

International Trade Alert

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DC Court Strikes SEC Rule Requiring Extractive Industries' Reporting of Payments to Foreign Governments

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On Tuesday, July 2, 2013, the U.S. District Court for the District of Columbia vacated a Securities and Exchange Commission (SEC) rule requiring oil, gas and mining companies to report payments in excess of \$100,000 to foreign governments. The rule originated as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act's (Dodd-Frank) amendments to the Securities Exchange Act of 1934, 157 U.S.C. § 78m(q).

The rule was advanced largely by human rights and anti-corruption interests targeting corruption in developing countries with significant oil and mining resources and proved a costly compliance burden for extractive companies with global operations. Indeed, a coalition of oil industry associations led by the American Petroleum Institute, U.S. Chamber of Commerce and the National Foreign Trade Council filed the lawsuit challenging the rule, *American Petroleum Institute v SEC*, No. 12-1668 (D.D.C.). The lawsuit asserted that the SEC misinterpreted Dodd-Frank by forcing public disclosure of detailed data on payments, and failed to consider associated competitive effects, including risks associated with revealing trade secrets and pricing strategies.

The Court agreed. Finding that the SEC misread Section 1504 of Dodd-Frank to mandate public disclosure of all taxes, fees, royalties, production entitlements, bonuses, dividends, and infrastructure improvements, Judge John Bates remanded the case back to the SEC for further action. The Court also agreed with the Plaintiffs that the SEC erred by denying exemptions for countries with laws prohibiting payment disclosure, such as China and Qatar, characterizing the SEC's decision as "arbitrary and capricious."

Section 1504 of Dodd-Frank directs the SEC to implement rules requiring firms to report payments made to foreign officials. The SEC rule had broadly defined "commercial development" to include all exploration, extraction, processing, export, and the requisite acquisition of licenses. The rule, which was set to take effect on September 30, 2013, will now be reexamined by the SEC pursuant to the Court's remand order.

It is unlikely that the SEC will appeal the ruling because legislation that passed the House of Representatives last week and is currently pending in the Senate would implement lesser disclosure requirements pursuant to Section 1504. H.R. 1613, the Outer Continental Shelf Transboundary Hydrocarbon Agreements Authorization Act, narrows the scope of the reporting requirement by creating an exemption for "actions taken by a public company in accordance with any transboundary hydrocarbon agreement." During the SEC rulemaking process preceding issuance of the final rule in August 2012, industry stakeholders had advocated that the SEC issue an anonymous compilation report of company disclosures rather than company- and country-specific disclosures. While the immediate reporting requirement may have passed, it is expected that the SEC may come back with proposed rules that attempt to reach a middle ground – so stay tuned.

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