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Securities Exchange Commission (SEC) Staff Guidance: Companies Must File Conflict Minerals Disclosure With Modifications

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In response to the U.S. Court of Appeals for the District of Columbia Circuit's recent opinion upholding the **conflict minerals statute** and rule, but finding First Amendment violations, the Director of the SEC's Division of Corporate Finance issued a statement providing SEC staff guidance about the effect of that ruling. The **SEC** also issued an order staying the effective date for compliance with the portions of the conflict minerals rule and the related Form SD that would otherwise require companies to make statements – that their products have not been found to be "DRC conflict free" – which were held by the Court of Appeals to violate the First Amendment. As a result, for now, companies are still expected to comply with the portions of the conflict minerals rule that have not been held to violate the First Amendment.

The key takeaways of the SEC staff guidance are as follows:

- The filing date for the first Form SD and any related Conflict Minerals Report (June 2, 2014) remains the same.
- Companies that file a Form SD but not a Conflict Minerals Report must disclose their reasonable country of origin inquiry (RCOI) and briefly describe that inquiry.
- Companies that file a Form SD and a Conflict Minerals Report do not need to identify their products as "not found to be 'DRC conflict free'" or "DRC conflict undeterminable," but should disclose 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.
- If any company voluntarily elects to describe its products as "DRC conflict free" in its Conflict Minerals Report, it would need to obtain an independent private sector audit as required by the rule.
- Pending further action, no independent private sector audit is required unless a company voluntarily describes a product as "DRC conflict free" in its Conflict Minerals Report.

In issuing its order, the SEC also denied a motion filed by the National Association of Manufacturers (NAM) and others for a stay of the entire conflict minerals rule. It is also notable that SEC Commissioners Daniel Gallagher and Michael Piwowar issued a joint statement urging that the entire conflict minerals rule should be stayed pending the outcome of the litigation because the district court could (and in those commissioners' views, should) declare the entire rule to be invalid. In their view, "the fact that an issuer would still be required to include a description of its due diligence procedures in its reports would suggest that the issuer may have 'blood on its hands' for its products since it is sourcing certain minerals from the [covered countries]." In addition, those commissioners argue that "disclosures about the diligence process should not be seen as severable" from the ultimate disclosure of "not DRC conflict free." As other practitioners have noted, this type of dissenting statement is unusual but not surprising given the general controversy over the conflict minerals rule.

The battle over the conflict minerals rule appears to be ongoing, as the NAM and other groups have filed an emergency motion for a stay of the rule. The appellants have requested a decision on that motion by May 26 – shortly before the filing deadline for the first Form SD and Conflict Minerals Report. Given the proximity of the filing deadline, it is advisable to continue progressing on drafts of those documents. However, issuers are also advised to closely watch the progress of this litigation, as the outcome may affect those filing obligations.

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