

D.C. Circuit Court Re-Affirms Decision that Portions of SEC's Conflict Minerals Rules are Unconstitutional

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On August 18, 2015, the United States Court of Appeals for the D.C. Circuit, in likely the first majority opinion citing Charles Dickens (*A Tale of Two Cities*) and George Orwell (*Nineteen Eighty-Four*), re-affirmed its previous ruling striking down the SEC rule mandating that public companies specifically declare their products to be “not DRC conflict free” in their SEC filings and on their websites as a violation of the First Amendment. *National Association of Manufacturers, et al., v. Securities and Exchange Commission, et al.* (“NAM II”).

Rehearing on Proper Standard of Review for Compelled Speech

In its ruling in April, 2014 (“NAM I”), the Court struck down the disclosure requirement of the Conflict Minerals Rules as unconstitutionally compelled speech. (See our Client Alert dated April 23, 2014 [here](#)). The Court arrived at its decision after rejecting the SEC’s position that the proper legal standard in reviewing regulatory promulgations was the deferential rational basis review standard under *Zauderer v. Office of Disciplinary Counsel*. The Zauderer standard, according to the Court, was limited only to disclosure requirements that were related to curing consumer deception. Since the disclosure requirement in the Conflict Minerals Rules was not related to preventing consumer deception, the Court instead used the more exacting intermediate scrutiny standard under *Central Hudson Gas & Electric Corp v. Public Service Commission* and held that the SEC had failed to meet its burden.

In October 2014, however, the D.C. Circuit *en banc* held that governmental interests other than prevention of consumer deception could trigger the more relaxed Zauderer standard of review. *American Meat Institute v. U.S. Department of Agriculture* (“AMI”). When the SEC claimed that AMI was an *en banc* refutation of NAM I, the Court granted a rehearing to re-examine whether the disclosure requirement in the Conflict Minerals Rules should have been subject to Zauderer.

Zauderer Standard Remains Limited

The Court, in a 2-to-1 decision, re-affirmed its rejection of the Zauderer standard to the compelled disclosure sections of Conflict Minerals Rules, limiting that deferential standard as applicable to advertising and product labeling at the point of sale. Since the SEC disclosures at issue did not deal with voluntary advertising or point of sale disclosures, the Court concluded that Zauderer (and AMI) did not apply and the Court properly utilized a heightened standard of review.

Recognizing the uncertainty surrounding compelled commercial speech case law, the Court also articulated an alternative ground for striking down the disclosure requirement by analyzing the case under the Zauderer standard. The Court found that the required disclosure failed the more lenient standard because (1) the assertion that the disclosure would reduce the humanitarian crisis in the conflict minerals region to a material degree was based on speculation and conjecture, and (2) the required disclosure statement was not “purely factual and uncontroversial.” As such, the Court concluded, the required disclosure was unconstitutionally compelled speech.

Next Steps

As was the result in NAM I, the ruling by NAM II does not affect the Conflict Minerals Rules as a whole. As the SEC considers its next steps, including whether to request *en banc* review of the decision, the status quo remains in effect. Until otherwise advised by the SEC, the April 2014 partial stay of the portion of the Rules under NAM I remains in effect and public companies should continue to prepare their Form SD filings to comply with all other aspects of the Rules.

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