Toxic Substances

Industries Assail SEC Refusal to Include De Minimis Clause in Conflict Minerals Rule

National Association of Manufacturers v. SEC, D.C. Cir., No. 12-1422, *reply brief filed* 3/22/13

Key Development: Industry challengers tell a federal appeals court the SEC's refusal to adopt any de minimis exception to its conflict minerals disclosure rule will greatly increase the rule's costs.

What's Next: Final briefs are due March 28, and oral arguments are scheduled May 15.

By Pat Rizzuto

In a court filing, industry challengers said the Securities and Exchange Commission's refusal to adopt any de minimis exception to its conflict minerals disclosure rule will greatly increase the rule's costs (*National Association of Manufacturers v. SEC*, D.C. Cir., No. 12-1422, *reply brief filed* 3/22/13).

The case involves a final regulation published Sept. 12, 2012, by SEC to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. No. 111-203), which requires companies to disclose their use of so-called conflict minerals--tantalum, tin, gold, or tungsten--from the Democratic Republic of Congo (DRC) and surrounding countries (180 DEN A-3, 9/18/12).

Final briefs in the case are due March 28, and oral arguments are scheduled for May 15 in the U.S. Court of Appeals for the District of Columbia Circuit.

Scope of Rule Called Overbroad.

In a reply brief filed March 22, the National Association of Manufacturers (NAM) and other petitioners wrote, “The SEC's arbitrary refusal to adopt any de minimis exception will greatly increase the rule's costs, requiring companies to expend substantial resources determining whether their products contain trace amounts of minerals added by subsuppliers, and then to expend further resources in pointless attempts to determine the origin of minerals appear in 'parts per million or less' in a single subcomponent of a finished product, which might have tens of thousands of different parts.”

Moreover, “the commission failed to assess whether these determinations would yield any benefits or instead make a tragic humanitarian situation even worse,” the petitioners wrote.

The coalition referred to the possibility that ceasing trade with DRC-based companies to avoid potential violations of the SEC rule could further impoverish the population.

Challenge Filed in October.

The National Association of Manufacturers, the U.S. Chamber of Commerce, and the Business Roundtable filed the lawsuit in October 2012 asking the court to vacate the SEC regulation.

Since then, several members of Congress and advocacy groups filed amici briefs supporting the rule.

In January, a coalition of chemical, plastics, and other manufacturers filed an amici brief supporting the

intent of the legislation that spurred SEC rule, but challenging the final implementing regulation. The coalition includes the American Coatings Association Inc., the American Chemistry Council, the Can Manufacturers Institute, the Consumer Specialty Products Association, the National Retail Federation, and the Society of the Plastics Industry Inc.

Industry Concerns Partly Addressed.

Eric Lasker, an attorney with Hollingsworth LLP, told BNA March 25 that SEC partly addressed some of the coalition's concerns in a brief filed March 1. Nonetheless, the coalition's key objections remain, he said.

Those objections include the SEC alleged failure to include a de minimis exception in the regulation, and its failure to consider the costs and benefits of that and other discretionary choices, Lasker said.

Therefore, the potential breadth of the SEC rule could sweep in businesses that include chemical and plastics manufacturers, personal care product manufacturers, and pesticide manufacturers, he said.

Case Studies Provided.

The industry coalition's amici brief includes case studies to provide the reasoning for its arguments. For example, tiny amounts of metals can act as catalysts in chemical reactions needed to make a product such as a plastic item or coating that, eventually, is used in a consumer good, the coalition wrote.

In some production processes, the catalyst will be washed away, captured, and reused, but in others, trace amounts of the metal could remain in the product, the brief said.

“The residual metal's presence would not be intentional, and there is no meaningful distinction in the action of a catalyst based on whether it is or is not completely washed away,” the coalition wrote.

In other cases, the metal may stabilize a resin or other product molded at high temperatures. “Here as well, only small amounts of the metal-based additive would be present in the product.”

In these and other case studies presented in the amici brief, “the burden of the rule is the scope of the investigation that will be required to establish the presence of absence of a conflict mineral. The rule would require a time-consuming and expensive investigation of a company's products, which in some cases would number in the thousands, to determine whether one of the four metals could be present, even at minute levels, in some minor component of a finished product,” the coalition wrote.

Even packaging could be covered by the SEC rule, the coalition wrote.

SEC Seems to Have Changed on Packaging.

Lasker told BNA that SEC appears, in its March 1 brief, to have backed down from its position on packaging. A footnote in the brief states that packaging would not be included, he said.

“Nothing in the release states that packaging is included,” SEC wrote.

SEC's brief also suggests the commission is open to allowing companies to use contract language, in which a supplier would certify that its product does not contain conflict minerals, as part of its compliance with the regulation, Lasker said.

That interpretation of its requirement also would address some of the coalition's concerns, he said. However, the coalition still maintains the rule should be vacated as the petitioners are asking, Lasker said.

Elsewhere, however, SEC's brief described the coalition's case studies as “unpersuasive” and “overstated.”

SEC Disputes Allegations.

In its March 1 brief, SEC said many of the petitioners' assertions were simply wrong.

“The commission did provide a detailed quantitative analysis of the costs of the final rule. It estimated the aggregate initial cost of compliance for the 5,994 issuers estimated by the rule to be between approximately $3 billion and $4 billion, and the annual ongoing costs of compliance to be between $207 million and $609 million,” SEC wrote.

A de minimis exception was not included in the rule so that the regulation would fulfill Congress' intent, the commission wrote.

The weight of conflict minerals essential to many products is “very small, and the percentage by weight or dollar value of the conflict minerals as a proportion of unit cost is often also very small,” the commission wrote, citing co-sponsors of the conflict minerals portion of the law.

Nonetheless, even though a computer chip may contain perhaps a few milligrams of tantalum, the semiconductor industry as a whole consumes more than 100 tons of tantalum metal annually, it wrote.

Eric Gotting and Devon Hill from the law firm of Keller and Heckman LLP also represent the industry coalition that filed the amici brief.

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SEC's brief filed March 1 is available at http://op.bna.com/env.nsf/r?Open=avio-965q5j.

The coalition's amici brief filed Jan. 23 is available at http://op.bna.com/env.nsf/r?Open=avio-965q63.

The NAM brief filed March 22 is available at http://op.bna.com/env.nsf/r?Open=avio-965q73.