Drilling for Disclosure: Resource Extraction Issuer Disclosure and *American Petroleum Institute v. SEC*

Andrew L. Magner*

* J.D. Candidate, University of Iowa College of Law, 2015; B.A., University of Iowa, 2012. I would like to thank the editorial board and student writers of *The Journal of Corporation Law* for their insight and assistance in publishing this Note. I would also like to thank my family and friends for their continued support.

I. INTRODUCTION

In 2010, Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank)[1] in response to the 2008 financial crisis. While its primary purpose was to reform and regulate the financial industry, Dodd–Frank also contained a number of miscellaneous provisions, including a rule requiring disclosure of payments by overseas resource extraction issuers. Dodd–Frank's Section 1504[2] was an attempt not only to protect investors but also to fight the resource curse that plagues resource-rich countries. The rule met stiff resistance from the resource extraction industry, and in July 2013, the U.S. District Court for the District of Columbia invalidated the SEC's final rule, declaring the rule outside of the agency's authority.

This Note will discuss the background of Dodd–Frank and Section 1504, along with a brief history of resource extraction industry transparency initiatives and how the case ended up in court. This Note will then analyze the court's decision in light of administrative agency deference and where the decision leaves the interested parties. Finally, this Note will discuss developments after the court's decision and will offer a recommendation on both the final form of the Section 1504 rule and what resource extraction issuers should do to prepare for the eventual rule.

II. BACKGROUND

A. Introduction to Dodd–Frank Section 1504

While Section 1504 did not become law until it was included in the Dodd–Frank Act, discussion about disclosure by resource extraction issuers predated the Act. The discussion can be traced back to the "Publish What You Pay" movement within the industry, which dates back to the 1990s. This movement eventually culminated in Section 1504 becoming law in 2010.

1. The Dodd–Frank Act

As the smoke cleared from the financial crisis of 2008, it became apparent that extensive financial regulation was on the horizon.[3] Following the worst economic downturn since the Great Depression,[4] Congress enacted the Dodd–Frank Act.[5] This enormous act, over 845 pages long, covers everything from the creation of new government

1. The Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, *available at* http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

2. *Id.* at § 1504.

3. Robert A. Eisenbeis & George G. Kaufman, *The World of Unintended Consequences: A Post Mortem on Regulation Q and Prologue for the Future*, *in* THE FINANCIAL CRISIS AND THE REGULATION OF FINANCE 175, 175 (Christopher J. Green et al. eds., 2011).

4. *Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression*, REUTERS, (Feb. 27, 2009, 10:22 AM), http://www.reuters.com/article/2009/02/27/idUS193520+27-Feb-2009+BW20090.

5. The Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, *available at* http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

councils[6] to complete overhauls of the mortgage lending industry.[7] Among the Act's miscellaneous provisions was Section 1504, which added a new Section 13(q) to the Securities Exchange Act of 1934, requiring the Securities and Exchange Commission (SEC) to develop disclosure rules for resource extraction issuers operating in foreign markets.[8]

2. A Brief History of Section 1504

Congress introduced Section 1504 as an amendment to the proposed bill in 2010.[9] In discussing the bill, Senator Ben Cardin lauded the proposal for increasing transparency for both investors and companies, especially in regions of the world prone to political instability.[10] While Senator Cardin focused on the provision's potential to make U.S. firms more competitive,[11] Senator Richard Lugar voiced another rationale for the bill, one focused on addressing the "resource curse," the theory that a wealth of natural resources impairs economic development in many countries.[12] Senator Lugar argued that increasing transparency across the board was at the heart of the reform effort and that transparency would allow investors "sufficient information" to judge their investments.[13] This amendment was added to the final Dodd–Frank Act as Section 1504 under Title XV, "Miscellaneous Provisions."[14]

3. History of Resource Extraction Transparency Initiatives

Senators Cardin and Lugar's proposed framework was remarkably similar to a bill they proposed in 2009.[15] Even at the time of proposal, the Senators acknowledged that there is a similar, industry-led disclosure movement called the Extractive Industries Transparency Initiative (EITI).[16] The EITI, created in 2003, is the culmination of a late 1990's industry movement to "Publish What You Pay" for extraction.[17] The EITI is designed to allow the industry to collectively challenge countries that prohibited disclosure

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6. *Id.* at § 111.

