

## D.C. Circuit to Reconsider Conflict Minerals Ruling; Initiatives Proceed in the European Union and China

Article By:

Graham C. Zorn

K. Russell LaMotte

Lauren A. Hopkins

Paul E. Hagen

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Recent developments in the U.S., European Union and China underscore the **dynamic nature of evolving supply chain due diligence requirements and expectations** for **companies sourcing tin, tantalum, tungsten and gold**. The following news alert highlights activities that may influence companies' approaches to conflict minerals in the near term.

### D.C. Circuit to Reconsider Conflict Minerals Ruling

The U.S. Court of Appeals for the D.C. Circuit granted the petitions of the Securities and Exchange Commission ("SEC") and intervenor Amnesty International for panel rehearing in the conflict minerals case, *National Association of Manufacturers, Inc. v. Securities and Exchange Commission* ("NAM v. SEC").

In *NAM v. SEC*, the court upheld most of the SEC conflict minerals rule earlier this year but also ruled that the requirement in the rule to describe products as "not found to be DRC conflict free" was compelled speech in violation of the First Amendment (see our [April 16, 2014 news alert](#) for details). The Court applied heightened scrutiny in reaching this holding, rejecting the SEC's argument that rational basis review – as set out in an earlier consumer deception case, *Zauderer v. Office of Disciplinary Counsel* – should apply.

The SEC and Amnesty International petitions seek reconsideration in light of another D.C. Circuit case, *American Meat Institute v. U.S. Department of Agriculture*, which addressed the applicable standard of review in the context of a First Amendment challenge to country-of-origin disclosures for meat products outside the consumer deception context.

In the November 18, 2014 *per curiam* order granting the petitions for panel rehearing with respect to *NAM v. SEC*, the court directed the parties to file supplemental briefs on the following issues:

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1. What effect, if any, does this court's ruling in *American Meat Institute* have on the First Amendment issue in this case regarding the conflict mineral disclosure requirement?
  2. What is the meaning of "purely factual and uncontroversial information" as used in *Zauderer v. Office of Disciplinary Counsel* and *American Meat Institute*?
  3. Is determination of what is "uncontroversial information" a question of fact?

The panel rehearing will proceed before the same three-judge panel of the D.C. Circuit (composed of Judges Srinivasan, Sentelle and Randolph) that issued the decision in *NAM v. SEC*. The SEC's and Amnesty International's briefs are due within 20 days, with NAM's brief due 20 days thereafter. Given this timeline, it is unlikely the panel will conclude its rehearing before the end of the calendar year. The SEC and Amnesty International had also petitioned the court for rehearing *en banc*, but a separate order issued on November 18 states that consideration of these petitions is deferred pending the dispositions of the petitions for panel rehearing. In other words, the D.C. Circuit will not consider rehearing by the full court until after the conclusion of the panel rehearing.

## Draft European Union Regulation

In the European Union ("EU"), the Commission's conflict minerals proposal is continuing to proceed through the ordinary "co-decision" legislative procedure, notwithstanding new Commission leadership following the 2014 elections. Member States are reported to share broad consensus on the basic approach set out in the Commission's draft Regulation, i.e., that the Regulation will set forth a voluntary self-certification scheme for importers of tin, tantalum, tungsten and gold. Unlike the SEC rule, the EU approach to identifying conflict and high risk areas will be global in scope. On November 6, the Committee on International Trade of the European Parliament held its first debate on the conflict minerals proposal, and a hearing before the International Trade and Development Committees is planned for early December. The Parliament debate is expected to continue well into 2015, and the Regulation is not likely to be finalized before late 2015. The EU is expected to adopt additional measures creating public procurement incentives for certain products containing 3Ts and gold that are sourced in conformance with the new certification and supply chain due diligence standards.

## Conflict Minerals Initiatives in China

Meanwhile, the Chinese Chamber of Commerce for Minerals, Metals and Chemicals Importers and Exporters ("CCCMC"), an industrial association affiliated with the Chinese government, has issued a new [Guideline for Social Responsibility in Outbound Mining Investments](#). The Guideline is designed to encourage Chinese companies to develop specific corporate social responsibility strategies and management systems for mining investment and operations. The Guideline includes provisions directing companies to conduct risk assessments to determine whether traded minerals originate in or are routed through conflict-affected areas (which are not limited to the DRC and adjoining countries), adapt supply chain due diligence to the specific needs of conflict-affected areas, and obtain a third-party audit of and publicly report on such due diligence measures. The Guideline references the Organisation for Economic Co-operation and Development ("OECD")'s Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas as a resource for further guidance on conducting due diligence. The Guideline also contains a number of additional provisions relating to social responsibility in the mining sector, including prohibitions on the use of child and forced labor and provisions relating to worker safety and

environmental protection.

The Guideline is part of a series of joint activities and coordinated efforts planned between the CCCMC and the OECD pursuant to a [Memorandum of Understanding](#) signed by the two groups in October.

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