

Corporate Representatives Argue Against Petition to Rehear Conflict Minerals Case

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Rehearing en banc of the conflict minerals case is not warranted because there is no conflict with other court decisions, argues the National Association of Manufacturers, Chamber of Commerce and the Business Roundtable (collectively referred to as “NAM”) in a joint response to the petitions for rehearing en banc submitted by the SEC and Amnesty International (which we previously discussed [here](#)).

The dispute between the parties centers on whether, in light of the recent *American Meat Institute* case, the statement that issuers were previously required to make regarding whether or not products are DRC conflict free is eligible for review under *Zauderer*, a Supreme Court precedent. The *American Meat Institute* case overruled prior circuit precedent limiting *Zauderer* to disclosure aimed at preventing consumer deception, but NAM asserts that the conflict minerals disclosure statement still does not constitute “purely factual and uncontroversial information” as necessary under *Zauderer*.

According to NAM, the information is not simply factual because, in many cases, issuers who are compelled to state that their products are “DRC conflict undeterminable” or “not found to be DRC conflict free” are being forced to “admit to potential complicity in the armed conflict.” Those issuers may have no connection to the conflict, but are simply unable to identify the source of their minerals. The minerals themselves may not have originated near the Congo.

In support of this position, NAM refers to the recent U.S. Department of Commerce report that was required under Dodd-Frank. The report is supposed to list all known conflict mineral processing facilities world-wide and was originally due in January 2013. While more than 400 sites are named in the [report](#), the Commerce Department indicated that it does not know whether a specific facility actually processes minerals that are used to finance DRC conflict, since it does not have the ability to distinguish such facilities. Some have pointed to this report as validating issuers’ complaints regarding the difficulty in determining the source of the minerals.

The disclosure statement is also clearly not uncontroversial, NAM posits, since the court itself declared that issuers would be forced to convey “blood on their hands.” NAM criticizes the disclosure statement as a policy conclusion that reflects a governmental viewpoint that the mineral trade bears responsibility for causing the DRC conflict, forcing issuers to “bear a scarlet letter that is laden with value judgments and opprobrious connotations.”

Finally, NAM warns that a decision upholding the disclosure statement would “break new and dangerous ground”...one that “permit[s] the government to require a company to adopt an ideological slogan written by the government that attacks the company and its products.” If this was allowed, “the temptation for Congress and state legislatures to require similar self-shaming measures across a range of controversial issues could be irresistible.”

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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