

SEC Defends Conflict Minerals Disclosure as Case Continues

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As requested by the D.C. Circuit Court of Appeals on the conflict minerals case, the SEC has filed a brief addressing the three questions that the Court asked, which we previously discussed [here](#).

The SEC asserts that the disputed disclosure requiring issuers to describe their products as not “found to be ‘DRC conflict free’” fits within the newly interpreted *Zauderer* standard by being “purely factual and uncontroversial,” since it provides objectively determinable facts and is not tantamount to a statement of viewpoint, belief or ideology. According to the SEC, the contentious statement is made in the context of disclosures regarding the steps that an issuer has taken to exercise due diligence on the source and chain of custody of minerals used in its products. The required disclosure measures those diligence results against an “objectively defined standard” and does not ask issuers to characterize their products.

The agency disputes the appellants’ argument that the description reflects a viewpoint that the mineral trade bears responsibility for causing the DRC conflict, since the standard for the meaning of “not found to be DRC conflict free” is set forth in the statute, and there is no discussion necessary of the “cause” of the conflict. It is the issuer, and not the government, that is applying the statutory standard to determine whether its minerals “financed or benefits” armed groups, and even “armed groups” is a known term specifically identified in an annual State Department report.

In refuting the appellants’ argument that the disclosure is misleading because it obscures uncertainties about the origin of the minerals, the SEC notes that issuers are free to make those ambiguities known in the disclosure itself, as the rule allows issuers to provide additional information to clarify the level of certainty regarding the origin of the minerals. The SEC acknowledges that the disclosure here is designed to reduce funding to armed groups in the DRC, but merely by providing information to consumers and investors, and letting them make their own decisions, akin to identifying products with disclosures about mercury levels and toxic hazards that have been upheld by other courts.

The SEC believes that the nature of the issuer’s connection to the DRC conflict is already apparent from the entire report, and the lone statement regarding “DRC conflict free” does not inherently convey that the products are tainted. Ultimately, the SEC argues that the conflict minerals disclosure is reasonably designed and not unduly burdensome, since it is not a labeling requirement and is not made in the context of an issuer’s advertising. Rather, the challenged statement is required only once a year in the body of a report that is posted somewhere on the issuer’s website that each issuer can select.

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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