reports may seek to have those audits performed within a short period between the end of 2013 and May 31, 2014. As a consequence, obtaining a last minute audit of a conflict minerals report may prove difficult. Moreover, reporting issuers should consider that obtaining an acceptable audit report for inclusion in their conflict minerals report may prove to require more time and effort than they expect, especially in the maiden season for those reports.

¹. See *Nat'l Assoc. of Mfrs., et. al. v. SEC*, CA No. 13-cv-635 (D.D.C. July 23, 2013), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2013cv0635-37. The conflict minerals rule is embodied in Rule 13p-1 under the Securities Exchange Act of 1934, as amended (Exchange Act), and Item 1.01 of the SEC's Form SD (Item 1.01, and together with Rule 13p-1, the Rule), which implement Exchange Act Section 13(p). Section 13(p) was added to the Exchange Act pursuant to Section 1502 of the Dodd-Frank Wall Street Reform

and Consumer Protection Act (Dodd-Frank). For a discussion of the Rule and the SEC's interpretive guidance on the Rule, please see our client alert

dated September 10, 2012, [SEC Adopts Dodd-Frank Conflict Minerals Rule](#), and our client alert dated June 19, 2013, [SEC Provides Guidance on Dodd-Frank Conflict Minerals Rule](#).

². For a discussion of this decision, please see our client alert dated July 5, 2013, [D.C. District Court Vacates Dodd-Frank Disclosure Rule for Payments](#)

[by Resource Extraction Issuers.](#)

3. See PricewaterhouseCoopers LLP, *Conflict Minerals Survey - How Companies are Preparing* (Jul. 2013), available at http://www.pwc.com/en_US/us/audit-assurance-services/publications/assets/pwc-conflict-minerals-preparedness-survey.pdf. Survey responses indicated that the following industries expect to be most impacted by the Rule: (1) industrial products and manufacturing; (2) technology; (3) retail and consumer; and (4) automotive.

4. This exemption exempts from reporting any particular quantities of conflict minerals that were "outside the supply chain" prior to January 31, 2013. Columbite-tantalite, cassiterite and wolframite and their derivatives, tantalum, tin and tungsten, are outside the supply chain if they have been smelted,

while gold is outside the supply chain if it has been fully refined. In addition, any conflict mineral or its derivatives that have not been smelted or fully

refined are outside the supply chain if they are located outside of the Democratic Republic of the Congo and the countries adjoining it.

Copyright © 2025, Hunton Andrews Kurth LLP. All Rights Reserved.

National Law Review, Volume III, Number 218

Source URL: <https://natlawreview.com/article/dc-district-court-upholds-dodd-frank-conflict-minerals-rule>