THE UNSETTLED STATE OF COMPELLED CORPORATE DISCLOSURE REGULATION AFTER THE CONFLICT MINERAL RULE CASES

by
*Celia R. Taylor**

There has long been debate about the use of regulation to compel corporate disclosure about environment and social issues—often referred to as matters relating to corporate social responsibility. Those who oppose mandatory reporting of CSR issues may now have a powerful new tool in their arsenal due to the outcome of legal struggles over the conflict minerals rule—a rule requiring companies to make particular disclosures if their products used certain minerals mined in the Democratic Republic of Congo. After a protracted battle, the Court of Appeals for the District of Columbia Circuit upheld parts of the rule but, importantly, struck down on First Amendment grounds the portion of the rule that required companies to label their products as "not found to be DRC conflict free."

The decision has important implications for compelled corporate disclosure regulation. It leaves uncertain what standard of review should apply to compelled commercial speech. If the view of the court in the conflict minerals case were widely adopted, many compelled disclosure regulations would be subject to greater scrutiny and thus greater likelihood of being found unconstitutional. This work will use the conflict minerals rule cases as a lens to consider the unsettled state of compelled corporate disclosure regulation and the implications of the uncertainty on the use of such disclosure in the corporate social responsibility arena.

* Professor, University of Denver Sturm College of Law; Nanda Chair, Director of International Legal Studies Program.

There is little dispute that the use of corporate disclosure regimes to promote environmental, social, and governance goals is on the rise globally.[1] The increased reliance on social disclosure to address matters of global importance, including but not limited to climate change, human trafficking, and the use of genetically modified organisms, is causing a corresponding pushback from industry groups and others opposed to the increased burdens imposed by disclosure requirements. In the United States, there are increasing demands that the Securities Exchange Commission (SEC) change the position it took in 1975[2] when it concluded that it "generally is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure requirements."[3] In its recent concept release, the SEC signaled its potential willingness to shift its stance on environmental, social, and corporate governance (ESG) reporting, asking for comments:

> Are there specific sustainability or public policy issues [that] are important to informed voting and investment decisions? If so, what are they? If we were to adopt specific disclosure requirements involving sustainability or public policy issues, how could our rules elicit meaningful disclosure on such issues? How could we create a disclosure framework that would be flexible enough to address such issues as they evolve over time?[4]

The potential broadening of the SEC disclosure mandate to incorporate more rigorous ESG reporting will no doubt be widely debated. As I have argued elsewhere, there is a real risk of overburdening the agency with disclosure obligations it is ill-suited to take on.[5] In addition, recent

[1] *See generally* Ioannis Ioannou & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries* (Harvard Bus. Sch., Working Paper 11-100, 2014), http://www.hbs.edu/faculty/Publication%20Files/11-100_7f383b79-8dad-462d-90df-324e298acb49.pdf (discussing the effect of mandatory and widespread sustainability reporting).

[2] Press Release, Ctr. for Int'l Envtl. Law, Environmental Groups Petition the SEC to Require Environmental, Social, and Governance Disclosures (July 22, 2016), http://www.ciel.org/news/environmental-groups-petition-the-sec-to-require-environmental-social-and-governance-disclosures/.

[3] Environmental and Social Disclosure, 40 Fed. Reg. 51,656 (Nov. 6, 1975) (codified at 17 C.F.R. §§ 239, 240, 249 (2012)).

[4] Business and Financial Disclosure Required by Regulation S-K, Exchange Act Release No. 33-10064, at 213 (Apr. 13, 2016).

[5] *See generally* Celia R. Taylor, *Drowning in Disclosure: The Overburdening of the Securities & Exchange Commission*, 8 VA. L. & BUS. REV. 85 (2014) (describing the SEC as a "disclosure dumping ground," discussing its consequences, and suggesting solutions).

challenges to compelled corporate disclosure raise doubts as to whether increased mandates on companies will be enforceable.

This Article considers one attempt to use social disclosure to ameliorate a global social problem and the challenges brought against that attempt. Specifically, it examines Section 1502 of the Dodd-Frank Act, which requires the SEC to implement a rule requiring certain issuers to investigate whether their products use "conflict minerals" (described below) and to disclose whether their products are Democratic Republic of the Congo (DRC) conflict free or not DRC conflict free[6]—terms which I will describe in greater detail below. When, after great delay, the SEC did promulgate the required conflict minerals rule (the Rule), there was immediate pushback from many interest groups, led by the National Association of Manufacturers.[7] After a long and tortured legal process, the United States Court of Appeals for the District of Columbia Circuit ruled that requiring issuers to state that their products could not be determined to be DRC conflict free violated their First Amendment right against compelled corporate speech[8]—and the case has not received the attention it should. In reaching its decision, the court articulated a standard of review for compelled corporate disclosures that many ESG provisions will likely fail to satisfy, meaning they will not pass constitutional muster. Thus, even if the SEC proves willing to take on a more robust ESG disclosure regime, the legality of such efforts remains in great doubt.[9]

This Article tells the story of the Conflict Minerals Rule. It begins with a brief overview of the Rule and the method by which it came into being. It then focuses on the challenges raised against the Rule by the National Association of Manufacturers, Chamber of Commerce, and Business Roundtable (collectively NAM), with particular attention paid to the First Amendment challenge. To help understand the First Amendment challenge, it includes a brief overview of the evolution of First Amendment challenges to corporate speech. Finally, it considers the implications the ruling the most recent NAM decision poses for the use of ESG disclosure going forward.

[6] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213–18 (2010) (codified at 15 U.S.C.§ 78m (2012)).

[7] *See* Nat'l Ass'n of Mfrs. v. SEC, 956 F. Supp. 2d 43 (D.D.C. 2013) [hereinafter *NAM I*].

[8] Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) [hereinafter *NAM III*].

[9] Given the new political climate, this seems unlikely. *See infra* Part VI; *see also* Hendrik Bartel, *What Does Trump Mean for ESG Data and Investment Strategies?*, THOMPSON REUTERS (Nov. 22, 2016), http://lipperalpha.financial.thomsonreuters.com/2016/11/what-does-trump-mean-for-esg-data-and-investment-strategies/.

PART I: THE GENESIS OF THE CONFLICT MINERALS RULE, DODD-FRANK SECTION 1502: CONFLICT MINERALS, AND THE SEC IMPLEMENTING RULE

Most people familiar with Dodd-Frank think of it as legislation aimed at the "fundamental reform of the financial system,"[10] and focused on regulation of Wall Street practices and complex financial products. But tucked within the voluminous text of the Act—which consists of 2,300 pages and stipulates the passage of 387 rules by 20 different agencies[11]—is Section 1502, the "conflict minerals" provision. This provision required the following of the SEC:

> Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes [specific due diligence processes and other detailed information].[12]

The SEC (after much foot-dragging) did pass a final Conflict Minerals Rule on August 22, 2012.[13] The precise requirements of the Rule are complex and technical. In brief, the Rule applies to any reporting company, for whom the designated minerals are "necessary to the functionality or production" of its products.[14] If the Rule applies, an issuer must, at a minimum, engage in processes (including a "reasonable country of

[10] Timothy Geithner, *A Dodd-Frank Retreat Deserves a Veto*, WALL STREET J., July 20, 2011, at A19 (Mr. Geithner, the U.S. Secretary of the Treasury, stated that the Act "was designed to lay a stronger foundation for innovation, economic growth and job creation with robust protections for consumers and investors and tough constraints on risk-taking.").