7. *Id.* at § 1400.

8. *Id.* at § 1504. Under the section, "resource extraction issuers" are companies engaged in the "commercial development of oil, natural gas, or minerals" and already have to file reports with the SEC. *Id.*

9. 156 CONG. REC. S3814 (daily ed. May 17, 2010).

10. *Id.* at S3815 (statement of Sen. Ben Cardin).

11. *Id.*

12. *Id.* at S3816 (statement of Sen. Richard Lugar). The "resource curse" is the theory that "oil or natural gas reserves can be a bane for many poor countries, leading to fraud, corruption, wasteful spending, military adventurism and instability." S. REP. NO. 110-49, at 2 (2008), *available at* http://www.gpo.gov/fdsys/pkg/ CPRT-110SPRT44727/pdf/CPRT-110SPRT44727.pdf.

13. *Id.*

14. Dodd–Frank Act § 1504.

15. 156 CONG. REC. S3815 (daily ed. May 17, 2010) (statement of Sen. Richard Lugar); *see* Energy Security Through Transparency Act of 2009, S. 1700, 111th Cong. (2009), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111s1700is/pdf/BILLS-111s1700is.pdf (providing an earlier bill that would have required a similar disclosure of payments).

16. 156 CONG. REC. S3816 (statement of Sen. Lugar).

17. *History of EITI*, EITI, http://eiti.org/eiti/history (last visited Jan. 17, 2015). "Publish What You Pay" developed in response to a 1999 report detailing the "complicity of the oil and banking industries in the plundering of state assets during Angola's 40-year civil war." *History: Publish What You Pay*, PUBLISH WHAT YOU PAY, http://www.publishwhatyoupay.org/about/history (last visited Jan. 17, 2015).

of payments through a collective international program.[18]

The EITI allows countries to apply for admission to the standard and requires countries to adhere to a number of rules mandating transparency by their resource extraction issuers.[19] EITI allows protection in numbers for resource extraction issuers to prevent government abuse by creating a unified rule that applies to all members.[20] The United States was not a member of the EITI at the time Dodd–Frank was enacted.[21]

B. Section 13(q) and the SEC's Rule

Passing Section 1504 did not create an actual rule. It merely authorized the SEC to promulgate a functional rule that would meet the goals of Dodd–Frank. After soliciting comments from the public, the SEC issued the final functional rule in 2012, triggering industry litigation against the SEC.

1. Section 13(q)

Section 1504 did not itself create a mandate; instead, it created Section 13(q) as an amendment to the Securities Exchange Act of 1934.[22] Section 13(q) requires the SEC to create a rule for annual disclosure by resource extraction issuers.[23] Section 1504 requires resource extraction issuers to report their information in an interactive data format.[24] Finally, the rule contains a public disclosure provision: "To the extent practicable, the Commission shall make available online, to the public, a compilation of the information required to be submitted."[25] Section 13(q) also allows the SEC to consult with anyone it feels is useful in generating the rule.[26]

2. Comment Period

On December 15, 2010, the SEC released the proposed rule for Section 1504.[27] Within the rule, the SEC requested comments on a number of issues including: possible exemptions for smaller companies, the issue of "not de minimis" payments, exceptions when disclosure would violate the host country's laws, and technical issues over the form of disclosures.[28] The SEC, however, never explicitly requested comments regarding the public availability of the disclosed information.[29] The window for comments closed on

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18. *History of EITI*, *supra* note 17.

19. *See generally EITI Standards*, EITI INTERNATIONAL SECRETARIAT, (July 11, 2013), http://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf.

20. *History of EITI*, *supra* note 17. In 2001, BP's attempt to disclose payments made to the Angolan government were met with "backlash and threats" from Angola, and showed that a "unilateral approach" was "not workable." *Id.*

21. The United States has since made a commitment to adopt the EITI standard. *See infra* Part III.C(1)(A).

22. Dodd–Frank Act § 1504.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Disclosure of Payments by Resource Extraction Issuers Proposed Rule, Exchange Act Release No. 34-63549 (Dec. 15, 2010), *available at* http://www.sec.gov/rules/proposed/2010/34-63549.pdf [hereinafter Proposed Rule].

