Office of the Attorney General
Washington, D. C. 20530

March 4, 2016

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *National Association of Manufacturers* v. *Securities and Exchange Commission*, 800 F.3d 518 (D.C. Cir. 2015)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you concerning the above-referenced case. A copy of the decision of the United States Court of Appeals for the District of Columbia Circuit is enclosed.

The case involves a challenge to the Securities and Exchange Commission's rule requiring public disclosures about the use of "conflict minerals" (tin, tungsten, tantalum, and gold) from the Democratic Republic of the Congo (DRC) and neighboring countries. In Section 1502(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 2213, Congress directed the Commission to promulgate a rule requiring securities issuers to investigate the source and chain of custody of conflict minerals necessary to the functionality or manufacture of their products and to make certain disclosures about their findings. 15 U.S.C. 78m(p). After public notice and comment, the Commission promulgated its Conflict Minerals Rule, 17 C.F.R. 240.13p-1. See 77 Fed. Reg. 56,274 (Sept. 12, 2012). In certain circumstances, the rule requires an issuer to file a report that includes, *inter alia*, a description of the measures the issuer has taken to exercise due diligence about the source and chain of custody of its conflict minerals and a description of any of its products that have "not been found to be 'DRC conflict free,'" as that term is defined in the rule. 77 Fed. Reg. at 56,364.

In this lawsuit, three associations representing manufacturers and other businesses challenged the Commission's Conflict Minerals Rule. The plaintiffs alleged in part that the requirement that firms describe their products as not having been found to be "DRC conflict free" constitutes compelled speech in violation of the First Amendment. *National Ass'n of Mfrs.* v. *S.E.C.*, 956 F. Supp. 2d 43, 46 (D.D.C. 2013). Applying the "intermediate scrutiny" standard set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), the district court held that the statute and rule directly and materially advance the government's substantial interest in "promoting peace and security in and around the DRC," and that the nature of the product-specific public disclosures required by the rule is "reasonable and proportionate." 956 F. Supp. at 77-82.

In an initial decision issued in April 2014, the court of appeals reversed in relevant part. The court rejected several of the plaintiffs' challenges to the rule. The panel majority held,

however, that the challenged public-disclosure requirements "violate the First Amendment to the extent [they] require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be "DRC conflict free."'" *National Ass'n of Mfrs.* v. *S.E.C.*, 748 F.3d 359, 373 (D.C. Cir. 2014). Judge Srinivasan declined to concur in that aspect of the majority's analysis, on the ground that a related question was already pending before the en banc court in another case. *Id.* at 373-375. After the en banc court had decided that other case — in which it sustained the constitutionality of a requirement to disclose country-of-origin information on meat labels, see *American Meat Inst.* v. *United States Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014) — the panel in this case issued new opinions on rehearing.

The majority adhered to its prior determination that the disclosure requirement violates the First Amendment. *National Ass'n of Mfrs.* v. *S.E.C.*, 800 F.3d 518, 530 (D.C. Cir. 2014). The majority held that the conflict-minerals-disclosure requirement could not satisfy intermediate scrutiny under the *Central Hudson* test. *Id.* at 524. But, recognizing doctrinal "uncertainty" and a "conflict in the circuits" about the proper standard of review, the majority also found it "prudent to add an alternative ground" for its decision. *Id.* The majority concluded that, even assuming that the required disclosures are governed by a lower standard of scrutiny, the Commission had failed to demonstrate that the forced disclosures would materially alleviate the humanitarian crisis in the DRC. *Id.* at 524-527. The majority further found that the required disclosures had not been limited to "purely factual and uncontroversial information." *Id.* at 527-530 (citation and quotation marks omitted). In the majority's view, being required to state that certain products have not been found to be "DRC conflict free," as defined in the statute and rule, effectively "compel[s] an issuer to confess blood on its hands," which interferes with the "exercise of the freedom of speech under the First Amendment." *Id.* at 530 (citation and quotation marks omitted). Finally, the majority noted that its holding of unconstitutionality may apply only to the rule, rather than to the statute itself, depending on whether use of the "particular descriptor" at issue — that a product has "not been found to be 'DRC conflict free'" — is compelled by the statute or instead is "purely a result of the Commission's rule." *Id.* at 530 n.32 (citation and quotation marks omitted).

Judge Srinivasan dissented. 800 F.3d at 531-545. He would have applied the more permissive standard of review that the majority rejected, *id.* at 533-541, but he also concluded that the rule would "satisf[y] even the more demanding standard set forth in *Central Hudson*," *id.* at 541.

The Commission and intervenors supporting the Commission filed petitions for rehearing en banc. Those petitions were denied on November 9, 2015, and the case was remanded to the district court for further proceedings.

Although the Commission defended the constitutionality of the conflict-minerals disclosure regime in the court of appeals, the Department of Justice has decided, in consultation with the Commission, not to file a petition for a writ of certiorari seeking review of the court of appeals' decision. The panel majority and the dissenting judge disagreed as to the proper standard of scrutiny for First Amendment challenges to compelled-disclosure requirements of the sort at issue here. But because the majority concluded in the alternative that the challenged requirements would be unconstitutional even under the more lenient standard, this would be a poor case in which to seek Supreme Court clarification of the proper standard of scrutiny. The

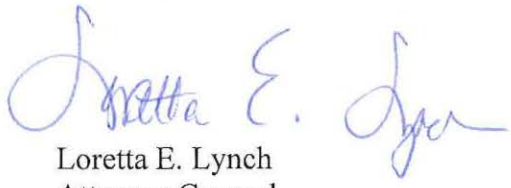
panel majority and the dissenting judge also disagreed on the question whether the disclosure requirements at issue here — which compel some issuers to state publicly that their products have "not been found to be 'DRC conflict free'" — are properly characterized as involving "purely factual and uncontroversial information." The need to resolve that case-specific issue could likewise make it difficult for the Supreme Court to provide useful guidance concerning the application of the First Amendment to more typical disclosure requirements.

The panel majority also expressly recognized that its holding of unconstitutionality may apply only to the Commission's rule rather than to the underlying statute. If, after remand, it is determined that the statute itself does not require use of the specific phrase "not been found to be 'DRC conflict free,'" the Commission could promulgate an amended disclosure rule that attempts both to fulfill the statutory mandate and to comport with the court of appeals' view of the First Amendment. (Although the original rule was adopted in 2012 by a 3-2 vote, none of the Commission's current members participated in that vote.) The decision not to seek Supreme Court review will allow the Commission or the district court to determine in the first instance, subject to further review, whether such an amended rule can and will be promulgated.

A petition for a writ of certiorari would be due, after two extensions, on April 7, 2016.

Please let me know if we can be of further assistance in this matter.

Sincerely,



Loretta E. Lynch
Attorney General

Enclosure