[11] Jake Bernstein & Jesse Eisinger, *From Dodd-Frank to Dud: How Financial Reform May Be Going Wrong*, PROPUBLICA (June 3, 2011), http://www.propublica.org/article/from-dodd-frank-to-dud.

[12] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213 (2010) (codified at 15 U.S.C.§ 78m (2012)).

[13] Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b (2015)).

[14] *Id.* For a more complete description of how the Rule functions, see Taylor, *supra* note 5 at 86–87. The most common of the "designated" minerals are tin, tungsten, tantalum, and gold, commonly known as "the 3TGs." *See What Are Conflict Minerals?*, CONFLICT-FREE SOURCING INITIATIVE, http://www.conflictfreesourcing.org/about/faq/general-questions/what-are-conflict-minerals/ (last visited Apr. 9, 2017).

origin inquiry") designed to determine the degree to which conflict minerals are used in its products and disclose what processes were used to make that decision.[15] Depending on the outcome of that decision, an issuer must state in its annual report either that conflict minerals are not necessary to the functionality or production of its products or if an issuer cannot make that assertion, it must state that the issuer's products that "are not DRC conflict free."[16]

These disclosures were to be made on a new Form SD (Specialized Disclosure Report).[17] Given that conflict minerals are widely used in industries ranging from electronic component manufacturers to jewelry makers to the aerospace industry, Section 1502 is of concern for many public companies.[18]

Why was Section 1502 included in Dodd-Frank? It has nothing to do with the financial crisis the Act was passed to address. There was little discussion of the section during the intense negotiations of Dodd-Frank. In fact, Representative Gary Miller (R-CA), Chairman on International Monetary Policy & Trade, noted:

> Congress did not have an opportunity to consider the sections implemented and whether it would help in the conflict in the DRC, and what effect it would have on the DRC and the companies and minerals and manufactured goods that come from this area and go to regions and manufacturers in the United States. Although bills similar to Section 1502 were introduced earlier, they were never heard. . . .
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> While it is puzzling to me that Section 1502 falls completely outside the scope of the Dodd-Frank Act, that legislation was passed as a result of the financial crisis to add stability to the financial system. Section 1502 does nothing to ''provide for financial regulatory reform, to protect consumers and investors, to enhance Federal un-

[15] Conflict Minerals, 77 Fed. Reg. at 56,343.

[16] *Id.* at 56,276.

[17] U.S. SEC. & EXCH. COMM'N, FORM SD: SPECIALIZED DISCLOSURE REPORT (OMB No. 3235-0697) (2014), https://www.sec.gov/about/forms/formsd.pdf.

[18] *SEC Issues Final "Conflict Minerals" Rule*, BRYAN CAVE LLP 2 n.2 (Aug. 29, 2012), http://www.bryancave.com/files/Publication/dcbd3f78-7756-42f2-b29d-4baa1687c024/Presentation/PublicationAttachment/6203d14b-45ff-4fb3-bbdb-4e736f223120/CorpFiAlert8-29-12.pdf ("Columbite-tantalite is the metal ore from which tantalum is extracted. Cassiterite is the metal ore that is most commonly used to produce tin, which is used in alloys, tin plating, and solders for joining pipes and electronic circuits. Gold is used for making jewelry and, due to its superior electric conductivity and corrosion resistance, is also used in electronic, communications, and aerospace equipment. Wolframite is the metal ore that is used to produce tungsten, which is used for metal wires, electrodes, and contacts in lighting, electronic, electrical, heating, and welding applications. Tantalum is used in electronic components, including mobile telephones, computers, videogame consoles, and digital cameras, and as an alloy for making carbide tools and jet engine components.").

> derstanding of insurance issues, or to regulate over-the-counter derivatives markets,'' which were the stated purpose of the Dodd-Frank Act. Section 1502 does nothing to address the cause of the financial crisis.[19]

The short version of the genesis story of Section 1502 is that many senators were justifiably concerned with the atrocities occurring in the DRC and saw an opening. There had been previous attempts to pass free-standing legislation on the matter, but those attempts went nowhere.[20] In the rush to pass Dodd-Frank, when attention was elsewhere, the provision was inserted in the legislation without much fanfare. After a short debate on the topic, Section 1502 was added, after which Representative McDermott stated "[y]ou get bills passed any way you can."[21]

The purpose of the section was the same as that of previous unsuccessful pieces of legislation. When adopting the section, Congress stated that "[i]t is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein[.]"[22] The hope was that, by forcing issuers to disclose whether their products used conflict minerals, it would encourage them to stop doing so, and thus, the tool of social disclosure might help alleviate or bring an end to the violence in the DRC.

PART II: LEGAL CHALLENGES TO THE RULE

Shortly after the Rule was promulgated, NAM challenged various aspects of the Rule as arbitrary and capricious under the Administrative Procedure Act (APA)[23] and mounted a constitutional attack against both the Rule and Dodd-Frank Section 1502, "claiming that the disclosures re-

[19] *The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo: Hearing Before the Subcomm. on Int'l Monetary Policy & Trade of the H. Comm. on Fin. Servs.*, 112th Cong. 2 (2012) (opening statement of Rep. Gary G. Miller, Chairman, Subcomm. on Int'l Monetary Policy & Trade) (quoting an early version of the Dodd-Frank Act, Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. (2009)).

[20] *See, e.g.*, Conflict Minerals Trade Act, H.R. 4128, 111th Cong. § 2 (2009), introduced by Congressman Jim McDermott (D-WA); Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. § 2, introduced by Senators Sam Brownback (R-KS), Dick Durbin (D-IL), and Russ Feingold (D-WI).

[21] Ben Protess, *Unearthing Exotic Provisions Buried in Dodd-Frank*, N.Y. TIMES (July 13, 2011), http://dealbook.nytimes.com/2011/07/13/unearthing-exotic-provisions-buried-in-dodd-frank/.

[22] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a) (124 Stat. 1376, 2213 (2010)) (codified at 15 U.S.C.§ 78m (2012)).

[23] Administrative Procedure Act, 5 U.S.C. §§ 701–06 (2012).

quired by the SEC and by Congress run afoul of the First Amendment."[24] In that first action, the United States District Court for the District of Columbia found "no problems with the SEC's rulemaking and disagree[d] that the 'conflict minerals' disclosure scheme transgresses the First Amendment" and therefore concluded that the "claims lack[ed] merit."[25] So far, so good for the use of "social disclosure." But, of course, that was only the beginning.

After losing in the first round, NAM appealed to the United States Court of Appeals for the District of Columbia, where a three-judge panel reached a different conclusion.[26] The court agreed with the outcome of the first action to the extent it found that the Rule was not passed in violation of the APA because it was not arbitrary and capricious.[27] However, the court found that the requirement that an issuer describe its products as "not 'DRC conflict free'" in the report it files with the Commission and posts on its website compelled speech unconstitutionally and therefore could not stand.[28] The ruling rested on the court's understanding of how the First Amendment applies to compelled corporate speech—an area of law that is in some disarray. Before continuing with the story of the conflict minerals rule, a brief (and very cursory) discursion into the history of compelled corporate speech is in order.