28. *Id.*

29. *Id.*

January 31, 2011, giving commentators approximately a month and a half to submit comments.[30]

The comments revealed that the most contentious provisions included host country exemptions and public disclosure of entire reports.[31] Some commentators noted that the lack of exemptions could make eligible companies less competitive in the international market,[32] a complaint also levied against the public disclosure requirements.[33] While the SEC had considered the costs of implementation of the regime,[34] commentators felt the analysis overlooked the potential that the law would eventually lead to billions of dollars in losses by forcing companies to abandon investments in countries outlawing disclosure.[35]

3. SEC's Final Rule

Starting on November 30, 2012, the SEC rule would require any company that had to file a report with the SEC to include a report of its government payments.[36] The rule does not allow for an exemption to this requirement.[37] The disclosure rule would only apply to payments that are "not de minimis," which the SEC interpreted as payments in excess of $100,000.[38] The disclosure would be through a new form (Form SD), uploaded to the SEC's EDGAR online reporting platform.[39] Critically, all reports uploaded to EDGAR would be accessible in their entirety to the public.[40] The SEC decided that an EDGAR disclosure, available in its entirety, fit with Section 13(q)'s intent and that Congress did not intend the SEC to treat this disclosure differently than other Exchange Act disclosures.[41] The first reports would be due for fiscal years ending after September 30, 2013.[42]

4. American Petroleum Institute Lawsuit

During the comment period, few institutions offered more commentary than the American Petroleum Institute (API).[43] API is a trade association that "represents all aspects of America's oil and natural gas industry."[44] API's mission is quite broad, including

30. *Id.*

31. *See supra* Parts III.A(2) and (3) (discussing these rules and comments about their inclusion during the court's analysis).

32. Letter from American Petroleum Institute to Elizabeth M. Murphy, Secretary of the SEC (May 18, 2012), *available at* http://www.sec.gov/comments/s7-42-10/s74210-385.pdf.

33. Letter from American Petroleum Institute to Elizabeth Murphy, Secretary of the SEC (Aug. 11, 2011), *available at* http://www.sec.gov/comments/s7-42-10/s74210-107.pdf [hereinafter Letter to the SEC].

34. Proposed Rule, *supra* note 27.

35. Letter to the SEC, *supra* note 33.

36. Disclosure of Payments by Resource Extraction Issuers Final Rule, Exchange Act Release No. 34-67717 (Aug. 22, 2012), *available at* http://www.sec.gov/rules/final/2012/34-67717.pdf [hereinafter Final Rule].

37. *Id.* at 13.

38. *Id.* at 14.

39. *Id.* at 16.

40. *Filings & Forms*, SEC EDGAR, http://www.sec.gov/edgar.shtml (last visited Jan. 17, 2015).

41. Final Rule, *supra* note 36, at 845.

42. *Id.* at 2.

43. The group was responsible for at least ten comment letters, either as the sole commentator or as part of a larger collection of companies. *See* Comments on Proposed Rule: Disclosure of Payments by Resource Extraction Issuers Release No. 34-63549, *available at* http://www.sec.gov/comments/s7-42-10/s74210.shtml (last visited Jan. 17, 2015).

44. *API Overview and Mission*, AMERICAN PETROLEUM INSTITUTE, http://www.api.org/globalitems/

advocacy, education, certification, standards, and research about the oil and natural gas industries in the United States.[45] Membership in the group includes companies involved at all stages of oil and natural gas production.[46]

As part of its advocacy program, the API initiated two suits against the SEC's rule on October 10, 2012.[47] The suits, filed in both the Court of Appeals for the District of Columbia Circuit and in the District Court for the District of Columbia, addressed different jurisdictions but were materially similar.[48] After evaluation, the court of appeals had jurisdiction and the parties dismissed the district court complaint.[49]

III. ANALYSIS

A. American Petroleum Institute v. SEC

The court invalidated the SEC's final rule in 2013.[50] This ruling relied heavily on the SEC's admission that it was compelled to provide public disclosure with no exemptions as part of the rule. The court rejected this claim and remanded the rule to the SEC for further action.

1. Standard of Review

At the outset of litigation, both the SEC (supported by intervenor Oxfam America[51]) and API moved for summary judgment.[52] While Federal Rule of Civil Procedure 56(a) normally governs summary judgment,[53] review of a regulatory agency final rule falls under the Administrative Procedure Act (APA).[54] The judge rules as a matter of law in much the same way that she would through summary judgment, assuming no genuine issues of material fact exist.[55] The court applies the APA statutory test, which requires the rule to

globalheaderpages/about-api/api-overview (last visited Jan. 17, 2015).

