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Court Upholds Partial Invalidation of SEC Conflict Minerals Rule

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On August 18, 2015, a divided panel of the US Court of Appeals for the District of Columbia Circuit, in *National Association of Manufacturers v. Securities and Exchange Commission* ("*NAM*"), upheld its earlier ruling that held that requiring companies to describe their products as having "not been found to be 'DRC conflict free'" is unconstitutional, thereby invalidating a part of the US Securities and Exchange Commission's ("*SEC*") conflict minerals rule.[1]

The D.C. Circuit had agreed to rehear the case in light of the Court's intervening decision in *American Meat Institute v. US Department of Agriculture* ("*AMI*"), which held that the federal government had not violated the First Amendment when it forced companies to list on the labels of their meat cuts the country in which the animal was born, raised and slaughtered. The effect of *AMI* was to extend the relaxed standard of review established by the US Supreme Court in the 1985 *Zauderer* case[2] beyond government-compelled disclosures designed to prevent the deception of consumers. In its decision on rehearing, the Court held (again) that the *Zauderer* standard of review did not apply to the conflict minerals disclosure at issue. The majority further reasoned that, even under a *Zauderer* review, the compelled disclosure violates the First Amendment.

The Court's decision on rehearing can be found here.

What this Means for SEC Reporting Companies

In short, this most recent decision means nothing changes. Following the D.C. Circuit's initial decision in *NAM*, the SEC's Division of Corporation Finance issued a statement on the effect of the ruling (see here). The SEC stated that it expected reporting companies to

[1] Exchange Act Rule 13p-1 and Form SD.

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

continue to comply with the provisions of the conflict minerals rule that were upheld by the Court. However, no company is required to describe its products as "DRC conflict free," having "not been found to be 'DRC conflict free,'" or "DRC conflict undeterminable." An independent private sector audit will not be required unless a company voluntarily elects to describe a product as "DRC conflict free" in its Conflict Minerals Report. This has been the status for the last two conflict minerals reporting periods (calendar years 2013 and 2014), and, unless the SEC changes the position it took following the D.C. Circuit's first decision, companies should expect to continue to prepare their conflict minerals disclosure as they have in the past.

With the rehearing before the D.C. Circuit concluded, and subject to any appeal or further litigation concerning the conflict minerals rule, the SEC Division of Corporation Finance may now be in a position to publish additional guidance on compliance with the rules and respond to frequently asked questions in the near future.

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