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THE LEGAL CHALLENGE TO THE SEC'S CONFLICT MINERALS REPORTING REGULATIONS

by Richard A. Wilhelm

In the 2010 Dodd-Frank Act, the United States Congress required, inter alia, the SEC to promulgate regulations requiring certain manufacturers to trace the sources of tin, tantalum, tungsten and gold that are contained in products they manufacture or contract to manufacture to allow them to report yearly to the SEC whether the products are "not DRC [Democratic Republic of the Congo] conflict free." Conflict free was defined by Congress as meaning the products do not contain minerals that finance or benefit violent armed groups in the DRC or adjoining countries. Congress required the SEC action because "it [was] the sense of Congress" that the exploitation of conflict minerals from that region was financing armed groups that engaged in "extreme levels of violence" creating "an emergency humanitarian situation."

Various industry groups lobbied heavily against the passage of the Dodd-Frank Act and later submitted comments during the SEC's rulemaking challenging the proposed regulations' due diligence and reporting obligations as unduly burdensome and costly. After considering the comments, the SEC, where it would not run afoul of the Congressional mandate, did reduce some of the burdens that would be imposed on industry. However, the SEC acknowledged that compliance with Congress's intent precluded reduction of other burdensome aspects of the regulations. The SEC promulgated the regulations in August 2012.

In October, 2012, the National Association of Manufacturers, along with the U.S. Chamber of Commerce, commenced a legal challenge to the conflict minerals regulations. Since then, voluminous briefs have been filed by NAM and the SEC along with briefs by numerous interested groups. These briefs outline the parameters of the dispute and suggest that NAM faces an uphill battle.

The crux of the industry's challenge is that the SEC failed to properly quantify the benefits and costs associated with the regulations and thereby acted arbitrarily and capriciously in promulgating them. NAM claims the reporting requirements will not aid the DRC and could cripple the region economically. It also claims that the SEC failed to agree to certain revisions that would have lessened the burdens and costs on business, like carving out a *de minimus* exemption for manufacturers whose products used only trace amounts of conflict minerals and predicating a burdensome due diligence requirement on whether a manufacturer had "reason to believe" that their products contained conflict minerals that may have originated in the DRC as opposed to whether the products "did originate" there. NAM asks the court to strike the entire regulation and send the SEC back to square one.

The SEC responds that it was not its responsibility to quantify the benefits of the regulations, noting that Congress had made that calculation and had determined that the benefits justified the reporting requirement Congress mandated. In fact, the SEC admitted it could not quantify the benefits because it lacked data to do so. Rather it performed a qualitative analysis. It also defends its rejection of NAM's proposed revisions that would have reduced the costs of compliance. The SEC noted, and various members of Congress agreed, that Congress had considered and rejected the *de minimus* exemption because it would defeat the purpose of the rule. Congress concluded that thousands or millions of trace amounts can add up to a significant amount, the trade in which would undercut the rule's purpose of stopping the flow of money to armed insurgents in the region. The second NAM proposal was rejected because in the SEC's view, it would encourage willful blindness by industry. That is, if a business encountered a red flag suggesting the sources of its minerals were not conflict-free, it would investigate no further, so as to avoid a determination that they did originate there.

An interesting issue concerns the regulation's imposition of the reporting requirements not just on manufacturers but also to those who contract for the manufacture of goods. NAM believes that this extension of the reporting requirements is contrary to the express language of Dodd-Frank. It supports its position through application of rules of construction routinely used in interpreting statutes and its argument is logical. However, former and current members of Congress came to the SEC's aid on this issue claiming in their brief that they intended to include those who contract for the manufacturer of goods, again to prevent exemptions that would significantly undercut what the regulations sought to achieve.

Oral arguments are scheduled for May 15, 2013. It will be very interesting to see how receptive the panel from the DC Circuit is to NAM's arguments. Asking the court to scuttle the entire regulation, the parameters of which Congress as a matter of policy framed, makes NAM's challenge all the more difficult.

E-MAILS AND AUTOMOTIVE: A QUICK REMINDER

by M. Kimberly Stagg & John E. Anderson, Sr.