45. *Id.*

46. *Id.* This means that while a majority of the membership base is comprised of small companies, enormous corporations like ExxonMobile, BP America, and Dow Chemical are among the interests represented by the group. *API Member Companies*, AMERICAN PETROLEUM INSTITUTE, http://www.api.org/globalitems/globalheaderpages/membership/api-member-companies (last visited Jan.17, 2015).

47. Carlton Carroll, *API Files Court Challenge Against Costly, Anti-Competitive SEC Rule*, AMERICAN PETROLEUM INSTITUTE (Oct. 10, 2012), http://www.api.org/news-and-media/news/newsitems/2012/oct-2012/api-files-court-challenge-against-costly-sec-rule.

48. Donna Cline, *Transparency Win*, EG JUSTICE (Apr. 26, 2013), http://www.egjustice.org/post/transparency-win.

49. *See id.* (This led to some claims of victory by advocacy groups, even though the decision was based on jurisdictional grounds and had little to do with the merits of the case.).

50. Am. Petroleum Inst. v. SEC, 953 F.Supp.2d 5 (D.D.C. 2013).

51. Oxfam America is one of 17 members of Oxfam International, which works "to right the wrongs of poverty, hunger, and injustice." *Inside Oxfam America*, OXFAM AMERICA, http://www.oxfamamerica.org/explore/inside-oxfam-america/ (last visited Jan. 25, 2015). Oxfam America had been interested in the SEC's rule long before the API suit; in fact, Oxfam sued the SEC in May 2012 after the SEC missed the original deadline to issue a rule. *Oxfam America Files Lawsuit Against Securities and Exchange Commission*, OXFAM AMERICA (May 16, 2012), http://www.oxfamamerica.org/press/oxfam-america-files-lawsuit-against-securities-and-exchange-commission/.

52. Am. Petroleum Inst. v. SEC, 953 F.Supp.2d 5, 11 (D.D.C. 2013).

53. *Id.* (citing FED. R. CIV. P. 56(a)).

54. *Id.* (citing 5 U.S.C. § 706).

55. *Id.* (citing Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001)) (noting that the

be reasonably related to the legislature's intent and within the law's scope.[56] This evaluation is entirely based on the administrative agency's record provided to the court.[57]

2. Court's Statutory Ambiguity Analysis

The court began its analysis of the rule[58] by examining whether the rule's public disclosure component[59] complied with the established language of Section 1504.[60] The court determined that the final rule, which required public disclosure of the annual reports,[61] included complete public disclosure because the SEC concluded it was bound by the text of the legislation.[62] To determine the validity of the final rule, the court next applied the *Chevron* test.[63] The *Chevron* test first asks if Congress has "spoken directly" on the issue in question; if so, the rule must follow the "unambiguously expressed intent" of the legislature.[64] If the legislature has been silent on the issue, then the court moves to determine if the rule is within a "permissible construction" of the statute.[65] If the rule falls within a permissible construction, the court will defer to the agency in question to impose the rule.[66]

The court, however, has recognized this deference only when the agency has "exercised its own judgment" when interpreting the statute.[67] When the agency assumes that the first step of the *Chevron* test is complete without further analysis, the court will not defer to the agency.[68] Because of this assumption, the court requires Congress to have "spoken directly on this precise issue" before granting deference.[69]

The court next looked to see whether Congress had, in fact, spoken directly on the issue.[70] It began by examining the plain language of the statute, which includes looking at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[71] The court determined that the word "disclosure," as it

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court analyzes agency rules as a matter of law).

56. *Id.* ("[A] court must 'hold unlawful and set aside agency action, findings, and conclusions' that are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' in excess of statutory authority, or 'without observance of procedure required by law'") (quoting 5 U.S.C. § 706 (citations omitted)).

57. *Am. Petroleum Inst.*, 953 F.Supp.2d at 11 (citing Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–44 (1985)).

58. *Id.* (analyzing whether there was a violation of the First Amendment).

59. Final Rule, *supra* note 36, section (2)(A).

60. Dodd–Frank Act § 1504.

61. Final Rule, *supra* note 36, section (2)(A).

62. *Am. Petroleum Inst.*, 953 F.Supp.2d at 13; *see also* 17 C.F.R. §§ 240–249 (2012).