PART III: THE EVOLUTION OF COMMERCIAL SPEECH DOCTRINE UNDER THE FIRST AMENDMENT

The First Amendment's protection of speech appears to be clear, uncontroversial, and absolute: Congress "shall make no law . . . abridging the freedom of speech . . . ."[29] However, the application of the text has not been without controversy. First, it is clear that not *all* speech is protected—most are familiar with the old trope that you cannot falsely shout "fire" in a crowded theater.[30] Further, the law makes a distinction between ordinary speech and commercial speech.[31]

The treatment of commercial speech under the First Amendment has a long and complex history. For many years, the issue simply did not

[24] *NAM I*, 956 F. Supp. 2d 43, 46 (D.D.C. 2013).

[25] *Id.*

[26] Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359, 373 (D.C. Cir. 2014) [hereinafter *NAM II*].

[27] *Id.* at 367.

[28] *Id.* at 370, 373.

[29] U.S. CONST. amend. I.

[30] Schenck v. United States, 249 U.S. 47, 52 (1919).

[31] For an in-depth discussion of the differences, see Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153 (2012).

arise.[32] Then, in 1942, the Supreme Court held that commercial speech was not protected by the First Amendment at all. In *Valentine v. Chrestensen*, a case involving commercial advertising, the Court stated:

> This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.[33]

The holding in *Valentine* lasted (albeit with certain exceptions) until 1976, when the Court reversed course in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[34] The case involved a ban on advertising prescription drug prices that was challenged on First Amendment grounds.[35] In changing course on the application of First Amendment protection of commercial speech, the Court observed:

> Here . . . the question whether there is a First Amendment exception for "commercial speech" is squarely before us. . . . Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that

[32] *See Timeline of Commercial Speech Cases*, CTR. FOR ADVANCEMENT CAPITALISM (2012), http://www.capitalismcenter.org/Advocacy/Speech/Timeline.htm (last visited Apr. 9, 2017).

[33] 316 U.S. 52, 54 (1942) (upholding a New York statute that prohibited the distribution of any "handbill, circular . . . or other advertising matter whatsoever in or upon any street" (*Id.* at 53 n.1)).

[34] 425 U.S. 748, 770–72 (1976) (striking down a Virginia statute declaring it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs).

[35] *Id.* at 749–50.

> the flow is not protected by the First Amendment, have reinforced our view that it is.[36]

Having acknowledged that commercial speech was eligible for some protection, the Supreme Court in 1980 established a standard of review for commercial speech restrictions. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*[37] involved a ban on promotional advertising of electricity put into place during the fuel shortages of 1973.[38] When the utility company sought to extend the ban after the shortages ceased, Central Hudson sued, claiming (among other charges) that the ban violated their First Amendment right to free speech.[39] After reviewing the development of the doctrine, the Court set forth the following test: if the government wants to regulate non-misleading commercial speech regarding otherwise legal activity, it must establish: (1) that there is a substantial state interest; (2) that the regulation directly advances that state interest; and (3) that the regulation is narrowly tailored to advance that substantial interest.[40] Thus, after *Central Hudson*, heightened—but not strict—scrutiny applies to regulations designed to limit commercial speech.

But what of situations where the government seeks not to limit commercial speech, but to compel it? The cases described above arose in the context of voluntary commercial speech—companies wanted to engage in commercial speech and the government tried to deny them that opportunity. What if companies do not want to engage in commercial speech and the government seeks to require them to do so? In the non-commercial speech arena, it is clear that the government cannot compel all forms of speech.[41] In addition, the federal government (together with state governments) has long demanded significant disclosures on the part of corporations. Prime examples include, among others, warnings on cigarette packages,[42] drug side-effects warnings in pharmaceutical ad-

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[36] *Id.* at 760, 764, 770 (internal citations omitted).

[37] 447 U.S. 557 (1980) (holding that the Public Utilities Commission requirement cannot require a private utility company to include speech in its billing envelopes with which it disagrees).

[38] *Id.* at 558–61.

[39] *Id.* at 560–61.

[40] *Id.* at 563–64.

[41] *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 713 (1977) (holding New Hampshire cannot constitutionally require citizens to display the state motto upon their vehicle license plates when the state motto is offensive to their moral convictions); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking down state school requirement that all children must salute the American flag, stating "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

[42] 15 U.S.C. § 1333 (2012).

vertising,[43] and mandatory food labeling.[44] These disclosures at first received little scrutiny, consistent with the pre-1976 view that commercial speech deserved little First Amendment protection. When the First Amendment standard of review for commercial speech was heightened by the ruling in *Central Hudson*, these disclosures survived—because they are arguably narrowly tailored to advance a state interest and do no more than require disclosure of truthful information in an unbiased form.[45] But what of disclosure requirements that do not fall into that category? That question was put squarely before the Court in 1986 in *Zauderer v. Office of Disciplinary Counsel*.[46]

Zauderer raised the issue of whether the state could require an attorney to state in his advertising materials that clients might be subject to litigation costs even if their lawsuit was unsuccessful when that advertising included the statement that "if there is no recovery, no legal fees are owed by our clients."[47] Wading into the murky waters of the compelled commercial speech doctrine, the Court noted that there are "material differences between disclosure requirements and outright prohibitions on speech."[48] Here, the state did not prevent attorneys from conveying information to the public, but instead merely "required them to provide somewhat more information than they might otherwise be inclined to present."[49] Recognizing the First Amendment interest in preserving the informational value commercial speech provides to consumers, the Court concluded that a commercial speaker's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[50] Finally, the Court noted its consistent position that "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech," and held that "an advertiser's rights are adequately protected as long as disclosure requirements are

[43] 21 C.F.R. § 201.56 (2016).

[44] 21 C.F.R. § 101 (2016).

[45] Disclosure requirements that went beyond the provision of truthful, unbiased information have been stricken down. *See, e.g.*, Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 632 (6th Cir. 2010) (striking down Ohio's requirement that a voluntary label claiming that milk was not produced using synthetic growth hormones cannot use an asterisk to link to government-mandated disclaimer language); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69 (2d Cir. 1996) (striking down Vermont's compelled label for milk produced from cows treated with synthetic growth hormone).

[46] 471 U.S. 626, 629, 647 (1985) (holding that a State may not "discipline an attorney for soliciting business by running newspaper advertisements containing nondeceptive illustrations and legal advice").

[47] *Id.* at 652.

[48] *Id.* at 650.

[49] *Id.*

[50] *Id.* at 651.

reasonably related to the State's interest in preventing deception of consumers."[51]

Thus, under *Zauderer,* certain compelled commercial disclosures are entitled to a lower level of scrutiny—rational basis review—than that articulated in *Central Hudson*—intermediate scrutiny.[52] Unfortunately, the Court did not specify whether this standard of review should apply to disclosures other than those aimed at preventing consumer deception. At best, it made clear that if the lower standard of rational review is to apply to a compelled disclosure, the following three criteria must be met: (1) the affected speech is commercial speech; (2) the requirement is restrictive only in the sense of requiring a disclosure; and (3) the required disclosure is of "purely factual and uncontroversial" information.[53]

The challenge in the compelled commercial speech area remains how to determine whether the heightened *Central Hudson* standard of review or the lower, rational basis *Zauderer* standard of review applies to a required disclosure. Under the two tests, a government may, in order to correct misleading messages, require disclosure of pure, noncontroversial facts under the lower *Zauderer* standard but must apply heightened, *Central Hudson* scrutiny when the government requires a private party to publicize the government's opinion.[54] But where is the line between "noncontroversial facts" and opinion? Does the lower standard of review articulated in *Zauderer* apply *only* "to cases in which disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers'" as has been held by some courts,[55] or does it reach more broadly? And now let us return to our tale of the conflict minerals rule.

