

## ADVISORY | Securities

April 30, 2014

SEC DECLINES TO DELAY CONFLICT MINERALS RULE  
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On April 29, 2014, the SEC's Division of Corporation Finance (the "Division") issued a statement addressing the effect of the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in the challenge to the SEC's conflict minerals reporting rule.<sup>1</sup> As we reported in a previous alert, on April 14, 2014 that court decided that the SEC's conflict mineral reporting rule violates the First Amendment rights of public companies by compelling them to make public disclosures regarding any of their products that have not been found to be "DRC conflict-free." The Division noted, however, that the court rejected all claims based on the Administrative Procedure Act and the Securities Exchange Act of 1934.

In light of the limited nature of the DC Circuit opinion, the Division's guidance states that, subject to any further action by the SEC or a court, companies are expected to file any reports required under Rule 13p-1 on or before the due date. (The rule provides for a due date for initial reports of May 31, 2014, but because that date is a Saturday, initial reports will be due on June 2, 2014.) The Division expects Forms SD and any related Conflict Minerals Reports to comply with those portions of Rule 13p-1 and Form SD that were upheld by the court. More specifically, the Division provided the following guidance:

- Companies that do not need to file a Conflict Minerals Report should disclose their reasonable country of origin inquiry and briefly describe the inquiry they undertook.
- For those companies that are required to file a Conflict Minerals Report, the report should include a description of the due diligence that the company undertook.
- If a company filing a Conflict Minerals Report has products that fall within the scope of Items 1.01(c)(2) or 1.01(c)(2)(i) of Form SD (i.e., its products either have not been found to be DRC conflict free or are DRC conflict undeterminable), it need not identify the products as "not found to be 'DRC conflict free'" or "DRC conflict undeterminable." However, the company 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.<sup>2</sup>

The Division's guidance does not explicitly address whether a company must disclose which of its products (or product groups) contain conflict minerals that originated or may have originated in the Democratic Republic of the Congo or surrounding countries; however, such disclosure is likely relevant in describing the reasonable country of origin inquiry and/or due diligence measures.

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<sup>1</sup> *National Association of Manufacturers, et. al. v. Securities and Exchange Commission, et. al.* No. 13-5252 (D.C. Cir. Apr. 14, 2014).

<sup>2</sup> Consistent with the rule's requirements with respect to products that are "DRC conflict undeterminable," companies should only need to disclose the facilities used to produce the conflict minerals and the country of origin of the minerals to the extent known by the company. See item 1.01(c)(2)(i) of Form SD.

The Division’s guidance also makes clear that a company is not required to describe its products as “DRC conflict free,” having “not been found to be ‘DRC conflict free,’” or “DRC conflict undeterminable.” If, however, a company voluntarily elects to describe any of its products as “DRC conflict free,” it must obtain an independent private sector audit as required by the rule. Pending further action, the Division said an independent private sector audit will not be required unless a company voluntarily elects to describe a product as “DRC conflict free” in its Conflict Minerals Report.

The Division’s statement will not be the final word on the subject, but it does give public companies much-needed guidance to finalize their initial conflict mineral reports. There is speculation that the industry groups challenging the rule will seek a stay of the entire rule, so public companies are advised to monitor this space closely for future developments.

The Division’s statement is available [here](#).

If you have any questions concerning the material discussed in this client advisory, please contact the following members of our securities practice group:

<b>David Engvall</b> (author)	+1.202.662.5307	<a href="mailto:dengvall@cov.com">dengvall@cov.com</a>
<b>Keir Gumbs</b>	+1.202.662.5500	<a href="mailto:kgumbs@cov.com">kgumbs@cov.com</a>
<b>David Martin</b>	+1.202.662.5128	<a href="mailto:dmartin@cov.com">dmartin@cov.com</a>

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