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Court Declares Partial Victory for Manufacturers in Conflict Minerals Case

Yesterday a panel on the Court of Appeals for the D.C. Circuit, in *National Association of Manufacturers v. SEC*, held that one portion of the SEC's conflict minerals rules – the requirement that companies describe certain products as not “DRC conflict free” - is unconstitutionally compelled speech under the First Amendment. The Court rejected the National Association of Manufacturer's other challenges to the rules, finding that the provisions do not violate the Administrative Procedure Act or the Exchange Act.

The conflicts mineral rules, promulgated by the SEC pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, apply to publicly traded companies that manufacture products or contract for the manufacture of products.

The panel majority of the D.C. Circuit agreed with the Association that to describe its products as not “DRC conflict free” is unconstitutionally compelled speech. In rejecting the SEC's argument that the designation is factual and non-ideological, the Court observed that, “the label ‘conflict free’ is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups.” The Court concluded that the SEC failed to provide evidence that a less restrictive means of describing products affiliated with armed conflict in the DRC would fail to achieve the intended purpose behind the restriction and remanded that portion of the case to the District Court for further proceedings.

The D.C. Circuit unanimously affirmed the district court's ruling that the SEC did not act arbitrarily and capriciously in its decisions to:

Provide no exception for products containing *de minimis* amounts of a conflict mineral;

Require due diligence on the origin of conflict minerals when an issuer “has reason to believe that its necessary conflict minerals may have originated in” covered countries;

Apply the rules to products that a company contracts to manufacture in addition to those it directly manufactures; or

Provide a shorter phase-out period for large issuers to use the temporary “DRC conflict undeterminable” designation than for small issuers.

The court also rejected the claim that the SEC violated the Exchange Act by failing to determine whether the final rule would achieve the intended purpose of decreasing the conflict and violence in the DRC as part of its analysis of the rule’s costs and benefits.

The D.C. Circuit remanded the case to the district court for “further proceedings.” The initial reporting deadline is June 2, 2014, in just over 45 days. Although the conflict minerals rules will live on in some form, the practical implications of the decision for manufacturers will depend on the actions taken by the SEC in response to the ruling.

The D.C. Circuit is due to rehear a food labeling case with similar First Amendment issues *en banc* on May 19, 2014, and the dissenting opinion cited the pendency of that case. Given that posture, the SEC may seek rehearing of the Court’s decision. The D.C. Circuit could agree to consolidate the cases if the government requests. It is also possible that the Court will stay the conflict minerals rules reporting requirements on its own motion or in response to a request from the Association. Alternatively, the SEC itself could delay the effective date until it revises the language or reconsiders the entire public reporting portion of the rule as part of a separate rulemaking. We expect that additional information will be forthcoming within the next few days.