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Locke Lord QuickStudy: Conflict Minerals Rule is Still in Effect – For Now

WRITTEN BY

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On April 3, 2017, the D.C. District Court entered its final judgment in *National Association of Manufacturers v. SEC* holding that Section 1502 of Dodd-Frank and the SEC's conflict minerals rule, Rule 13p-1 and Form SD thereunder, violate the First Amendment to the extent that a covered public company is required to report to the SEC and state on its website if any of its products "have not been found to be DRC conflict free". The final judgment was entered at the mutual request of the parties after the Department of Justice and the SEC determined not to seek review of the appellate decisions affirming the District Court's earlier rulings. Even though the final judgment is not a surprise, it comes on the heels of other recent developments indicating the conflict minerals rule may not survive in its current form, if at all.

On January 31, 2017, the Acting Chairman of the SEC, Michael S. Piwowar, issued two public statements directing the SEC staff to reconsider its 2014 guidance on the conflict minerals rule, which partially stayed compliance with those portions of the rule found to be unconstitutional, and to consider whether any additional relief is appropriate.[1] Chairman Piwowar noted that on his visit to Africa last year he had seen firsthand the unintended consequences of the conflict minerals rule and questioned whether the rule has "in fact resulted in any reduction in the power and control of armed gangs or eased the human suffering of many innocent men, women, and children in the Congo and surrounding areas." Chairman Piwowar further noted that "the withdrawal from the region may undermine U.S. national security interests by creating a vacuum filled by those with less benign interests."

On February 8, 2017, Reuters reported that President Trump was planning to issue an order suspending the conflict minerals rule for two years by relying on a Dodd-Frank provision giving the President authority to suspend or revise the rule if such suspension or waiver is in the national

security interest of the United States.[2] No action has been taken by the President yet, but such an order is consistent with President Trump's regulatory agenda, including his executive order signed on February 24, 2017, establishing regulatory reform task forces aimed at paring back excessive regulations.

In response to the flurry of public statements, news reports and executive orders, on February 24, 2017, the Acting Director of the SEC's Division of Corporation Finance, Shelley Parratt, reminded covered public companies that the conflict minerals rule remains in effect.[3] The required conflict minerals rule filings are still due on **May 31st.** But, in the longer term, what will the SEC do? Notwithstanding these recent developments, there remains a legislative mandate for the conflict minerals rule or some version thereof unless Congress repeals Section 1502 of Dodd-Frank.[4] Will the SEC revise the existing conflict minerals rule to address the constitutional issues identified in *National Association of Manufacturers v. SEC*? Or will the SEC let the current rule stand, subject to their 2014 guidance providing relief from the disclosure requirements determined to violate the First Amendment?

Opponents of the conflict minerals rule think a disclosure-based "shaming" rule is the wrong tool, and the SEC is the wrong agency, to address the conflict mineral issues in the Congo and surrounding areas. Acting SEC Chair Piwowar has expressed similar concerns about "name and shame" regulations in his dissenting statement to the adoption of the SEC's pay ratio disclosure rule, noting that the pay ratio rule "simply has nothing to do with protecting investors, ensuring fair, orderly, and efficient markets, or facilitating capital formation."[5] Further, the August 2016 report from the U.S. Government Accountability Office regarding the effectiveness of the conflict minerals rule indicates that most covered public companies are facing significant challenges in their supply chain due diligence efforts with many companies unable to even confirm the source of the conflict minerals in their products.[6] Taking each of these developments into account, now may be the right time for Congress to re-think the U.S. approach to conflict minerals.For more information on the matters discussed in this *Locke Lord QuickStudy,* please contact the authors.

Endnotes

*[1]See Acting Chairman Michael S. Piwowar, "Statement on the Commission's Conflict Minerals Rule", January 31, 2017, available **here**; and "Reconsideration of Conflict Minerals Rule Implementation", January 31, 2017, available **here**. [2]Sarah N. Lynch and Emily Stephenson, "White House plans directive targeting 'conflict minerals' rule: sources." Reuters February 8, 2017, available **here**. [3]Tatyana Shumsky, "SEC Says Conflict Minerals, Pay Ratio Rules Remain In Force." The Wall Street Journal February 24, 2017, available **here**. [4]The repeal of Section 1502 of Dodd-Frank is certainly a possibility. The pending reintroduction of the Financial Choice Act by House Republicans may provide for the elimination of the statute's provisions regarding conflict minerals disclosure but the details on the legislation have not yet been released.*
*[5]See Acting Chairman Michael S. Piwowar, "Dissenting Statement at Open Meeting on Pay Ratio Disclosure", August 5, 2015, available **here**.*
*[6]U.S. Government Accountability Office, "SEC Conflict Minerals Rule: Companies Face Continuing Challenges in Determining Whether Their Conflict Minerals Benefit Armed Groups", August 2016, available **here**.*

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