

D.C. Circuit Court Partially Invalidates Conflict Minerals Rule

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The D.C. Circuit Court of Appeals issued an [opinion](#) today in the ongoing challenge to the SEC's conflict minerals rule, holding that the rule violates the free-speech guarantee of the First Amendment, to the extent the rule requires companies to report to the SEC and to state on their websites that any of their products have "not been found to be DRC conflict free." The appellate court dismissed all other aspects of the challenge to the rule, which was adopted by the SEC in August 2012 under a mandate included in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. In addition to the constitutional claims, the plaintiffs had argued that the SEC should have included a *de minimis* exception, should not have required compliance by companies that only contract to manufacture products with conflict minerals, and should have conducted a more robust cost-benefit analysis. The appellate court remanded the case to the district court for further proceedings.

The appellate court focused specifically on the rule's requirement that a company describe certain products as being "not DRC conflict free." According to the court,

The label "conflict free" is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that "message" through "silence." ... By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.

The appellate court stated that if the Dodd-Frank Act did not obligate the SEC to use this particular "description requirement" – *not DRC conflict free* – and if that descriptor "is purely a result of the Commission's rule," then the court's holding does not impact the conflict minerals provisions of the Dodd-Frank Act.

Because the appellate court did not overturn the rule in its entirety and did not otherwise stay the rule's implementation, it remains possible that the SEC will require companies to comply with all parts of the rule other than describing whether or not particular products are "DRC conflict free."* For a company subject to the rule, this would include filing a [Form SD](#) and, if required, a conflict minerals report, by May 31, 2014, describing its "reasonable country of origin" inquiry and its supply-chain due diligence. Unless the rule's challengers apply for and obtain a stay of the rule, we expect the SEC to clarify its expectations for compliance before the May 31 deadline.

For further information, please see our [October 26, 2012 client memorandum](#), which provides a general overview of the rule, and our [May 31, 2013 client newsflash](#), which explains the guidance issued by the SEC staff on May 30, 2013.

* In the absence of a stay, the SEC could even take the position that the rule remains in effect in its entirety pending final resolution of the lawsuit (although we think this is unlikely). In response to a suggestion by a concurring judge that the court could, on its own motion, issue a stay of the rule, the majority replied: "The concurring opinion suggests that we hold the First Amendment portion of our opinion in abeyance and stay implementation of the relevant part of the final rule. We do not see why that approach is preferable, even though it might address the risk of irreparable First Amendment harm."

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