63. *Am. Petroleum Inst.*, 953 F.Supp.2d at 12–13 (citing Chevron USA Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

64. *Id.* (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

65. *Id.* (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

66. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984).

67. *Am. Petroleum Inst.*, 953 F.Supp.2d at 13 (quoting Transitional Hosps. Corp. v. Shalala, 222 F.3d 1019, 1024 (D.C. Cir. 2000)). The court viewed the SEC decision as an internal one, as opposed to coming from a direct congressional mandate. *Id.*

68. *Id.* ("Here, then, the Commission 'itself has stopped at step one,' believing 'that it is without discretion to reach another result.'") (quoting Arizona v. Thompson, 281 F.3d 248, 254 (D.C. Cir. 2002)).

69. *Id.* (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984)).

70. *Id.*

71. *Id.* (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

appears in the statute, did not constitute a mandate for public disclosure.[72] Neither did the term "annual report," because that phrase, in its ordinary meaning, does not imply that the report must be public.[73]

The court then moved to an analysis of 13(q) as a whole and noted that while Section (2)(A) does not specifically mention "public" disclosure, Section (3)(A) does.[74] This led the court to presume that if Congress had wanted the annual reports to include public disclosure, then Congress would have added the word "public" to Section (2)(A).[75] Here, the court noted that "disclosure" is actually broader than the "public availability" component of the statute.[76] The "public availability" component of Section (3)(A) is subject to both "a compilation of the information" and "[t]o the extent practicable" limitation.[77] The court examined the Exchange Act in its entirety and found that the other references to "report" do not carry a "public availability" implication; in fact, "report" is often used to denote information only available to the SEC.[78]

Finally, the court addressed the arguments of both the SEC and Oxfam that the public disclosure requirement should remain in the final rule.[79] The court dismissed the SEC's claim that public disclosure is "presumed" because the Exchange Act is primarily a "public disclosure" law.[80] The court stated that this is because 13(q) has a "global political concern" not found in other Exchange Act provisions, does not carry a "presumption" of disclosure under statutory analysis, and "report" is not used anywhere else in the Exchange Act to require public disclosure.[81] This language would also prevent Congress from assuming all reports would be public.[82]

The court also rejected the SEC's claim that the word "compilation" required compiling all of the information in the annual reports together.[83] The court stated that this narrow reading of "compilation" ignores the plain language ability for compilations to include edited information.[84] The "[t]o the extent practicable" language would also lead to the conclusion that not all of the information disclosed to the SEC has to be available to the public.[85] The court similarly rejected Oxfam America's public disclosure claims.[86]

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72. *Am. Petroleum Inst.*, 953 F.Supp.2d at 14.

73. *Id.*

74. *Id.*

75. *Id.* ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

76. *Id.*

77. *Am. Petroleum Inst.*, 953 F.Supp.2d at 15 (citing 15 U.S.C. § 78m(q)(3)(A)).

78. *Id.* (citing 15 U.S.C. § 78m(f)(4)).

79. *Id.* at 20–24.

80. *Id.* at 14.

81. *Id.*

82. *Am. Petroleum Inst.*, 953 F.Supp.2d at 16.

83. *Id.*

84. *Id.* at 15 (listing a number of different ways "compilation" has been read to include edited information).

85. *Id.*

86. *Id.* at 20 (concluding that comments by the legislation's supporters are not a "legitimate tool of statutory construction," (quoting Bruesewitz v. Wyeth, LLC, 131 S. Ct. 1068, 1081 (2011) and that even if the SEC's rule was reasonable, it would be invalidated as black letter law (citing Arizona v. Thompson, 281 F.3d 248, 259 (D.C. Cir. 2002))).