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[51] *Id.*

[52] *Id.* at 647; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

[53] *Zauderer*, 471 U.S. at 651.

[54] Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 20–21 (1986) (striking down requirement that utility company include third-party material in customer billing envelopes and concluding that because the order is not "narrowly tailored," it "impermissibly burdens appellant's First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints").

[55] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213 (D.C. Cir. 2012) (quoting *Zauderer*, 471 U.S. at 651); *see also* Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 959 n.18 (D.C. Cir. 2013) (distinguishing *Zauderer* in a unfair labor action because "no one . . . has even suggested that the posting rule was needed because employers are misleading employees about their rights under the National Labor Relations Act").

PART IV: *NAM V. SEC* ROUND ONE ("*NAM I*" & "*NAM II*"): THE CONFLICT MINERALS RULE AS COMPELLED COMMERCIAL SPEECH

It was in this unsettled legal quagmire that the challenge to the Rule arose. Recall that the challenged provision required companies to label their products as "DRC conflict free" or "not 'DRC conflict free.'"[56] The SEC argued for rational basis review of this provision of the Rule while NAM argued for at least *Central Hudson*-level heightened review.[57] The three-judge panel hearing the appeal wasted little time in making its position clear, stating "[t]he Commission argues that rational basis review is appropriate because the conflict free label discloses purely factual non-ideological information. We disagree. Rational basis review is the exception, not the rule, in First Amendment cases."[58] The court, relying on its opinion in *R.J. Reynolds Tobacco Company v. FDA*, expressly limited the reach of *Zauderer,* finding that rational basis review of compelled disclosure is "limited to cases in which disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers.'"[59] The panel then noted that "[n]o party has suggested that the conflict minerals rule is related to preventing consumer deception. In the district court the Commission admitted that it was not."[60] For this reason alone, rational basis review would be inappropriate.

The court went further and stated that:

> At all events, it is far from clear that the description at issue—whether a product is "conflict free"—is factual and non-ideological. Products and minerals do not fight conflicts. The label "conflict free" is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that "message" through "silence." By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.[61]

Having decided that the lower *Zauderer* standard of review (rational basis) did not apply, the court then stated:

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[56] *NAM I*, 956 F. Supp. 2d 43, 48–51 (D.D.C. 2013).

[57] *Id.* at 76–77.

[58] *NAM II*, 748 F.3d 359, 370 (D.C. Cir. 2014).

[59] *Id.* at 371 (quoting *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1213).

[60] *Id.* (citing *NAM I*, 956 F. Supp. 2d at 77).

[61] *Id.* (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp., 515 U.S. 557, 573 (1995)).

> [W]e do not decide whether to use strict scrutiny or the *Central Hudson* test for commercial speech. That is because the final rule does not survive even *Central Hudson*'s intermediate standard. Under *Central Hudson*, the government must show (1) a substantial government interest that is; (2) directly and materially advanced by the restriction; and (3) that the restriction is narrowly tailored. The narrow tailoring requirement invalidates regulations for which "narrower restrictions on expression would serve [the government's] interest as well." Although the government need not choose the "least restrictive means" of achieving its goals, there must be a "reasonable" "fit" between means and ends. The government cannot satisfy that standard if it presents no evidence that less restrictive means would fail.[62]

The Rule failed under this test because the Commission did not show that less-restrictive means would fail. Instead, NAM suggested, and the court agreed, that other means were available to achieve the goals of the Rule.[63] Specifically, rather than the required "conflict free" description, issuers could use their own language to describe their products, or the government could compile its own list of products that it believes are affiliated with the Congo war based on information the issuers submit to the Commission.[64] Because the SEC failed to meet its burden of showing that such approaches would not work, the Rule failed *Central Hudson* review and was found to violate the First Amendment.[65] But our story continues.

Chapter Break:
American Meat Institute v. U.S. Department of Agriculture Round One ("AMI I")

At the same time that the Rule was being challenged, another case involving compelled corporate disclosure was making its way through the courts. In *American Meat Institute v. U.S. Department of Agriculture*,[66] a group of trade associations representing livestock producers, feedlot operators, and meat packers (collectively "AMI") challenged a 2013 rule requiring it to disclose country-of-origin information to retailers, who will ultimately provide the information to consumers (the "COOL rule").[67] AMI argued that the COOL rule violated its First Amendment rights by compelling it to speak against its wishes.[68] In weighing this argument, the Court of Ap-

[62] *Id.* at 372 (internal citations omitted).

[63] *Id.* at 372–73.

[64] *Id.* at 372.

[65] *Id.* at 373.

[66] 746 F.3d 1065 (D.C. Cir. 2014) [hereinafter *AMI I*], *reh'g en banc granted and opinion vacated by* No. 13-5281, 2014 WL 2619836 (D.C. Cir. Apr. 14, 2014), *judgment reinstated by* 760 F.3d 18 (D.C. Cir. 2014) (en banc).

[67] *Id.* at 1067–68.

[68] *Id.*

peals[69] found "that *Zauderer* is best read as applying not only to mandates aimed at curing deception but also to ones for other purposes,"[70] the *NAM* panel would not conclude the same.[71]

The *American Meat* court found *Zauderer* did reach beyond the prevention of consumer deception. It upheld the COOL rule under *Zauderer*-level review, noting that there was no question that the COOL rule involved commercial speech and that the information required to be disclosed was "purely factual and non-controversial."[72] Thus, two of the necessary predicates for *Zauderer* review were satisfied. In determining whether *Zauderer* review is limited to those disclosures aimed at preventing consumer deception, the court found that it is not:

> Neither party has called our attention to any Supreme Court case extending *Zauderer* beyond mandates correcting deception, and we have found none. Other circuits, however, have extended it to, for example, government interests in telling buyers that mercury-containing light bulbs do contain mercury and may not be disposed of until steps have been taken to "ensure that [the mercury] does not become part of solid waste or wastewater,"[73] and in alerting health benefit providers of the background decisions made by pharmacy benefit managers in their sales to the providers.[74] Although AMI's preferred analysis has an appealing symmetry (deception as the evil to be corrected, disclosure of purely factual and noncontroversial information as the permissible cure), *Zauderer*'s characterization of the speaker's interest in opposing forced disclosure of such information as "minimal" seems inherently applicable beyond the problem of deception.[75]

This decision was appealed by AMI, and that appeal was underway when the NAM panel issued its opinion finding that *Zauderer* did not extend beyond disclosures aimed at preventing consumer deception—

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[69] A panel that included a judge also sitting on the NAM panel (Judge Srinivasan). *Id.* at 1065; *NAM II*, 748 F.3d 359, 360 (D.C. Cir. 2014).

[70] *Id.* at 1073.

[71] *NAM II*, 748 F.3d at 371 (explaining that *Zauderer* is "limited to cases to in which disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers'" (quoting R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1213 (D.C. Cir. 2012))).

[72] *AMI I*, 746 F.3d at 1071.

[73] *Id.* at 1072 (citing Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 107 n.1 (2d Cir. 2001)).

