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# SEC Answers "FAQ 14-1/2" on Dodd-Frank Conflict Minerals: Are You Required to Say It?

## By Douglas Hileman, CRMA, CPEA

The Court of Appeals for the D.C. Circuit issued its opinion on the challenge to the Dodd-Frank Conflict Minerals rule on April 14, 2014. A majority of the Court agreed with the petitioners' first amendment challenge, requiring companies to make certain statements about the DRC Conflict Free status of their products in SEC filings. The Court found this to be "compelled speech."

The SEC's Division Director released a public statement on April 29, 2014 on the effect of the decision on issuers' requirements for upcoming filings – due June 2, 2014. The Director's statement indicates that issuers are not required to identify products as "DRC Conflict Free", or having "not been found to be 'DRC Conflict Free'", or "DRC Conflict Undeterminable".

The SEC released a series of FAQs (numbers 13 through 21) on April 8, 2014. Many of these FAQs dealt with the Independent Private Sector Audit (IPSA).

The SEC Division Director's guidance on April 29 actually answered a question that should have been between FAQ 14 and FAQ 15. The answer was already there by its absence; now it is confirmed.

FAQ 14 dealt with a scenario where an issuer determines that at least one of its products may be described a "DRC Conflict Undeterminable"; would the issuer be required to obtain an IPSA? SEC said "no." [Emphasis added]

FAQ 15 dealt with a scenario where an issuer wished to describe one or more products as "DRC Conflict Free" in its Conflict Minerals Report, but other products are DRC Conflict Undeterminable; can the issuer go without an IPSA? Again, SEC said "no." [Emphasis added]

The author notes there is a difference between making a determination (an internal conclusion, ideally supported by sufficient evidence) and a declaration (a matter of speech – either verbal or written). It is the compelled speech issue at the heart of the Circuit Court decision and the SEC Division Director's statements.

All of this could have been inferred from a question not included in SEC's FAQ list released April 8. The author proposes "SEC FAQ 14-1/2":

- If an issuer determines that at least one of its products is DRC Conflict Free, must it describe it as such in its Conflict Minerals Report? SEC's answer would have been "no" – as confirmed in later remarks.

FAQ 14-1/2 is based on a few assumptions, including:

- The issuer has determined that other products are not "DRC Conflict Free", and
- The issuer has elected to make its determination (and descriptions, if it has elected to do so) at an entity level, such that the boundary for determination includes both "DRC Conflict Free" and other determinations.

The Circuit Court decision, the Division Director's guidance, and SEC's [imaginary] "FAQ 14-1/2" leave several other issues open for Year Two, such as:

- If an entity determines that all of its products (or all products in a line of business) are "DRC Conflict Free" – and no products are "DRC Conflict Undeterminable" or "not found to be DRC Conflict Free", how will the issuer describe the results of its conflict minerals due diligence in its Conflict Minerals Report for Year Two?

The author notes that the major reason to avoid making any statement [at least in the Conflict Minerals Report] describing any product as "DRC Conflict Free" is to avoid the need to obtain an IPSA. The author suggests that an IPSA need not be dreadful. Non-CPAs can perform an IPSA using performance standards in the Generally Accepted Government Auditing Standards (GAGAS). Performance auditing standards allow for more flexibility than attestation standards; an IPSA Auditor familiar with Dodd-Frank Conflict Minerals, business processes, SEC filings, and performance auditing standards can provide a suitable IPSA at lower cost than major CPA forms.

Stay tuned – there may be an "FAQ 14-3/4" in the works.