3. Rejection of Any Disclosure Exemption

After ruling against the public disclosure requirement, the court next addressed the rule's complete lack of exemptions.[87] The court noted that many of the comments on the proposed rule expressed concern that companies could suffer "potential losses of many billions of dollars" in countries that prohibit disclosure.[88] The SEC decided that allowing these exceptions would undermine the purpose of the law and declined to adopt exemptions in the final rule.[89] The court ruled that this was an incorrect reading of Section 13(q)'s language "[t]o the extent practicable," which the court found evidenced an "openness to exemption."[90] The court stated that while the SEC had a valid concern that exemptions would encourage other countries to limit disclosure to avoid the rule, the rule was still invalid because the court was not sure the SEC would have adopted this rule absent the "flawed rationale" already discredited.[91]

4. API's Additional Claims and Conclusion

Because the court concluded that its analysis had already invalidated the rule, it declined to address API's First Amendment claim or their other claims under the APA.[92] With the rule still pending implementation, the court decided to both vacate the rule and remand it to the SEC to address the rule's "grave" deficiencies.[93] Theoretically, this should give the SEC 270 days from the end of the case to create a new final rule that would address the court's concerns.[94]

B. Examining the Court's Decision

The court's ruling relies heavily on the *Chevron* test. In particular the ruling focuses on how subsequent case law has modified the application of the test. The court also implied that existing statutes may complicate an agency's analysis of a congressional rulemaking mandate.

1. Limiting Deference to Administrative Action and the Chevron *Test*

When coming to its decision in API, the D.C. District Court rejected the notion that the court should defer to the SEC's proposed rule, simply because the agency promulgated

87. *Am. Petroleum Inst.*, 953 F.Supp.2d at 21.

88. *Id.*

89. *Id.* at 21–23; *see also* Final Rule, *supra* note 36, at 202 (explaining why the SEC chose not to adopt exemptions).

90. *Am. Petroleum Inst.*, 953 F.Supp.2d at 22.

91. *Id.* (citing Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 839 (D.C. Cir. 2006)). The court even questioned this rationale, noting that any number of narrow exemptions would address both the SEC's concerns about exploitation and commentators' concerns. *Id.*

92. *Am. Petroleum Inst.*, 953 F.Supp.2d at 23. The court also noted that a First Amendment analysis would be nearly impossible until the Commission interpreted and enforced the rule. *Id.*

93. *Id.* at 23–24.

94. Letter from Oxfam America to Mary Jo White, Chair of the SEC (Sept. 26, 2013), *available at* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-4.pdf [hereinafter Letter from Oxfam].

the details.[95] The first step for this analysis is the APA,[96] where the court will act as an appellate tribunal to determine if the agency's action is "arbitrary and capricious."[97] In this case, the court began by applying the *Chevron* framework.[98] This two-part framework starts by looking at Congress's intent; if the statute precludes a finding of Congress's intent, then the court will defer to the agency provided the promulgated rule is within the "permissible construction of the statute."[99]

However, more recent court cases have modified how the *Chevron* test is applied; before moving to the second *Chevron* step, the court will ask if the agency acted with the mistaken belief that the law compelled this particular action.[100] If the court finds the agency acted with such mistaken belief, the court will not permit deference under the second *Chevron* step.[101] The court found clear evidence that the SEC required public disclosure because the agency believed Congress required it.[102] As a result of this finding, the court's *Chevron* analysis would require nothing short of express intent from Congress; ambiguities in intent that would normally trigger second-step deference would no longer be sufficient.[103] Many commentators have applauded this approach, arguing that the *Chevron* test as constructed was far too deferential to administrative action.[104]

2. Exemptions and Cost-Benefit Analysis

While the court used a modified *Chevron* test to reject deference for public disclosure, the court made a clear determination that the exemption denial was "arbitrary and capricious," even before a *Chevron* analysis.[105] The court noted that even though the SEC has the discretion to grant exemptions,[106] another statutory provision could require the SEC to grant exceptions in situations where it could create an undue cost for companies.[107]

C. Where Does the Judgment Leave the Interested Parties?

The court's rejection of the SEC's final rule may end the discussion for now, but

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95. *Am. Petroleum Inst.*, 953 F.Supp.2d at 13.

96. 5 U.S.C. § 706 (2013).

97. *Am. Petroleum Inst.*, 953 F.Supp.2d at 20; *see also* Univ. Med. Cent. of S. Nev. v. Shalala, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999) (discussing the court's role when reviewing agency action).

98. *Am. Petroleum Inst.*, 953 F.Supp.2d at 12. For more on the *Chevron* framework as applied to the Dodd–Frank Act, *see generally* John F. Cooney, *Chevron Deference and the Dodd-Frank Act*, 37 ADMIN. & REG. L. NEWS 7 (2012).

99. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

100. *Am. Petroleum Inst.*, 953 F.Supp.2d at 5, 12; *see* Phillips Petroleum Co. v. FERC, 792 F.2d 1165, 1169 (D.C. Cir. 1986) (applying this standard to the *Chevron* framework).

101. *Am. Petroleum Inst.*, 953 F.Supp.2d at 12 (citing Transitional Hosp. Corp. v. Shalala, 222 F.3d 1019, 1024 (D.C. Cir. 2000)).

102. *Id.* The SEC's final rule laid out this belief: "[W]e believe Section 13(q) *requires* resource extraction issuers to provide the payment disclosure publicly . . . ." 77 Fed. Reg. 56,365, 56,401 (Sept. 12, 2012).

103. *Am. Petroleum Inst.*, 953 F.Supp.2d at 13.

104. *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989) (discussing the theoretical underpinnings of the *Chevron* analysis and the role of the judiciary in challenging administrative interpretations of law).

105. *Am. Petroleum Inst.*, 953 F.Supp.2d at 12.

106. 15 U.S.C. § 78*l*(h) (2013).

107. *Am. Petroleum Inst.*, 953 F.Supp.2d at 21(discussing how a provision prohibiting unnecessary burdens on competition could compel exemptions in this case) (citing 15 U.S.C. § 78w(a)(2)).

Section 1504 still requires some new disclosure requirements. Resource extraction issuers will still have to update their disclosure practices in the near future, while the SEC will have to modify their rule and potentially face additional litigation. The SEC has targeted March 2015 to release an updated version of the rule, which has been unpopular with many human rights groups like Oxfam America.[108]

1. Resource Extraction Issuers

a. Eventual Disclosure Requirements

While it appears that resource extraction issuers "won" against the SEC's final rule, the ruling does not exactly leave resource extraction issuers to act as they have done in the past.[109] Section 1504 of Dodd–Frank still requires the SEC to issue a disclosure rule for payments made to foreign governments.[110] Because a substantial number of requirements are laid out in the text of Dodd–Frank, the next proposed rule will have to be similar to the rule that was rejected in *API*.[111] This is not to say that the industry did not benefit from the *API* ruling; the court's decisions on public disclosure and the reasonableness of exceptions were in line with the industry's claim that the rules would make them less competitive.[112]

Even before the judgment, the U.S. oil industry, led by API, has pushed the Obama administration to adopt and implement EITI standards.[113] The U.S. government has taken clear steps toward adopting the EITI standards, including naming the Secretary of the Interior as the senior official responsible for monitoring the EITI application and adoption process.[114] Former Secretary of the Interior Ken Salazar created the USEITI group in late 2012,[115] which is responsible for implementing the EITI Standard in the United States and completing the application process.[116] Secretary Sally Jewell assumed the role[117] after Mr.

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108. *See Oxfam America Sues SEC over Delay on Oil, Gas and Mining Transparency Rules*, OXFAM AMERICA (Sept. 18, 2014), http://www.oxfamamerica.org/press/oxfam-america-sues-sec-over-delay-on-oil-gas-and-mining-transparency-rules/ (discussing how Oxfam has attempted to accelerate the SEC rule by suing for a second time).

109. *See generally* Letter from Oxfam, *supra* note 94 (listing the impact of *Am. Petroleum* on Section 1504 and its effect on the SEC).

110. Dodd–Frank Act § 1504.

111. *Id.* (requiring the actual disclosure by resource extraction issuers, requires that information to be submitted in an interactive electronic format, and "to the extent practicable" the information must be released to the public).

112. Carlton Carroll, *API Lauds Court Win Ending SEC's Anti-competitive Disclosure Rule*, AMERICAN PETROLEUM INSTITUTE (July 2, 2013), http://www.api.org/news-and-media/news/newsitems/2013/july-2013/api-lauds-court-win-ending-sec-anti-competitive-disclosure-rule.

113. *Id.*

114. *Interior Submits U.S. Candidacy Application for Extractive Industries Transparency Initiative*, DEPARTMENT OF THE INTERIOR (Dec. 19, 2013), *available at* http://www.doi.gov/eiti/FACA/upload/USEITI-Application-Background.pdf [hereinafter *Interior Submits U.S. Candidacy Application*]; *see The EITI Requirements*, EITI, http://eiti.org/eiti/requirements (last visited Jan. 17, 2015) (requiring applicant countries to appoint a senior official to oversee the process).