[74] *Id.* (citing Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 298–99, 308–10 (1st Cir. 2005) (Torruella, J.); *id.* at 316 (Boudin, C.J. & Dyk, J.) ("giving *Zauderer* a very broad reading"); *id.* at 297–98 (per curiam) ("explaining that the opinion of Chief Judge Boudin and Judge Dyk is controlling on the First Amendment issue")).

[75] *Id.* (citing N.Y. Rest. Ass'n v. N.Y. City Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009) (applying *Zauderer* to requirement that restaurant menus include calorie content information)).

leaving the state of the law on compelled corporate disclosure in a state of disarray. But would the appeal in *American Meat* clear up the confusion? Our story continues.

American Meat Institute v.
*U.S. Department of Agriculture Round Two ("*AMI II*")*

When the United States Court of Appeals for the District of Columbia Circuit took the *American Meat* appeal en banc, it attempted to clarify the doctrine of what standard of review should apply in First Amendment challenges to compelled commercial disclosures, stating: "[W]e answer affirmatively the general question of whether 'government interests in addition to correcting deception' can be invoked to sustain a disclosure mandate under *Zauderer*, and specifically find the interests invoked here to be sufficient."[76] To eliminate any confusion, it went further and said "[t]o the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them."[77]

So it seemed that the matter had been settled: *Zauderer's* rational basis review would be used whenever a compelled commercial disclosure was of information that was purely factual and noncontroversial, and the *NAM* ruling, holding otherwise, was invalidated. But not so fast.

*Part IV Continued: NAM v. SEC Round Two ("*NAM III*")*[78]

After the *American Meat* decision came down, the SEC asked for a rehearing of the April 2014 decision on the Conflict Minerals Rule, clearly believing that such a rehearing would result in *Zauderer*-level review being applied to the Rule and it thus being found constitutional. Unfortunately for the SEC (and for compelled commercial speech doctrine), that was not the way it went. Instead, on rehearing, the same three-judge panel found that, notwithstanding the *American Meat* decision, "the Supreme Court's opinion in *Zauderer* is confined to advertising, emphatically and, one may infer, intentionally"[79] and that "the Supreme Court has refused to apply *Zauderer* when the case before it did not involve voluntary commercial advertising."[80] Thus (as the SEC acknowledged) because the Conflict Minerals Rule does not deal with advertising or with point of sale

[76] Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 27 (2014) [hereinafter *AMI II*] (citation omitted) (quoting *AMI I*, 746 F.3d at 1073 n.1).

[77] *Id.* at 22–23. (citing *NAM II*, 748 F.3d 359, 370–71 (D.C. Cir.2014)).

[78] 800 F.3d 518 (D.C. Cir. 2015). Although this is "Round Two" of *NAM* for the purposes of this Section of the Paper, it is the third iteration ("*NAM III*") of the case.

[79] *Id.* at 522.

[80] *Id.* at 523.

disclosures, the court found that "*Zauderer* has no application to this case."[81]

The court could have stopped there, but did not. Recognizing that their position was in direct contrast to the *American Meat* decision, the court noted that:

> [G]iven the flux and uncertainty of the First Amendment doctrine of commercial speech, and the conflict in the circuits regarding the reach of *Zauderer*, we think it prudent to add an alternative ground for our decision. It is this. Even if the compelled disclosures here are commercial speech and even if *AMI*'s view of *Zauderer* governed the analysis, we still believe that the statute and the regulations violate the First Amendment.[82]

The court articulated two separate reasons why the Rule would not survive even if *Zauderer* level review applied. First, it stated that under *American Meat's* analysis of *Zauderer,* in order for a compelled disclosure to pass muster, the government must identify its interest or objective in establishing the regulation and then must show that the measure it adopted would "'in fact alleviate' the harms it recited 'to a material degree.'"[83] With regard to the Conflict Minerals Rule, the SEC had identified the government's interest as "ameliorat[ing] the humanitarian crisis in the DRC."[84] Not surprisingly, the court found that the SEC could not show that the Rule was effective in achieving its stated goal.[85] To support its position, the court referred to Congressional testimony heard after Section 1502 was enacted, suggesting that "[b]ecause of the law, and because some companies in the United States are now avoiding the DRC, miners are being put out of work or are seeing even their meager wages substantially reduced, thus exacerbating the humanitarian crisis and driving them into the rebels' camps as a last resort."[86] The court did acknowledge

[81] *Id.* at 524.

[82] *Id.* (footnotes omitted).

[83] *Id.* at 527 (quoting Edenfield v. Fane, 507 U.S. 761, 771 (1992)).

[84] *Id.* at 524 (quoting Brief of the Securities and Exchange Commission, Appellee at 26, *NAM III*, 800 F.3d 518 (Oct. 23, 2013) (No. 13-5252)). The SEC articulated the same goal during its rule-making process, stating that the purpose of the Rule was "the promotion of peace and security in the Congo," rather than "economic or investor protection benefits that [SEC] rules ordinarily strive to achieve." *Id.* at 524 n.17 (quoting Conflict Minerals, 77 Fed. Reg. 56,274, 56,350 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b (2015))).

[85] *Id.* at 526.

[86] *Id.* (citing Supplemental Brief of Appellants at 17, *NAM III*, 800 F.3d 518 (D.C. Cir. Dec. 29, 2014) (No. 13-5252)).

Dominic P. Parker & Bryan Vadheim, *Resource Cursed or Policy Cursed? U.S. Regulation of Conflict Minerals and Violence in the Congo*, 4 J. Ass'n Envtl. & Resource Economists 1 (2017) is a fascinating paper that suggests that the Conflict Minerals Rule had serious adverse consequences. The Paper documents that while the law may have cut off one source of revenue to armed groups, it led them to intensify their

that some commentators argued the Rule was helping to alleviate the situation in the DRC,[87] but found the uncertainty about the result of the Rule meant that its effectiveness was not proven to the degree required under the First Amendment to compel speech.[88]

That finding alone would have doomed the Rule, but the court went on. It found that the term "not conflict free" was not a statement of purely factual and uncontroversial information[89]—yet another reason that the Rule could not be entitled to *Zauderer* review. The court referred to its opinion in *NAM II*, where it stated:

> Products and minerals do not fight conflicts. The label "[not] conflict free" is a metaphor that conveys moral responsibility for the Congo war. It requires an issuer to tell consumers that its products

plundering of civilians in the region—exacerbating the humanitarian crisis. By their estimates, violent incidents more than doubled after the law was implemented. The authors argue that before Dodd-Frank, Congolese militias acted as "stationary and roving bandits." The idea is that a strongman who seeks to rule for years won't use his iron fist to crush the people entirely—and he may even invest a bit in roads, security, and other provisions to ensure he avoids an uprising that could loosen his control. The authors compare the eastern Congo's stationary bandits to the mafia. They write that some militias charged roughly the equivalent of $1 to enter a mining site and took a weekly cut of miners' earnings. In return for this "tax," militias provided a degree of protection—even if only from themselves—as the mob does. Dodd-Frank upset the stationary-bandit equilibrium because, rather than spending resources to scrutinize a fragmented and opaque supply chain, many U.S. companies simply stopped purchasing minerals from the Congo. Companies avoided the extra costs and red tape by boycotting tantalum, tin, and tungsten mined in the Congo. They instead looked to suppliers in Australia and Brazil. Congolese mineral exports plunged by 90 percent in the wake of the legislation, according to DRC mining officials. Consequently, income to militias from such mines either plunged or vanished entirely. None of this stopped the militias from killing. Some of them pivoted and became "roving bandits," expanding their looting to make up for lost mining revenues. Ultimately, the paper finds the conflict minerals legislation increased looting of civilians, and shifted militia battles towards unregulated gold mining territories.

