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Conflict Minerals Update: D.C. Circuit Hears Oral Arguments

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On the first issue, the panel appeared to conclude that striking down an agency's rule for failing to include a *de minimis* exception, when it is not required, is improper. On the second issue, Judge Srinivasan questioned whether the "may have" language would actually expand reporting obligations; he pointed to the fact that Congress's text includes a qualifier "reason to believe" before the "did originate" language, which went unaddressed by the Plaintiffs' argument. The Plaintiffs reasoned that a 5% possibility that minerals may have originated in the conflict region would trigger reporting responsibilities under the SEC's text, but not under Dodd-Frank's "did originate" language. Judge Srinivasan countered that the "reason to believe" precursor also triggers a less than certain threshold. He questioned whether the Plaintiffs were distinguishing between tests based on probability versus possibility, rather than a steadfast test based on certainty and uncertainty. In other words, he asserted, the SEC's Final Rule does not deviate greatly from the "less than certain" standard mandated by Dodd Frank.

After a series of questions, the Plaintiffs agreed that the Dodd-Frank language did initiate a standard based on probability. Judge Sentelle, however, seemed to suggest that the textual switch from "did originate" to "may originate" in the conflicts region imposes a much broader set of reporting requirements; his opinion reflected that of the Plaintiffs' — that the Dodd-Frank text only creates a reporting requirement if the minerals "did originate" in the DRC.

The panel's participation was liveliest on the constitutionality of the disclosure requirements. The Plaintiffs maintain that the rule compels companies to make ideologically-driven, rather than factual statements about their own products; they contend that labeling products as not "conflict free" is forcing companies to self-stigmatize. In response, the panel asked the SEC's counsel sharp questions about the relevance of this disclosure requirement to investor

protection. The SEC's counsel countered that the information is relevant to the "socially conscious investor." Judge Randolph called this rationale a "slippery slope" when it comes to compelling speech, and went on to imply that the statute is a shaming statute where the means are not tied to its purpose and objective. It must of course be emphasized that this statute was mandated by Congress.

The tenor of the dialogue at oral argument cannot necessarily be used to predict the outcome of the case. It would appear, however, that the panel is seriously considering the implications of permitting this rule to stand. It is uncertain whether the Court will issue a ruling before the first conflict minerals reports come due in late May of this year. Therefore, companies must be prepared to comply with conflict minerals due diligence and reporting obligations as they are currently defined.

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