

What Does the District Court's Decision in the Challenge to the Resource Extraction Disclosure Rule Portend About the Conflict Minerals Rule?

Introduction

In its July 2 ruling in *American Petroleum Institute (API) v Securities and Exchange Commission (SEC)*, the U.S. District Court vacated the SEC's controversial resource extraction disclosure rule and remanded it to the SEC for further proceedings. Observers of the SEC's conflict minerals rule, itself being challenged in *National Association of Manufacturers (NAM) v Securities and Exchange Commission*, are reviewing the *API v SEC* decision and considering what insight it may provide into the future of the SEC's conflict minerals rule.

API v SEC

In his decision on July 2, 2013, Judge Bates of the U.S. District Court for the District of Columbia ruled that the SEC wrongly concluded that Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) required **public** disclosure of resource extraction payment information. In a strongly worded opinion, he also found that the SEC's decision not to grant any exemptions to the rule was, given the SEC's limited explanation of its reasoning, "arbitrary and capricious." In light of his finding that the resource extraction disclosure rule was "invalid," Judge Bates vacated the rule and remanded it to the SEC. He noted that his decision to vacate was related to the seriousness of the deficiency of the rule and the fact that no disruption would occur as a result of vacatur because no companies had yet been required to make any disclosures under the rule.

Relationship Between Conflict Minerals Rule and Resource Extraction Disclosure Rule

As we have previously observed, conflict minerals disclosure and resource extraction disclosure have been on parallel paths since Congress included provisions on both of them in the Dodd-Frank Act. Section 1502 of the Dodd-Frank Act required the SEC to issue rules relating to disclosure about the use of conflict minerals that are necessary to the functionality or production of manufactured products. Section 1504 of the Dodd-Frank Act required the SEC to issue rules relating to payments made by a resource extraction issuer to foreign governments in connection with the commercial development of oil, natural gas or minerals. Both sections amended the Securities Exchange Act by adding two new subsections to the end of Section 13. The conflict minerals rule was added as 15 U.S.C. § 78m(p), and the resource extraction disclosure rule was added as 15 U.S.C. § 78m(q). After many months of SEC activity and public comment on each proposed rule, the SEC issued the final conflict minerals rule and the final resource extraction disclosure rule at the same meeting on the same day – August 22, 2012. The SEC went on to create a new form – Form SD – to house the disclosure required by both rules.

The paths of the two rules continued in parallel as each has been the subject of its own legal challenge. The conflict minerals rule was challenged by the National Association of Manufacturers,

the U.S. Chamber of Commerce, and the Business Roundtable in *NAM v SEC*. The resource extraction disclosure rule was challenged by the American Petroleum Institute, the U.S. Chamber of Commerce, the Independent Petroleum Association, and the National Foreign Trade Council in *API v SEC*.

Both cases took similar procedural routes. The parties filed their challenges with the U.S. Court of Appeals, arguing that it would be the proper venue for a legal challenge to these rules. However, the Court of Appeals in *API v SEC* ruled that the district court, not the court of appeals, has jurisdiction to consider the challenge to the resource extraction disclosure rule. The American Petroleum Institute's petition in the Court of Appeals was dismissed for lack of jurisdiction, and the corollary petition that had been filed in U.S. District Court continued there. Recognizing the impact of the dismissal of *API v SEC*, the petitioners in *NAM v SEC* filed a motion to transfer their case to U.S. District Court, and the Court of Appeals granted that motion.

In both cases, the parties agreed that the case should be decided on the briefs that had already been filed with the Court of Appeals. Oral argument was heard on motions for summary judgment in *API v SEC* on June 7, 2013. Oral argument was heard on motions for summary judgment in *NAM v SEC* on July 1, 2013.

Several arguments made by the petitioners in *NAM v SEC* are similar to those made in *API v SEC*. In particular, the plaintiffs in *NAM v SEC* argued, among other things, that the SEC was wrong not to include a *de minimis* exception to the conflict minerals rule. It also argued that the SEC did not engage in a proper cost-benefit analysis when it developed the particular requirements of the rule.

Many observers are now noting the parallels between the conflict minerals rule and the resource extraction disclosure rule. In addition, elements of the court's analysis in *API v SEC* could apply to certain of the issues raised in *NAM v SEC*. A similar decision about the conflict minerals rule would put both rules back in the hands of the SEC. At the conclusion of Monday's oral argument in *NAM v SEC*, Judge Wilkins indicated that he would render a decision soon. Reporting companies are anxiously awaiting that decision and the impact it will have on their conflict minerals compliance programs.

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