

Recent Court Decisions on Challenges to Resource Extraction and Shareholder Proposal Rules

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The D.C. Circuit has dismissed for lack of jurisdiction the case brought by the American Petroleum Institute and others against the SEC rules requiring certain companies to disclose payments made to foreign governments relating to the commercial development of oil, natural gas or minerals. The case will now be decided in the U.S. District Court for the District of Columbia, where the petitioners had also filed suit “out of an abundance of caution.”

The Commission had not disputed the Circuit Court’s right to hear the petition for review, but intervenor Oxfam America argued that the petitioners must first sue in district court. Exchange Act Section 25 establishes the framework for initial appellate review of Commission actions. Congress created original appellate jurisdiction over challenges to certain Commission rules in 1975, because it believed that the district court’s factfinding function is rarely necessary in these cases.

In this case, the D.C. Circuit determined that absent a statutory grant of original appellate jurisdiction under Section 25, a party must first file in district court. While certain enumerated sections of the Exchange Act specifically give the appellate court jurisdiction, the Commission did not rely on any of those sections when it published the resource extraction rule. In fact, the Court noted that Section 25 is limited to Exchange Act provisions directly relating to the operation or regulation of the national market system, a national clearing system or the Commission’s oversight of the self-regulatory organizations.

In another case, the U.S. District Court for the Southern District of New York found that the 2010 amendment to Rule 14a-8(i)(8) did not change its original holding in *Lucian Bebchuk against Electronic Arts, Inc.* In February 2008, the plaintiff submitted a shareholder proposal to the company to amend its bylaws and require management to allow shareholders to vote on all “qualified proposals.” Qualified proposals include all submissions made on behalf of any shareholders owning at least 5% of stock that are valid under state law and did not deal with ordinary business operations. Before the SEC could respond to a no-action letter request from the company, plaintiff filed suit.

In November 2008, the district court held that the proposal was contrary to the proxy rules because it eliminated the discretion of the company and dismissed the complaint under Rule 14a-8(i)(3). The court found that the plaintiff’s proposal contradicts the purpose of Rule 14a-8 given that different grounds are available for exclusion of shareholder proposals, which the plaintiff’s proposal would not recognize.

Plaintiff appealed and while appeal was pending, the SEC adopted the proxy access rules in 2010 and amended Rule 14a-8(i)(8). The Second Circuit then remanded to the district court to determine the relevance of the proxy rule changes to this case.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

Ning Chiu

+1 212 450 4908

ning.chiu@davispolk.com

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