We just successfully defended a lawsuit that turned on a critical issue – are e-mails sent by an employee to his personal attorney using his employer's computer protected by the attorney-client privilege? In our case here in Tennessee, the court held that the employee and his personal attorney had lost privilege over their communications. The e-mails could be used against the employee in the litigation and any alleged merits to the employee's lawsuit quickly dissolved.

The linchpin issue in the court's decision serves as a good reminder: Has your company, as an employer, expressly advised its employees that e-mails sent through the company system are not private and may be accessed by your company? That deciding factor is becoming consistent throughout a number of jurisdictions.

A company's decision whether its employees have no right to privacy with regard to their company e-mail accounts and utilization of company computers is important. Once made, that decision must be adequately documented through a clear notice to employees and preferably through a well-worded provision in the company's employee handbook that requires written acknowledgement of receipt of the handbook from the employees. In the event of the misfortune of subsequent litigation initiated by the employee, the simple step of properly documenting your company's policy can sometimes mean a quick and successful end to the litigation.

AUTO INSURER TRADE GROUPS APPLAUD THE INTRODUCTION OF THE "PARTS ACT" AS A STEP TOWARDS GREATER COMPETITION IN THE COLLISION PARTS REPLACEMENT INDUSTRY AND REDUCED INSURER COSTS

by James M. Burns

In late April, Congressman Darrell Issa (R-CA) and Congresswoman Zoe Lofgren (D- CA) in the House of Representatives, and Senators Orrin Hatch (R-UT) and Sheldon Whitehouse (D-RI) in the Senate, announced that they were introducing the "Promoting Automotive Repair, Trade and Sales (PARTS) Act of 2013" (H.R. 1663). The legislation would amend patent law to reduce the length of a design patent issued on the external automotive parts used in collision repairs (bumpers, headlights, door panels, etc.), from 14 years to 30 months. As such, if enacted, parts manufacturers would be free to copy the design of such parts much sooner, without fear of a claim of patent infringement from the patent holder arising from the design of the part. For this reason, proponents of the legislation claim that it would increase competition in the repair parts market, potentially lowering insurer costs and insurance premiums for insureds.

Not surprisingly, several insurance trade groups voiced their strong support for the bill. The Property Casualty Insurers Association applauded the legislation as "good for consumers, businesses and the U.S. economy," claiming that "it will encourage greater competition among parts suppliers." Similarly, a spokesman for the National Association of Mutual Insurance Companies stated that the PARTS Act "provides for a reasonable amount of exclusivity for auto manufacturers while still ensuring reasonable pricing through competition over the long term," and stated that the Act "would simply ensure consumers will have more choices in the marketplace." NAMIC has also stated that aftermarket parts can cost up to 50% less than those made by original equipment manufacturers and that, consequently, the use of aftermarket parts (which currently only constitute a small portion of the parts market and would presumably increase if the bill was passed) already saves consumers over $1.5 billion per year.

Despite the bipartisan introduction of the legislation, its prospects for passage are uncertain at this time. While Senator Hatch announced that he was "hopeful we can get this legislation passed by both the House and Senate and signed into law soon," similar legislation was introduced in the 112th Congress (H.R. 3889) but failed to advance out of committee. Moreover, at a hearing on H.R. 3889 last year, several Representatives voiced concerns about whether the legislation would reduce manufacturer incentives to innovate and invest in research and development. Those opposing the legislation included Congresswoman Maxine Waters (D-CA), who stated that she just "did not like the idea of investing in a patent, and then all of sudden it is not yours after a short period of time."

The new bill, H.R. 1663, has been sent to the House Judiciary Committee for further action.

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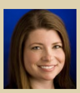

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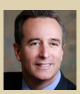

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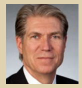

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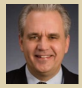

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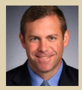

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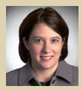

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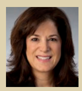

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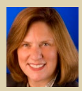

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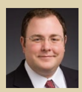

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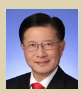

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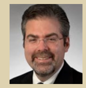

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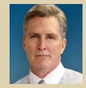

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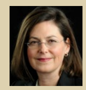

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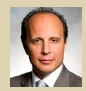

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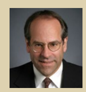

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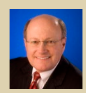

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