

PWYP FACT SHEET:

Status of Section 1504 Regulations Given Results of U.S. District Court Decision

What is Section 1504 and what does it require?

Section 1504, or the Cardin-Lugar Amendment of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, requires any oil, gas or mining company filing an annual report to the Securities and Exchange Commission (SEC) to disclose their country and project-level payments to host governments each year.

What regulations were proposed by the SEC and what is their coverage?

On August 22, 2012, the SEC voted to approve regulations to implement Section 1504, following a nearly two-year rulemaking process. These regulations required public reporting in annual reports of country and project-level payments, and allowed no exemptions from reporting. The regulations required covered companies to report payments to governments in all countries of operation, including to the U.S. federal government. Payment categories required to be reported align with those required by the Extractive Industries Transparency Initiative (EITI), a voluntary initiative endorsed by most major oil, gas and mining companies. Companies covered include U.S. and foreign companies, including Chinese, Canadian, Brazilian, European and others.

Who filed the lawsuit and why?

On October 25, 2012, the American Petroleum Institute and the U.S. Chamber of Commerce, along with two other trade associations, sued the SEC, claiming that it had made a number of procedural errors in promulgating the rules. These groups also claimed that Section 1504 violates oil companies' First Amendment free speech rights.

What did the court ultimately decide?

On July 2, 2013, the D.C. District Court ruled that the SEC must provide better justifications for certain aspects of the regulations. The court vacated the rules and returned them to the SEC for review.

- The decision focused on how the SEC justified its regulatory choices on two requirements of the regulations: 1) requiring company reports to be made public; and 2) allowing no exemptions to address the oil industry claim that some countries prohibit disclosure of the information required under the law.
- The SEC's decision to publish all reports and deny exemptions was based partially on its belief that it was required to do so by the wording and structure of the law. It believed that it lacked the discretion to choose any other alternative. It also found that the evidence of host government prohibitions provided by industry was "unpersuasive."
- The court disagreed with the SEC that the statute was unambiguous when it required public reporting and no exemptions. According to U.S. procedural law, the SEC must provide greater justification for its regulatory choices when the statute is ambiguous about specific requirements. According to the court's opinion, nothing in the statute prevented the SEC from keeping the reports confidential or granting exemptions. However, the court **did not** rule on whether the SEC *should have* required public reporting or denied exemptions. The court also declined to rule on the First Amendment challenge, noting that the rule could change upon SEC review and would therefore present different constitutional issues.

Based on the court decision, what is the SEC required to do?

The law itself still stands, and the SEC remains bound by the statute to produce implementing regulations. The court ruled that the SEC must provide additional justification for its regulatory choices to require public reporting and allow no exemptions. **There is nothing in the ruling that would prevent the Commission from reenacting the same rules with additional justification in these areas.** In addition, the previous rulemaking process provides SEC with ample formal evidence from industry, investor and other commenters to support their positions on any revised requirements.

What happens next?

As with the previous rulemaking process, the SEC will propose a new rule, then request public comment on the rule in a limited timeframe. The SEC remains bound by the statutory deadline to release final rules.

Will external policy precedents affect the SEC's rulemaking on the key issues ruled on by the court?

Yes. The European disclosure law adopted this past summer, was modeled on the SEC's rules from August 2012, and covers cross-listed companies like Shell, BP, BHP Billiton, Rio Tinto, Total and others. The SEC is likely to strongly consider the fact that these large and important companies will report under the EU standard, which requires public, project reporting and no exemptions, since they are listed with the London Stock Exchange or other EU exchanges.

The 28 EU member states have 2 years to "transpose" the EU disclosure law into national legislation, however, the UK, French, German, Finnish, Swedish, and Danish governments have publicly committed to fast-tracking this process. The UK and France are aiming for adoption in the fall of 2014, with a view to achieving public reporting of 2015 payments by covered companies in 2016. A number of large multinationals that list shares in the United States and operate in the Gulf of Mexico, are also listed on the UK's London Stock Exchange, and therefore will be required to report payments for all countries of operation, including the United States, under the European legislation. EU member states do not have discretion to provide exemptions or allow anything other than public disclosures within their national implementing legislation.

What is the position of investors on the rules?

Forty-four investor groups with **more than \$5.6 trillion** in assets under management wrote to the SEC Chairman in August, citing the importance of public disclosure to both citizens and investors. They state, "[t]he SEC's leadership encouraged the development of a public global disclosure standard," and that in light of the momentum in other markets the SEC should ensure, "...that the reporting obligations in these jurisdictions are as uniform as possible." They note that consistent regulations across markets could lead to better disclosures and decreased compliance costs. Notable signers of the investor letter to the SEC include APG, the third largest pension fund in the world, UBS, the largest private wealth manager in the world, as well as ING IM International, the global asset management arm of the world's largest banking, financial services and insurance conglomerate.

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