

SEC (Mostly) Forges Ahead on Conflict Minerals

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The [SEC staff has responded](#) to the D.C. Circuit Court of Appeals' [April 14 decision](#), which found a key feature of the conflict minerals rule in violation of constitutional free-speech guarantees and sent the matter back to the district court for further proceedings. Today the staff instructed public companies to file their initial Form SD reports by the June 2, 2014 deadline. In a nod to the D.C. Circuit's opinion, however, the staff stated that companies need not characterize any products as "DRC conflict free," having "not been found to be 'DRC conflict free,'" or "DRC conflict undeterminable." For products that otherwise would have merited a label other than "DRC conflict free," the company should disclose 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. If a company voluntarily elects to describe any of its products as "DRC conflict free" in its Conflict Minerals Report, it would be permitted to do so as long as it has obtained an independent private sector audit. No audit is needed if no products are identified as "DRC conflict free."

Evidently the staff acted in line with the preferences of only three members of the Commission, including Chair White, since today's guidance ran contrary to yesterday's [call by Commissioners Gallagher and Piwowar](#) to stay the rule in its entirety. They argued that a "full stay is essential because the district court could (and, in our view, should) determine that the entire rule is invalid." Given the circumscribed holding of the D.C. Circuit's opinion, discussed in our [April 14 newsflash](#), it is not clear that the district court will agree. Indeed, the appellate court suggested that the rule's constitutional flaw might be fixed by adopting one of the "intuitive" disclosure alternatives proposed by the rule's challengers. For example, "rather than the 'conflict free' description the statute and rule require, issuers could use their own language to describe their products." And what kind of disclosure will ultimately be required for filings in 2015 and beyond? Stay tuned; there may be several innings left.

Please see our [October 26, 2012 client memorandum](#), updated as of April 17, 2014, for an overview of the rule and a template Form SD.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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