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Securities Law ALERT ■

AUGUST 20, 2015

D.C. Circuit Reaffirms 2014 Opinion on Conflict Minerals Rule

On August 18, 2015, the U.S. Court of Appeals for the D.C. Circuit reaffirmed its 2014 ruling that struck down the requirement that public companies must disclose to the Securities and Exchange Commission (SEC), and on their website, whether any of their products have not been found to be "DRC conflict free."[1] With one judge dissenting, the three-judge panel also reaffirmed the court's decision to uphold the remainder of the so-called conflict minerals statute and rule, which are included in Section 13(p)(1) of the Exchange Act and Rule 13p-1 promulgated thereunder (together, the "Conflict Minerals Rule").

Background

In 2014, the court in *National Association of Manufacturers v. SEC*[2] struck down the Conflict Minerals Rule's "DRC conflict free" disclosure requirement on First Amendment grounds. Following that decision, the court reached a decision in *American Meat Institute v. U.S. Department of Agriculture*[3] that expanded the application of a different, less demanding standard of review used in a U.S. Supreme Court ruling known as *Zauderer*.[4] The *Zauderer* standard calls for a lower threshold for what the government must prove in order to show that its law does not violate First Amendment rights.

In light of that intervening decision, the SEC and intervenor Amnesty International successfully petitioned the D.C. Circuit to rehear its 2014 decision on the theory that the court should apply the different, less demanding standard of review to determine whether the Conflict Minerals Rule violated First Amendment protections.

The Appellate Court's Ruling

The majority opinion reasoned that application of the *Zauderer* decision should be limited to compelled disclosures that involve voluntary advertising or point-of-sale disclosures, and since the Conflict Minerals Rule does not deal with advertising or point-of-sale disclosures, *Zauderer* would not apply to the present case.

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1 A copy of the decision is available at http://www.cadc.uscourts.gov/internet/opinions.nsf/7677C9E435244EC985257EA50054F3D4/$file/13-5252-1568402.pdf. Also see our client alert discussing the prior ruling, available here: http://www.alston.com/advisories/appellate-conflict-minerals-rule/.

2 748 F.3d 359 (D.C. Cir. 2014).

3 760 F.3d 18 (D.C. Cir. 2014) (en banc).

4 *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985).

The majority opinion added that even if *Zauderer* governed its analysis, requiring issuers to report whether their products have not been found to be "DRC conflict free" still constitutes compelled speech in violation of the First Amendment. The court ruled that the SEC had not met its burden of demonstrating that the Conflict Minerals Rule would in fact alleviate the harms it recited; namely, to reduce the humanitarian crisis in the Democratic Republic of the Congo (DRC) to a material degree. The majority noted that the government's idea that the forced disclosure regime will decrease the revenue of armed groups in the DRC and end or at least diminish the humanitarian crisis there is "entirely unproven and rests on pure speculation" and that the First Amendment requires more than speculation before speech can be compelled. For this reason, and others, the D.C. Circuit's earlier analysis was reaffirmed and the court adhered to its earlier ruling.

What Does This Decision Mean for Public Companies?

The impact of this decision on issuers' obligations under the Conflict Minerals Rule remains uncertain at this time, and it is possible that the SEC will appeal the decision. As of now, reports on Form SD for the next reporting period must be submitted to the SEC by May 31, 2016. We expect the SEC to issue some guidance relating to the Conflict Minerals Rule to provide clarity as to what the registrants' obligations are in light of this recent decision. Currently, the guidance that the SEC issued in April 2014, following the initial court ruling, remains in effect.[5] Issuers are still required to comply with the Conflict Minerals Rule except they are not required to state whether the materials they use are "DRC conflict free." In the meantime, we recommend that companies continue their efforts to comply with the Conflict Minerals Rule in accordance with prior SEC guidance.

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5 See our client alert regarding prior SEC guidance, available at: http://www.alston.com/advisories/SEC-issues-statements/.

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