ALSTON & BIRD LLP

WWW.ALSTONFINANCE.COM

Securities Law ALERT ■

APRIL 16, 2014

Appellate Court Issues Opinion on Conflict Minerals Rule – Requirement to State That Products Have "Not Been Found to Be 'DRC Conflict Free'" Violates First Amendment

On April 14, 2014, the United States Court of Appeals for the D.C. Circuit issued its opinion in the challenge to Section 13(p)(1) of the Exchange Act and Rule 13p-1 thereunder (the "Conflict Minerals Rule") brought by The National Association of Manufacturers.[1] The appeal sought to overturn the ruling by the District Court for the District of Columbia, which granted summary judgment for the Securities and Exchange Commission (SEC) and upheld the Conflict Minerals Rule as enacted.

The Appellate Court's Ruling

A majority of the panel of the appellate court agreed with the petitioners' First Amendment claim, which challenged the requirement that an issuer describe applicable products as not "DRC conflict free" in the report that it must post on its website and file with the SEC. The appellate court found that such a requirement constitutes "compelled speech." Accordingly, the appellate court held that Section 13(p)(1) of the Exchange Act and Rule 13p-1 thereunder violate the First Amendment to the extent that the statute and the Rule require regulated entities to post on their websites and report to the SEC that any of their products have "not been found to be 'DRC conflict free.'" Although the district court had limited the First Amendment claim to the description of products on an issuer's website, the appellate court clarified that the First Amendment claim also extends to the labeling of products as not conflict free in reports filed with the SEC.

The appellate court affirmed the rest of the district court's decision upholding the Conflict Minerals Rule. The appellate court rejected the challengers' arguments that (i) the SEC acted arbitrarily and capriciously by choosing not to include a ***de minimis*** exception in the final rule, (ii) the language of the due diligence threshold contained in the rule contravenes the statutory mandate and is arbitrary and capricious, (iii)

[1] A copy of the decision is available at http://www.srz.com/files/upload/Conflict_Minerals_Resource_Center/The_Courts_Opinion_on_National_Association_of_Manufacturers_v_SEC.pdf.

the rule should not apply to retailers and other companies that do not directly manufacture products but instead contract for their goods to be manufactured, (iv) the length of the phase-in period allowing issuers to use the "undeterminable" category is inconsistent and was arbitrarily and capriciously determined, and (v) the SEC did not adequately analyze the costs and benefits of the final rule.

The case has been remanded to the district court for further proceedings.

What Does This Mean for Public Companies?

The impact of this decision on issuers' obligations under the Conflict Minerals Rule remains uncertain at this time, although the reports for the first reporting period must (as of now) still be submitted to the SEC by June 2, 2014. We expect the SEC to issue a statement and/or guidance to provide clarity as to what this decision means for public companies and the Conflict Minerals Rule in the coming days. In the meantime, we recommend that companies continue with their efforts to comply with the Conflict Minerals Rule as enacted.

ALSTON & BIRD LLP

WWW.ALSTON.COM

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100
NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 275 Middlefield Road ■ Suite 150 ■ Menlo Park, California, USA, 94025-4004 ■ 650-838-2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333

For more information, contact your Alston & Bird attorney or one of the attorneys in the firm's Securities Group.