



Court of Appeals Confirms that Conflict Minerals Reporting Requirement is Unconstitutional

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In its decision on rehearing, the court confirmed that the SEC's conflict minerals reporting requirements (and corresponding provisions of the Dodd-Frank Act) violate the First Amendment to the extent that they "require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be 'DRC conflict free.'" The court also confirmed that the more relaxed standard of review established by the Supreme Court in *Zauderer v. Office of Disciplinary Counsel* (1985), does not apply to the SEC's conflict minerals rules on the grounds that they do not involve voluntary commercial advertising. The court found that the SEC's rule unconstitutionally compels speech when subject to review under either the *Central Hudson* (intermediate) standard or strict scrutiny. The court concluded that the SEC's rule (and the underlying statute) do not meet the second prong of the *AMI/Central Hudson* test because the SEC did not provide evidence that the reporting requirements effectively deter conflict in the Democratic Republic of Congo, which is the law's stated purpose.

The court's decision does not immediately change the conflict minerals reporting requirements as currently in effect. Following the court's original *NAM v. SEC* decision, the SEC instructed that, in light of the decision:

1. Covered companies are not required to state "DRC Conflict Free," "DRC Conflict Undeterminable," or "have not been found to be DRC Conflict Free" in relation to their covered products; and

2. An independent private sector audit is no longer required unless the company voluntarily elects to state that its products are DRC Conflict Free.

The SEC concluded that the remainder of the reporting requirement remained effective. The court subsequently denied NAM’s motion to enjoin the reporting requirement in its entirety. We continue to follow this issue closely and will provide regular updates.

*This blog post was originally on AG Trade Law.

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