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ALERT MEMORANDUM

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Court Rejects Challenge to SEC's Conflict Minerals Disclosure Rule

On July 23, 2013, the U.S. federal district court for the District of Columbia rejected a challenge brought by industry groups to the SEC's rule requiring disclosure about use of "conflict minerals" from the Democratic Republic of the Congo (the "DRC") and neighboring countries in the manufacture of products. In light of this decision, companies covered by the rule should continue to work to prepare their first annual filing of conflict minerals disclosures, which is due May 31, 2014.

Section 1502 of the Dodd-Frank Act required the SEC to adopt rules requiring disclosures by a reporting company that manufactures or contracts to manufacture products for which conflict minerals are necessary to those products' functionality or production. The specified minerals—cassiterite, columbite-tantalite (coltan), gold and wolframite, and their three derivatives—tin, tantalum and tungsten, are widely used in various types of products, including electronics, lighting, electrical and heating applications, and jewelry. After a long and controversial rule-making process, the SEC adopted Rule 13p-1 under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), in August 2012, which required these disclosures in new Form SD (Specialized Disclosure Report). Disclosures must also be posted on the company's website and maintained there for at least one year.

In the decision, National Association of Manufacturers et al. v. Securities and Exchange Commission, the court denied the plaintiffs' motion for summary judgment and granted summary judgment in favor of the SEC. The court found that:

(1) The SEC was under no obligation to evaluate whether the rule would achieve the humanitarian benefits identified by Congress, as the plaintiffs had contended. Rather, the Exchange Act requires the SEC to consider, in addition to investor protection, whether rules will promote "efficiency, competition and capital formation" and the impact on competition. While the court noted that the Exchange Act analysis may not be relevant in this particular case, given the Congressional directive to undertake the rulemaking, it found that in any event the SEC had considered the Exchange Act factors.

(2) With respect to certain aspects of the rule, including the SEC's decision not to include a de minimis exemption, the SEC in its interpretation of the Dodd-Frank Act was reasonable and not "arbitrary and capricious" under the Administrative Procedure Act.

(3) The requirement that a company must post conflict minerals disclosures on its website does not violate the First Amendment. Given the plaintiff's challenge to the public website disclosures rather than disclosures made to the SEC, the commercial nature of the disclosures and that they are not aimed at preventing misleading or

deceptive speech, the court applied an intermediate level of scrutiny (i.e., more than a rational basis test but less than strict scrutiny) and found that the rule (and the statute) directly advance the government interest asserted and that there is a "reasonable fit" between the end and the means.

There has been no indication in the immediate aftermath of the decision as to what steps may follow. If the plaintiffs choose to appeal the court's ruling, the U.S. Court of Appeals for the D.C. Circuit will review most aspects of the decision de novo. This may limit the significance in the appeals process of some of the determinations made by the district court.

The court's decision comes three weeks after another ruling by a different judge in the same court that vacated the SEC's rule requiring disclosure of resource extraction payments, adopted pursuant to Section 1504 of the Dodd-Frank Act. The SEC has not yet indicated its next steps following that decision. For more information concerning that ruling, see our Alert Memo dated July 2, 2013, available here.

The conflict minerals decision is available here. For more information about the conflict minerals rule, see our Alert Memo dated September 12, 2012, available here, and our Alert Memo regarding the SEC's FAQs dated June 3, 2013, available here.

Please feel free to call any of your regular contacts at the Firm or any of our partners and counsel listed under "Capital Markets" or "Corporate Governance" in the Practices section of our website (http://www.clearygottlieb.com) if you have any questions.

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