

Davis Polk Reviews the First Wave of Conflict Minerals Filings and a Similar First Amendment Case Gets Decided

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In a decision that may predict the outcome of the ongoing SEC conflict minerals court case, a divided U.S. Court of Appeals for the D.C. Circuit, sitting *en banc*, ruled that a regulation mandating disclosure of country-of-origin information about meat products was permissible.

In implementing a congressional statute, the Secretary of Agriculture initially promulgated rules in 2009 that sought labeling of meat products with a phrase starting with “Product of,” followed by one or more countries. If the meat product was “commingled,” the label could name all of the countries of origin. However, after the World Trade Organization found the rule to be imprecise, the Secretary responded with a rule that required the revelation of the location of each production step and eliminated the flexibility allowed in labeling commingled products. Trade groups subsequently sued, alleging a violation of the First Amendment.

In its decision, the court considered the precedent-setting U.S. Supreme Court case, *Zauderer v. Office of Disciplinary Counsel*, which addressed the government’s interest in avoiding deception. The opinion held that several aspects of the government’s interest in country-of-origin meat labeling was substantial enough to broaden the focus expressed in *Zauderer*: the context and long history of disclosures to enable consumers to choose American-made products, consumer interest in labeling, and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak. The opinion noted that Congress has been imposing similar country-of-origin disclosure mandates since 1890.

Most relevant for the conflict minerals situation, the opinion included the SEC conflict minerals decision from back in April when stating, “To the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them.” As we previously [discussed](#), in April, the earlier panel struck down the provision of the conflict minerals rule that would have required some companies to describe their products as “not having been found to be DRC conflict free,” finding it in contravention of the free-speech guarantee of the First Amendment.

Davis Polk recently reviewed the first wave of [conflict minerals filings](#). Some 1,300 companies have filed Form SDs since May, including 42% of the S&P 500 and 39% of the S&P 400. The vast majority included Conflict Minerals Reports, and two companies also had independent audit reports in order to be able to state that their products are “DRC conflict free.” As permitted after the April court ruling, many companies did not explicitly describe the results of their diligence.

While the earlier D.C. Circuit opinion invalidating a portion of the conflict minerals rule has now itself been invalidated in the meat labeling case, the outcome for the conflict minerals rule is not completely clear. We will be watching for the SEC’s next move, which could include a petition asking the court to dismiss the challenge to the conflict minerals rule, and affirm it as originally adopted.

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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