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SEC Staff Issues Statement on Effect of Court Decision on Conflict Minerals Rule

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On April 29, 2014, the SEC Division of Corporation Finance (the "Division") issued a statement on the effect of a recent decision by the US Court of Appeals for the District of Columbia Circuit (the "Court") on the SEC's reporting requirements regarding conflict minerals originating in the Democratic Republic of the Congo (the "DRC") and adjoining countries (the "Conflict Minerals Rule"). The Division expects companies to file all reports required under the Conflict Minerals Rule by the June 2, 2014 due date and to comply with all portions of the Conflict Minerals Rule that the Court upheld.

On April 14, 2014, the Court issued a decision in a case involving a challenge to the Conflict Minerals Rule by the National Association of Manufacturers, the Chamber of Commerce and Business Roundtable, in which it rejected all of the challenges based on the Administrative Procedure Act and the Securities Exchange Act of 1934 (the "Exchange Act"). The Court concluded, however, that Section 13(p)(1) of the Exchange Act, adopted pursuant to Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the Conflict Minerals Rule "violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be 'DRC conflict free.'" In an order issued concurrently with the decision, the Court withheld the issuance of its mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing *en banc*. As a result, the earliest date on which the Court's mandate is likely to be issued is June 5, 2014, which is after the June 2, 2014 due date for the first reports under the Conflict Minerals Rule.

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The statement issued by the Division on April 29, 2014 provides the following guidance:

- Companies are expected to file any reports required under the Conflict Minerals Rule on or before June 2, 2014.
- The Form SD and any related Conflict Minerals Report should comply with and address those portions of the Conflict Minerals Rule that the Court upheld.
- Companies that are not required to file a Conflict Minerals Report should disclose their reasonable country of origin inquiry and briefly describe the inquiry they undertook.
- Companies that are required to file a Conflict Minerals Report should include a description of the due diligence that the company undertook. If, after exercising due diligence, the company determines that any of its products have not been found to be "DRC conflict free" or if the company is unable to determine whether or not a product qualifies as "DRC conflict free," the company does not need to identify the products as "DRC conflict undeterminable" or "not found to be 'DRC conflict free,'" but 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.

According to the statement, companies are not required to describe their products as "DRC conflict free," having "not been found to be 'DRC conflict free,'" or "DRC conflict undeterminable." If a company voluntarily decides to describe any of its products as "DRC conflict free" in its Conflict Minerals Report, it may do so only if it has obtained an independent private sector audit ("IPSA") as required by the Conflict Minerals Rule. Pending further developments, unless a company voluntarily chooses to describe a product as "DRC conflict free" in its Conflict Minerals Report, an IPSA will not be required.

The Division noted that it may need to provide additional guidance in advance of the filing due date and that there could be further action taken by the SEC or a court.[1] The Division's statement is available at http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994/. The Division's statement was preceded by a separate statement by the SEC's two Republican Commissioners, Daniel Gallagher and Michael Piwowar, who would have preferred the entire Conflict Minerals Rule to be stayed pending a final outcome of the litigation. That statement is available at http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541665582/. More information and analysis of the Conflict Minerals Rule may be found in our previous client publications at http://www.shearman.com/sec-adopts-dodd-frank-conflict-minerals-and-government-payments-rules-08-27-2012/ and http://www.shearman.com/all-that-glitters-may-be-a-reportable-conflict-mineral-12-19-2012/. Our analysis of frequently asked questions on the Conflict Minerals Rule issued by the Division is available at http://www.shearman.com/sec-staff-issues-guidance-on-conflict-minerals-05-31-2013/ and http://www.shearman.com/en/newsinsights/publications/2014/04/additional-guidance-on-conflict-minerals/.

[1] The first Form SD and Conflict Minerals Report were filed by a Taiwanese company on April 24, 2014. As of today, no other issuers have filed disclosures under the Conflict Minerals Rule.

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