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Securities Law ALERT ■

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SEC Issues Statement on D.C. Court Of Appeals Decision on Conflict Minerals Rule: First Reports Due by June 2, 2014, as Scheduled

On April 29, 2014, the SEC's Division of Corporation Finance (the "Division") issued a statement providing guidance regarding the effect of the decision of the U.S. Court of Appeals for the D.C. Circuit in the case challenging the SEC's "Conflict Mineral Rules" (Section 13(p)(1) of the Exchange Act and Rule 13p-1 thereunder).

As described in our previous alert,[1] on April 14, 2014, the appellate court found that the requirement that an issuer describe products as not "DRC conflict free" in the report that it must post on its website and file with the SEC constitutes "compelled speech." Accordingly, the appellate court held that Section 13(p)(1) of the Exchange Act and Rule 13p-1 thereunder violate the First Amendment.[2] However, the appellate court rejected all of the other claims based on the Administrative Procedure Act and the Securities Exchange Act of 1934 and remanded the case to the district court for further proceedings. The mixed outcome of the case left issuers uncertain about the requirements for the first reporting period.

The Division's statement clarified that the reports for the first reporting period must still be submitted to the SEC by June 2, 2014. However, as a result of the appellate court's ruling, the Division instructed that companies will not be required to describe their products as "DRC conflict free," having "not been found to be DRC conflict free," or "DRC conflict undeterminable" in their reports. Issuers will still need to provide disclosure regarding their reasonable country of origin inquiry, due diligence (if required) and, in certain instances, 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. Additionally, if a company voluntarily elects to describe any of its products as "DRC conflict free" in its report, then it must obtain an independent private sector audit (IPSA); however, an IPSA will not otherwise be required.

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1 http://www.alston.com/advisories/appellate-conflict-minerals-rule/

2 A copy of the decision is available at http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/The_Courts_Opinion_on_National_Association_of_Manufacturers_v_SEC.pdf.

In light of the removal of the requirement to describe products as "DRC conflict free," having "not been found to be DRC conflict free" or "DRC conflict undeterminable," it is unclear whether companies will still need to provide any description of the products that contain conflict minerals. The type of description and level of detail required has been an area of confusion for some issuers, with practices varying from descriptions as detailed as providing product model numbers to broad descriptions based on segment reporting. While a description of the products containing conflict minerals will likely be helpful in describing the reasonable country of origin inquiry and/or due diligence measures, companies should have more flexibility in how they describe such products now that the categorization requirement has been lifted.

Companies should continue with their efforts to comply with the Conflict Minerals Rule while remaining mindful of this new guidance. The Division also noted that it will consider the need to provide additional guidance in advance of the filing due date, so companies should continue to monitor for further developments.

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