

Court Challenges to SEC Conflict Mineral Rules Continue

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Last week, the National Association of Manufacturers, Chamber of Commerce and the Business Roundtable began their appeal of the SEC conflict minerals decision with an opening brief filed in the U.S. Court of Appeals for the District of Columbia. We discussed previously the district court case upholding the SEC rules [here](#). The Appellants' arguments are largely similar to those raised in the district court case.

The brief contends that the Commission's analysis was "woefully inadequate" in four respects: refusing to create a de minimis exception, requiring reports if minerals "may have originated" in the Congo, expanding the scope to include non-manufacturers and allowing only a limited transition period for larger companies. Below is a summary of each argument:

De minimis exception. While the SEC inferred that Congress intended to preclude a de minimis exception because it did not do so explicitly, and even a very small amount of minerals could be necessary to a product's functionality, the appellants attest that the Commission has express statutory authority to create exemptions for the Exchange Act section that governs these rule as well as implied authority to provide exemptions if the regulatory burdens yield little gain. In addition, the SEC's decision not to provide any exception, even in some narrow form, lacked any rational analysis.

"Did originate" requirement. The appellants assert that the statute only requires disclosure of whether minerals "did originate" and the SEC wrongly adopted a "may have originated" standard instead. The district court had found the SEC's interpretation to be reasonable as a means for how companies would determine whether their minerals "did originate," and believed that the distinction is merely one of "semantic(s)." Appellants, however, claim the SEC's standard is extremely broad in its application, forcing companies to "prove a negative" that their minerals did not originate from the DRC.

Including non-manufacturers. Appellants maintain that the statute is not ambiguous as to the types of companies that are subject to the law, as the statutory reference to "contract to manufacture" was intended to be restricted only to the products to be included, while "manufacture" was the appropriate trigger for determining which companies are covered.

Phase-in period. Appellants emphasize that the SEC was flawed in giving small companies four years and larger companies only two years to comply, given that larger companies will need to rely on those small companies for their reports.

Finally, the brief alleges that the rule violates the First Amendment by forcing companies to publicly state on their own websites that their products are "not DRC conflict free," which serves as a "scarlet letter," and will also frequently be false or misleading.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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