

August 18, 2015

D.C. Circuit Panel Reaffirms Conflict Minerals Rule Decision

Earlier today, in [a split decision](#), the three-judge panel of the U.S. Court of Appeals for the D.C. Circuit reaffirmed its April 2014 decision in the litigation surrounding the Conflict Minerals Rule. In that decision, a majority of the panel held that the requirement to describe products as having “not been found to be DRC conflict free” is compelled speech that violates the First Amendment.

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Since most of the compliance professionals that read our Alerts are primarily interested in what today’s decision means for the work they need to do, we’ll dispense with a discussion of the legal reasoning behind the decision and limit our commentary today to some key take-aways. Like others, we are still analyzing the decision, which is only a few hours old, but we will put out further commentary as we continue to digest the decision and other developments occur. We look forward to having more extensive discussions regarding today’s decision with many of you.

- **The Conflict Minerals Rule litigation could extend well beyond the May 31, 2016 filing deadline of the next Form SD.** As Yogi Berra said, “It ain’t over til it’s over,” and the Conflict Minerals Rule litigation is not yet over. In a November 2014 [order](#) that was issued along with the order granting the panel rehearing, the court deferred the petitions that had previously been filed seeking a rehearing en banc — i.e., before the full D.C. Circuit. In an [order](#) issued today, those petitions were dismissed as moot. However, today’s order also started a new period for petitioning for en banc review. Especially in light of today’s split decision, we think it is likely that the SEC will seek rehearing en banc. Only time will tell whether that petition, if filed, will be granted. Assuming that rehearing en banc is sought, it could take several months for the court to issue a decision on whether to grant rehearing. If the petition is granted, a decision on the merits would likely be at least several months further down the road.
- **Registrants should continue with their compliance.** Except as modified by the SEC’s April 29, 2014 [Statement](#), which is discussed below, the Conflict Minerals Rule continues in effect. In a separate [order](#) issued today, the clerk of court was ordered to withhold issuance of the mandate contained in today’s opinion until seven days after disposition of any timely petition for rehearing en banc. Following the April 2014 decision, the petitioners sought a stay of the entire rule, and it is possible that they will do so again. However, the prior stay request was denied by both the SEC and the court.
- **The April 29, 2014 [Statement](#) by the SEC continues in effect.** In that Statement, the SEC indicated that companies are not required to identify products as “DRC conflict free,” having “not been found to be ‘DRC conflict free’” or “DRC conflict undeterminable.” The SEC also indicated that, pending further action, an independent private sector audit (“IPSA”) will not be required unless a company voluntarily elects to describe a product as “DRC conflict free” in its Conflict Minerals Report. The Statement is likely to remain in effect pending the outcome of the litigation. Although the SEC could modify the Statement to reinstate the audit requirement (delinking it from the “labeling” requirements), we think that is unlikely. **Accordingly, today’s decision makes it unlikely that an IPSA will be required for calendar year 2015.**
- **Irrespective of the outcome of the Conflict Minerals Rule litigation, many companies will continue to face increasing responsible-sourcing pressure.** As we have noted on other occasions, irrespective of the outcome of the Conflict Minerals Rule litigation, many larger companies — in a variety of industries — intend to continue implementing their 3TG traceability and responsible sourcing initiatives. This will continue to put pressure on the entire public- and private-company supply chain to implement compliance

programs as well. Many larger companies also should continue to expect varying degrees of pressure from other constituencies to maintain responsible sourcing momentum, such as NGOs, socially responsible investment funds, public pension funds and consumers.

For Further Information

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