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ALERT

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SEC Remains Divided Over Conflict Minerals Rules; CorpFin Issues Guidance on Compliance

On April 29, 2014 Keith F. Higgins, the Director of the Division of Corporation Finance (CorpFin) at the Securities and Exchange Commission (SEC), issued a policy statement making it clear that, barring further action by the courts or the SEC itself, CorpFin would not suspend compliance with the SEC's conflict minerals provisions under Rule 13p-1 (Rule) which was promulgated under the Securities Exchange Act of 1934, as amended (Exchange Act), pursuant to a controversial mandate under the Dodd-Frank Act. The statement released by Director Higgins follows a joint public statement released by SEC Commissioners Daniel M. Gallagher and Michael S. Piwowar on April 28, 2014, expressing their view that the "entirety of the rule should be stayed, and no further regulatory obligations should be imposed, pending the outcome of the litigation." This is just the latest move in the long-raging debate over the Rule, recently fueled by the D.C. Court of Appeals' ruling on April 14, 2014 that portions of the Rule constitute compelled speech in violation of the First Amendment and remanding the case to the federal district court for further proceedings consistent with the ruling. Commissioners Gallagher and Piwowar stated: "A full stay is essential because the district court could (and, in our view, should) determine that the entire rule is invalid." The Rule appears to remain a divisive issue at the SEC since its adoption in August 2012 by a 3-2 vote, in which Commissioner Gallagher also dissented.

The statement by Director Higgins confirms that, absent a court-imposed stay, SEC registrants subject to the Rule need to comply with the upcoming May 31st (June 2nd) initial reporting deadline for filing a Form SD to disclose the use of conflict minerals contained in and necessary to the production or functionality of the products they manufacture or contract to manufacture. The statement also offers the following limited guidance:

- Companies that do not need to prepare a Conflict Minerals Report (CMR) for inclusion in their Form SD should disclose their reasonable country of origin inquiry (RCOI) "and briefly describe the inquiry they undertook."

- Companies that, under the Rule, must prepare a CMR should similarly include a description of the diligence undertaken in accordance with the requirements of the Rule.
- Companies are not required to label their products. Products that are "not found to be DRC conflict free" or "DRC undeterminable" (within the scope of Item 1.01(c)(2) or Item 1.01(c)(2)(i) of Form SD) are not required to be disclosed as such, consistent with the D.C. Circuit's opinion. However, companies are advised to disclose: (i) the facilities used to produce the conflict minerals used in the products, (ii) the country of origin of the minerals, and (iii) the efforts to determine the mine or location of origin.
- Companies may voluntarily disclose whether any of their products are "DRC conflict free"; however, in doing so, an independent private sector audit report (IPSA) must be included as required by the Rule.
- Consistent with the D.C. Circuit's opinion and absent further guidance by CorpFin or action from the SEC, an IPSA will not be required unless a company describes products as "DRC conflict free."

The SEC has indicated that it may yet issue further guidance prior to the May 31st deadline. Companies subject to the Rule[1] should be moving ahead to complete their diligence and prepare their initial Form SD based upon the guidance contained in Director Higgins' statement and the Frequently Asked Questions issued by the SEC and last updated on April 7, 2014.

We anticipate, however, that the adjudication of this case is far from over. As noted in our Alert of April 15, 2014, the National Association of Manufacturers (NAM) could file a motion in the D.C. Circuit for a stay of the Rule pending a final determination of the Rule's validity, which the concurring opinion appears to invite. It is now clear that the SEC will not be voluntarily taking any action to delay the application of the Rules. The parties to the case have 45 days from the date the opinion was issued to petition the D.C. Circuit for a rehearing or a rehearing *en banc.* There is also a possibility that NAM could seek to participate in *American Meat Institute v. United States Department of Agriculture*, another case being heard *en banc* in the same circuit in mid-May that involves similar First Amendment issues.

A copy of our April 15, 2014 Alert on the D.C. Circuit Court's opinion can be found here**.**

A copy of Director Higgins' statement can be found here; and the joint statement by Commissioners Gallagher and Piwowar can be found here. The SEC's Frequently Asked Questions, as updated on April 7, 2014, can be found here**.**

Our attorneys from multiple disciplines have been assisting our clients with interpretation and application of Rule 13p-1 since its adoption in August 2012. For information on GT's Conflict Minerals Compliance Initiative, please click here**.**

[1] Companies subject to the Rule are reporting issuers under Sections 13(a) or 15(d) of the Exchange Act, having conflict minerals (tantalum, tin, tungsten and gold) that are necessary to the functionality or production of a product manufactured or contracted by that registrant to be manufactured. Companies that are not manufacturers of (or do not contract to have manufactured) products containing conflict minerals are not required to file Form SD.

This *GT Alert* was prepared by **Barbara A. Jones**. Questions can be directed to:

- Barbara A. Jones | 617.310.6000 | jonesb@gtlaw.com
- Or your Greenberg Traurig attorney

Albany 518.689.1400	**Denver** 303.572.6500	**New York** 212.801.9200	**Shanghai** +86 21 6391 6633
Amsterdam + 31 20 301 7300	**Fort Lauderdale** 954.765.0500	**Northern Virginia** 703.749.1300	**Silicon Valley** 650.328.8500
Atlanta 678.553.2100	**Houston** 713.374.3500	**Orange County** 949.732.6500	**Tallahassee** 850.222.6891
Austin 512.320.7200	**Las Vegas** 702.792.3773	**Orlando** 407.420.1000	**Tampa** 813.318.5700
Boca Raton 561.955.7600	**London*** +44 (0)203 349 8700	**Philadelphia** 215.988.7800	**Tel Aviv^** +03.636.6000
Boston 617.310.6000	**Los Angeles** 310.586.7700	**Phoenix** 602.445.8000	**Warsaw~** +48 22 690 6100
Chicago 312.456.8400	**Mexico City+** +52 55 5029.0000	**Sacramento** 916.442.1111	**Washington, D.C.** 202.331.3100
Dallas 214.665.3600	**Miami** 305.579.0500	**San Francisco** 415.655.1300	**West Palm Beach** 561.650.7900
Delaware 302.661.7000	**New Jersey** 973.360.7900	**Seoul∞** 82-2-369-1000	**White Plains** 914.286.2900