[87] *NAM III*, 800 F.3d at 526. A strong advocate of the Rule is the Enough Project. For their position, see *Progress and Challenges on Conflict Minerals: Facts on Dodd-Frank 1502*, ENOUGH PROJECT, http://www.enoughproject.org/special-topics/progress-and-challenges-conflict-minerals-facts-dodd-frank-1502 (last visited Apr. 9, 2017).

[88] *NAM III*, 800 F.3d at 526.

[89] *Id.* at 530. The court also took a dig at *American Meat* on this issue: "That the en banc court viewed the country-of-origin disclosures at issue in *AMI* as 'uncontroversial' poses another puzzle." *Id.* at 529. The court then asked, was there a controversy over the COOL Rule "'for some reason other than [a] dispute about simple factual accuracy'? One would think the answer surely was yes. As we explained earlier, while *AMI* was pending a panel of the World Trade Organization was conducting a proceeding in which other nations charged that the country-of-origin labeling law violated the treaty obligations of the United States, a controversy that later resulted in a ruling against the United States." *Id.* at 529 (quoting *AMI II*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc)).

> are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that "message" through "silence." By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.[90]

In reaching this conclusion, the court made several statements of critical importance to the issue of compelled commercial speech. There is common agreement that *Zauderer*-level review applies only when the compelled disclosure requires statements of fact.[91] The *NAM III* court noted that this necessarily requires a distinction between fact and opinion and said:

> Perhaps the distinction is between fact and opinion. But that line is often blurred, and it is far from clear that all opinions are controversial. Is Einstein's General Theory of Relativity fact or opinion, and should it be regarded as controversial? If the government required labels on all internal combustion engines stating that "USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING" would that be fact or opinion? It is easy to convert many statements of opinion into assertions of fact simply by removing the words "in my opinion" or removing "in the opinion of many scientists" or removing "in the opinion of many experts."[92]

The *NAM III* court also agreed with NAM that the fact that the statute provided a definition of "conflict free" was not enough to make "nonconflict free" an uncontroversial statement of fact:

> As NAM forcefully puts it, "[i]f the law were otherwise, there would be no end to the government's ability to skew public debate by forcing companies to use the government's preferred language. For instance, companies could be compelled to state that their products are not 'environmentally sustainable' or 'fair trade' if the government provided 'factual' definitions of those slogans—even if the companies vehemently disagreed that their [products] were 'unsustainable' or 'unfair.'"[93]

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[90] *Id.* at 530 (citations omitted) (quoting *NAM II*, 748 F.3d 359, 371 (D.C. Cir. 2014)).

[91] *See, e.g.*, *id.* at 522.

[92] *Id.* at 528.

[93] *Id.* at 530 (alteration in original) (quoting Supplemental Brief of Appellants at 12, *NAM III*, 800 F.3d 518 (D.C. Cir. Dec. 29, 2014) (No. 13-5252)). In a lovely rhetorical flourish, the court provided this example of "governmental redefinition": "WAR IS PEACE" [/] "FREEDOM IS SLAVERY" [/] "IGNORANCE IS STRENGTH[.]" *Id.* at 530 n.29 (quoting GEORGE ORWELL, NINETEEN EIGHTY-FOUR 10 (First World Classic, 2005) (1949)).

In sum, *NAM III* disagreed with *American Meat* and found that *Zauderer* review should be limited to advertising and should apply only to disclosures aimed at preventing consumer deception. Further, it suggested that even under *Zauderer*, the government seeking to compel a disclosure must prove that the disclosure will achieve its stated goals to a material extent. Finally, it strongly suggested that the universe of "purely factual and uncontroversial" disclosures is very limited. The SEC petitioned for a full court rehearing of the decision but was denied.[94]

PART V: IMPLICATIONS OF *NAM III* FOR COMPELLED COMMERCIAL SPEECH

Although the ruling in the conflict minerals case may seem of limited value, it is of great importance to those who care about ESG reporting. As noted above, the SEC is exploring what role it should play in this arena. Let us suppose for the sake of argument that the agency decides (or is forced)[95] to become more proactive and to require additional ESG disclosures. Or suppose that local or state governments[96] decide to increase their regulatory activities in the ESG area, as Vermont did with regard to the labeling of products including genetically modified organisms.[97] Given the unsettled state of the law regarding compelled commercial disclosure, what is likely to become of such disclosure requirements?

First, unless the disclosure relates to advertisements, the heightened *Central Hudson* standard of review will apply in those circuits that adopt the *NAM III* rationale. Amnesty International tried to get past this argument in *NAM I* by relying on *SEC v. Wall Street Publishing Institute, Inc.,* in which the court applied rational basis review to a SEC regulation requir-

[94] Nat'l Ass'n of Mfrs. v. SEC, No. 13-5252 (D.C. Cir. Nov. 9, 2015) (order granting motion to file brief amici curiae and denying rehearing en banc) (per curiam).

[95] The SEC has made it quite clear that it does not want to take on this task. Speaking at Fordham Law School in 2013, Chairman Mary Jo White said: "[R]ecent disclosure directives from Congress have been quite prescriptive, essentially leaving no room for the SEC to exercise its independent expertise and judgment in deciding whether or not to make the specified mandated disclosures." Mary Jo White, Chair, SEC, Speech at the 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture: The Importance of Independence (Oct. 3, 2013), https://www.sec.gov/News/Speech/Detail/Speech/1370539864016.

[96] Of course, the federal government could take similar action, but in light of the political climate, that seems unlikely, at best. Eric Bradner, *Trump to 'Repeal a Lot' of Obama's Actions on Day One, Top Aide Says*, CNN (Jan. 2, 2017), http://www.cnn.com/2017/01/01/politics/trump-obama-day-one/.

[97] VT. STAT. ANN. tit. 9, § 3043 (2015). This bill was later preempted by National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216, 130 Stat. 834 (codified at 7 U.S.C. § 1639 (2012)).

ing that a magazine disclose the consideration it received in exchange for stock recommendations.[98] Significantly, the court applied a less-exacting level of scrutiny, even though the injunction did not fall within any well-established exceptions to strict scrutiny.[99]

NAM II firmly rejected the argument that disclosure compelled as part of securities regulation deserved special treatment:

> To read *Wall Street Publishing* broadly would allow Congress to easily regulate otherwise protected speech using the guise of securities laws. Why, for example, could Congress not require issuers to disclose the labor conditions of their factories abroad or the political ideologies of their board members, as part of their annual reports? Those examples, obviously repugnant to the First Amendment, should not face relaxed review just because Congress used the "securities" label.[100]

So no special treatment for securities law-based disclosure. But this passage says much more than that, and it is worth pausing to let its message sink in. ESG disclosures such as labor conditions of foreign factories are deemed to be "obviously repugnant to the First Amendment," regardless of the body seeking to require them. Already, the imagined new ESG disclosure requirements are facing a hard road. Indeed, we do not even have to imagine. We already have on the table the House bill "Business Supply Chain Transparency on Trafficking and Slavery Act of 2014."[101] This bill, if adopted, would amend the Exchange Act to require disclosure regarding measures companies have taken to identify and address conditions of forced labor, slavery, human trafficking, and forms of child labor within the company's supply chains.[102] These issues sound very much like those that *NAM II* would hold to be "obviously repugnant" to the First Amendment and therefore unable to pass constitutional muster.[103]

The examples of disclosures "obviously repugnant to the First Amendment" seem to be based on the belief that they demand controversial information. If issuers can claim that a required disclosure invokes a controversial issue, heightened scrutiny will be applied because the disclosure no longer involves only "purely factual and uncontroversial" information.[104] But who gets to determine what information is "controver-

[98] 851 F.2d 365, 372 (D.C. Cir. 1988); Response Brief of Amnesty Int'l of the USA, Inc. & Amnesty Int'l Ltd. at 30–31, *NAM I*, 956 F. Supp. 2d 43 (D.D.C. Oct. 30, 2013) (No. 13-5252).

