Client Alert

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Legal Challenges to SEC Extractive Industries and Conflict Minerals Rules Move to Federal District Court

Adopted amid great controversy in August 2012, the Securities and Exchange Commission's final rules under the Dodd-Frank Act on conflict minerals and extractive industries were quickly challenged in two separate, but similar, petitions for review before the US Court of Appeals for the DC Circuit. The rules on conflict minerals, adopted under Section 1502 of the Dodd-Frank Act, require public companies that manufacture certain products in which so-called conflict minerals are present and sourced from central Africa to provide detailed reporting about their supply chain activities. The extractive industries rules, under Section 1504 of the Dodd-Frank Act, compel public companies engaged in the commercial development of oil, gas or minerals to disclose granular details about payments made to governments around the world for natural resource extraction by type, by project and by government.

In an opinion issued April 26, the DC Circuit dismissed the challenge to Section 1504 for want of jurisdiction. The court provided a detailed analysis of its ability to review actions taken by the SEC. In doing so, the court contrasted Section 25(a) of the Securities Exchange Act of 1934, which gives the court jurisdiction over a "final order" of the SEC, with Section 25(b), which gives the court jurisdiction over final SEC rules adopted under enumerated sections of the 1934 Act. The SEC's extractive industries rules were not promulgated under any of the enumerated sections listed in Section 25(b), but the petitioners cited the DC Circuit's holding in *Investment Company Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270 (D.C. Cir. 1977), for the proposition that jurisdiction was proper because a final order under Section 25(a) includes "any agency action capable of review on the basis of the administrative record." After a lengthy analysis of Section 25 of the 1934 Act and *Investment Company Institute*, the court concluded that Section 25(b) was the sole avenue for jurisdiction, and because the extractive industries rules were not adopted under any of the enumerated sections of the 1934 Act listed there, it therefore lacked jurisdiction to hear the case. The petitioners also filed a challenge before the US District Court for the District of Columbia and the case will now proceed there.

In light of the court's ruling in the extractive industries case, the DC Circuit cancelled oral arguments in the pending conflict minerals challenge. On April 30, the petitioners in that case filed a motion to transfer the case to federal district court, which the SEC does not oppose. Accordingly, the challenge to the conflict minerals rules will also proceed at the district court level.

These developments are procedural in nature and do not reflect a decision on the merits by the DC Circuit. But they could have the effect of delaying final judicial review of the two SEC rules. As a reminder, the rules on conflict minerals and extractive industries have not been stayed pending resolution of the cases. Thus, public companies should continue efforts to comply with both sets of rules because affected companies must generally begin reporting in 2014 on calendar year 2013 activities.

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