[99] *Id.* at 372–73.

[100] *NAM II*, 748 F.3d 359, 372 (D.C. Cir. 2014).

[101] H.R. 4842, 113th Cong. (2014).

[102] H.R. 4842 § 3.

[103] *NAM II*, 748 F.3d at 372.

[104] *NAM III*, 800 F.3d 518, 527 (D.C. Cir. 2015) (quoting *AMI II*, 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc)).

sial?" Controversy may well be in the eye of the beholder—consider the current "debate" over climate change. Using this characterization as a threshold for determining what level of scrutiny should be applied to compelled commercial disclosure sets a dangerous threshold.

Even if a required commercial disclosure can get past the "obviously repugnant" designation, significant hurdles await. Under *NAM III,* the disclosure must be shown to be effective in achieving its stated goal "to a material degree"[105]—a difficult task indeed. If the goal of a disclosure regulation is reducing human trafficking, how can it be shown whether a disclosure requirement makes a difference, given the myriad variables that affect the documentation of the practice? Similarly, how can those advocating for compelled disclosure about climate change possibly prove conclusively that such disclosures will reduce the harms of climate change when a portion of our population denies that climate change even exists?

None of the foregoing should suggest that all, or even most, compelled disclosure is at risk after the conflict minerals decision. If the compelled disclosure is intended to prevent confusion, deception, or danger to investors and consumers, it is likely constitutional. Further, it is possible that the Supreme Court will step in to clarify the law governing compelled commercial disclosure given the unsettled law in the area and the tension between circuits. To date, the Court has not clearly articulated definitions for commercial speech, political speech, or the boundaries between them; nor has it directly considered the interplay between securities regulations and the First Amendment. It is high time that it did so. Without clarification in this area, the fate of ESG disclosure regulation remains uncertain.

If the Supreme Court does not act and ESG disclosures are indeed vulnerable to First Amendment challenge due to the result in the conflict minerals case, is that such a bad thing? To be clear, this is not a debate about the practices and issues that are the subject matter of the disclosure. Few (I would hope none) support human trafficking or poor working conditions. The debate is about whether disclosure of such practices and issues should be mandatory or voluntary. The answer to this question is far from clear. Even if we decide that mandatory disclosure is the "answer," we should not reflexively put the burden on the SEC to be the "disclosure policeman." Far greater thought is needed to determine the allocative efficiencies of an ESG disclosure regime. The locus of responsibility for disclosure requirements is beyond the scope of this Article—although I will note that the SEC would be pleased if it was not tasked with greater agency involvement in ESG disclosure regimes. As Chairman White noted:

[105] *Id.* (quoting Edenfield v. Fane, 507 U.S. 761, 771 (1992)).

> [Some] mandates, which invoke the Commission's mandatory disclosure powers, seem more directed at exerting societal pressure on companies to change behavior, rather than to disclose financial information that primarily informs investment decisions. That is not to say that the goals of such mandates are not laudable. Indeed, most are. Seeking to improve safety in mines for workers or to end horrible human rights atrocities in the Democratic Republic of the Congo are compelling objectives, which, as a citizen, I wholeheartedly share. But, as the Chair of the SEC, I must question, as a policy matter, using the federal securities laws and the SEC's powers of mandatory disclosure to accomplish these goals.[106]

On the question of whether ESG disclosure should be mandatory or voluntary, let me make just a few observations, as that debate is not the focus of this Article. First, it is clear after the conflict minerals case that, absent a contrary ruling by the Supreme Court, mandatory environmental, social, and governance disclosures may face significant First Amendment challenges which may tip the scales in favor of voluntary regimes. Would that be better? The voluntary/mandatory disclosure debate is long-standing. The issues have been researched exhaustively with no definitive conclusion being reached. Just a few of the arguments on either side of the issue were highlighted in a 2010 report aptly titled: "Carrots and Sticks—Promoting Transparency and Sustainability," put out by KPMG, the Global Reporting Initiative (GRI), Unit for Corporate Governance in Africa, and United Nations Environment Programme (UNEP).[107] Given that it encapsulates a host of the arguments on either side of the debate, I reproduce it here:[108]

	Reasons for	Reasons against
Mandatory approaches to reporting	• Changing the corporate culture—leaders will continue to innovate above minimum requirements • Incompleteness of voluntary reports • Comparability • Non-disclosure of negative performance • Legal certainty • Market failures—theory of regulation • Reduction of non-diversifiable market risk free rider problem • Cost savings • Standardisation • Equal treatment of investors	• Knowledge gap between regulators and industry • One size does not fit all • Inflexibility in the face of change and complexity • Constraints on efficiency and competitiveness
Voluntary approaches to reporting	• Flexibility • Proximity • Compliance • Collective interest of industry	• Conflicts of interest • Inadequate sanctions • Under-enforcement • Global competition • Insufficient resources

[106] White, *supra* note 95.

[107] U.N. Env't Programme et al., Carrots and Sticks—Promoting Transparency and Sustainability (2010).

[108] *Id.* at 8.

With so many factors in play, the debate over whether ESG disclosure should be mandatory or voluntary is likely to continue for some time. Indeed, there is increasing recognition that the answer may be that neither approach standing alone is enough, but that instead there should be some combination of the two.[109]

Regardless of what one believes about whether ESG disclosures should be voluntary or mandatory, it is clear is that issuers, consumers, and regulators are gaining an increased understanding of ESG impacts on society at large as well as core business activities and organizational value.[110] Whether mandatory or voluntary, ESG reporting is not going to go away. The First Amendment challenges in the U.S. simply add one more piece to an already very complex puzzle.

PART VI: EPILOGUE(S)

Many good stories have an epilogue—this tale has two.

First, there is widespread speculation that President Trump will seek to repeal Dodd-Frank, and with it Section 1502.[111] It is of course impossible to predict what may happen in the future. At this point, companies are being encouraged to continue to file their conflict minerals reports, but it may soon prove to be moot.[112] However, even if Section 1502 and the Conflict Minerals Rule are eviscerated, the law that has come out of the cases involving them will not be and will continue to have impact. Which brings us to epilogue two, where we see the impact of the *NAM* cases directly.

On October 24, 2016, just before the Fair Pay and Safe Workplaces Final Rule ("Fair Pay Rule") was scheduled to go into effect, Judge Marcia A. Crone in the Eastern District of Texas issued a nationwide preliminary injunction prohibiting key provisions of the rule from taking ef-

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[109] *Id.* at 84–85.

[110] *See, e.g.,* GLOB. REPORTING INITIATIVE, REACHING INVESTORS: COMMUNICATING VALUE THROUGH ESG DISCLOSURES (2009); Zuraida Zuraida, Noor Houqe, & Tony van Zijl, *Value Relevance of Environmental, Social and Governance Disclosure* (Victoria Univ. of Wellington Sch. of Accounting and Commercial Law Ctr. for Governance and Taxation Research, Working Paper No. 98, 2015).

[111] *See, e.g.,* Jesse Hamilton & Elizabeth Dexheimer, *Trump's Transition Team Pledges to Dismantle Dodd-Frank Act*, BLOOMBERG (Nov. 10, 2016), https://www.bloomberg.com/news/articles/2016-11-10/trump-s-transition-team-pledges-to-dismantle-dodd-frank-act; Lisa Lambert & Sarah N. Lynch, *Trump May Already Have a Plan Ready to Revamp Dodd-Frank*, REUTERS (Nov. 11, 2016), http://www.reuters.com/article/us-usa-election-trump-doddfrank-idUSKBN1361X0.

[112] Marilyn Geewax, *Trump Team Promises to 'Dismantle' Dodd-Frank Bank Regulations*, NPR (Nov. 10, 2016), http://www.npr.org/sections/thetwo-way/2016/11/10/501610842/trump-team-promises-to-dismantle-dodd-frank-bank-regulations.

fect.[113] In the absence of an injunction, the so-called "blacklisting" rule would have mandated, among other things, that companies bidding on certain federal contracts and subcontracts publicly disclose information regarding "labor law violations" as part of the bidding process. The court struck down the rule as unconstitutionally compelled commercial speech because it:

> [I]mpose[d] an immediate disclosure requirement that obligates federal contractors and their subcontractors for the first time to report for public disclosure any "violations" of the fourteen federal labor laws occurring since October 25, 2015, regardless of whether such alleged violations occurred while performing government contracts, and without regard to whether such violations have been finally adjudicated after a hearing or settled without a hearing, or even occurred at all. . . . Far from being narrowly tailored, the disclosure requirement forces contractors to disclose a list of court actions, arbitrations, and "administrative merits determinations," even where there has been no final adjudication of any violation at all, and regardless of the severity of the alleged violation. . . .
>
> [T]housands of "administrative merits determinations" are issued against employers of all types each year, many of which are later dismissed or settled and most of which are issued without benefit of a hearing or review by any court. The arbitration decisions and civil determinations, including preliminary injunctions, that have to be reported under the FAR Rule are likewise not final and are subject to appeal. The Executive Order's unprecedented requirement, as implemented by the FAR [Federal Acquisition Regulation] Rule and DOL [Department of Labor] Guidance, thus compels contractors to engage in public speech on matters of considerable controversy adversely affecting their public reputations and thereby infringing on the contractors' rights under the First Amendment.[114]

The court found support for its position by citing to *NAM*, specifically calling out the most problematic findings of that case. Taking them one by one:

Disclosure of "controversial" information warrants heightened scrutiny

NAM III said that if compelled disclosure required communication of "controversial" information, the government bore a heavy burden to prove that forcing businesses to speak publicly about such activities in the

[113] Associated Builders & Contractors of Se. Tex. v. Rung, No. 1:16-CV-425 at 31 (E.D. Tex. Oct. 24, 2016) (memorandum and order granting preliminary injunction).

[114] *Id.* at 17–18.

form of public reports was narrowly tailored to advance a substantial government interest.[115]

With respect to the Fair Pay Rule, the court found that:

> [C]ontractors are not being required to disclose purely non-controversial, factual information. By defining "labor law violation" to include "administrative merits determinations," the government is requiring the disclosure of merely the opinions of agency employees who chose to issue notices, send letters, issue citations, or lodge complaints accusing a contractor of violating a labor law as if those opinions were actually labor law violations. These allegations are certainly controversial in nature, and they may prove not to be factual at all, if, after full exhaustion of the administrative and judicial remedies afforded employers by the statutes, the contractor is absolved of liability and found not to have violated the labor laws.[116]

NAM III requires evidence that required disclosures will achieve their stated goal

In *NAM III*, the court found that for a compelled disclosure to pass constitutional muster, it must be shown that the required disclosures will achieve the stated goal—a hurdle the Conflict Minerals Rule could not get over.[117] Similarly, the Fair Pay court found:

> It must also be noted that the FAR Council and the DOL [Department of Labor] have failed to support the basic premise of the Executive Order and the new Rule, namely that public disclosure of non-adjudicated determinations of labor law violations on private projects correlates in any way to poor performance on government contracts. The studies cited by the FAR Council for this premise did not examine the universe of administrative merits determinations, regardless of severity.
>
> None of the studies purported to show a relationship between mere *non-adjudicated, unresolved allegations* of labor law violations and government contract performance. Instead, the various studies cited in the Rule's preamble, with few exceptions, rely on the most severe findings of labor violations by agencies and courts, which have been closed and penalties paid. In any event, the Executive Order, FAR Rule, and DOL guidance have expanded their reach far beyond any claimed impact on government procurement and instead rely entirely on speculation in claiming that the burdensome new disclosures of non-final determinations demonstrate any likelihood of poor performance on government contracts.[118]

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[115] *NAM III*, 800 F.3d 518, 555 (D.C. Cir. 2015).

[116] *Associated Builders*, No. 1:16-CV-425 at 20.

[117] *NAM III*, 800 F.3d at 556.

[118] *Associated Builders*, No. 1:16-CV-425 at 20–21.

NAM III prohibits disclosures that require companies to stigmatize themselves

In *NAM III,* the court said the Conflict Minerals Rule essentially required issuers to confess to "blood on [their] hands,"[119] and stated "[r]equiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so."[120]

The Fair Pay Rule court found:

> The Executive Order, FAR Rule, and DOL Guidance share the same constitutional defect as the conflict minerals rule in *NAM*, only more so. The Order, Rule, and Guidance compel government contractors to "publicly condemn" themselves by stating that they have violated one or more labor or employment laws. The reports must be filed with regard to merely *alleged* violations, which the contractor may be vigorously contesting or has instead chosen to settle without an admission of guilt, and, therefore, without a hearing or final adjudication.[121]

In December 2016, an appeal was filed to the Fifth Circuit.[122] What will happen there is anyone's guess. If that circuit agrees with the *NAM* court, it will add powerful ammunition to those who want to curtail the use of compelled disclosures beyond their original purpose.

And so ends our tale. Not with the bang of resolution of the compelled commercial disclosure doctrine, but with the whimper of uncertainty that continues to cloud the issue.

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[119] *NAM III*, 800 F.3d at 530 (quoting *NAM II*, 748 F.3d 359, 371 (D.C. Cir. 2014)).

[120] *Id.* (quoting Reply Brief of Appellants at 27–28, *NAM III*, 800 F.3d 518 (D.C. Cir. Nov. 13, 2013) (No. 13-5252)).

[121] *Associated Builders*, No. 1:16-CV-425 at 19–20.

[122] Notice of Appeal, *Associated Builders*, No. 1:16-CV-425 (5th Cir. Dec. 23, 2016) (No. 16-41707). The Fifth Circuit recently heard a related case that facially challenged NLRB rules as violating the National Labor Relations Act (NLRA) and the Administrative Procedure Act (APA). Associated Builders & Contractors of Tex. v. NLRB, 826 F.3d 215, 229 (5th Cir. 2016).