115. Lisa Ellman & Rhea Suh, *Sunshine Week: In Celebration of Transparency*, WHITE HOUSE BLOG (Mar. 14, 2013), http://www.whitehouse.gov/blog/2013/03/14/sunshine-week-celebration-transparency.

116. *U.S. Extractive Industries Transparency Initiative: About*, U.S. DEPARTMENT OF THE INTERIOR, http://www.doi.gov/EITI/index.cfm (last visited Jan. 17, 2015).

117. *Interior Submits U.S. Candidacy Application*, *supra* note 114, at 1.

Salazar's retirement,[118] which ensured that the United States could continue to pursue EITI candidacy. On March 19, 2014, the EITI board approved the United States' application for candidacy.[119] While the United States is dedicated to adopting the EITI standard, it is still unclear how Section 1504 would modify the EITI procedures.[120]

b. Financial Impact

The industry's primary complaint with the final rule as written is that it would make companies in U.S. stock markets less competitive in the international market.[121] At least one commentator argues that this requirement could force resource extraction issuers out of U.S. equity markets as a way to avoid the regulation.[122] As part of its analysis, the D.C. District Court specifically mentioned the statute's potential financial impact during the court's analysis of the exemption language.[123]

While resource extraction issuers were granted temporarily relief as a result of the case, it is important to note that other cases have allowed SEC disclosure regimes under Dodd–Frank.[124] In *National Association of Manufacturers v. SEC* (*NAM*),[125] the D.C. District Court upheld a similar SEC disclosure rule on conflict minerals from Dodd–Frank Section 1502; in that case, the SEC never indicated it felt "obligated" by the statute to create certain rules.[126] The *NAM* court then went on to find Section 1502 ambiguous in its disclosure requirements,[127] and upheld the rule under a full *Chevron* analysis.[128]

NAM also describes how the court would address the First Amendment claim presented in *API*, which the *API* court did not address.[129] In *NAM*, the court recognized that public disclosure of certain information as part of the SEC disclosure regime is subject to intermediate scrutiny.[130] The court then applied the so-called *Central Hudson*

118. *Salazar to leave Interior*, POLITICO (Jan. 16, 2013), http://www.politico.com//politico44/2013/01/salazar-to-leave-interior-154325.html.

119. Press Release, Department of the Interior, Extractive Industries Transparency Initiative Board Approves U.S. Candidacy Application (Mar. 19, 2014), *available at* http://www.doi.gov/news/pressreleases/extractive-industries-transparency-initiative-board-approves-us-candidacy-application.cfm.

120. *USEITI Overview*, USEITI, http://www.doi.gov/eiti/upload/C-A-Overview_09-25-13.pdf (noting that EITI reporting standards are pending, to allow the USEITI "[t]o align the definition of 'project' with SEC Regulation 1504 and European Union law per the EITI Standard.").

121. Complaint ¶ 3, Am. Petroleum Inst. v. SEC, 953 F.Supp.2d 5 (D.D.C. 2013) (C.A. No. 12-1668) 2012 WL 4803691. The rule only applies to companies required to file annual SEC reports, which includes publically traded companies. 15 U.S.C. § 78m(a) (2013).

122. *See generally* Branden Carl Burns, Note, *Will Oil And Gas Issuers Leave U.S. Equity Markets In Response To Section 1504 Of The Dodd-Frank Act? Can They Afford Not To?*, 2011 COLUM. BUS. L. REV. 758 (2011) (discussing how Section 1504 disclosure requirements could drive U.S.-based resource extraction issuers out of U.S. equity markets).

123. Am. Petroleum Inst. v. SEC, 953 F.Supp.2d 5, 10 (D.D.C. 2013) (discussing the concerns of commentators about potential losses for companies operating in countries that prohibit disclosure, specifically Angola, Cameroon, China, and Qatar).

124. *See generally* Nat'l. Ass'n of Mfrs. v. SEC, 956 F.Supp.2d 43 (D.D.C. 2013) (upholding the SEC final disclosure rules for conflict minerals, originally Dodd–Frank Section 1502).

125. *Id.*

126. *Id.* at 59.

127. *Id.*

128. *Id.* at 70.

129. Am. Petroleum Inst. v. SEC, 953 F.Supp.2d 5, 12 (D.D.C. 2013).

130. *Nat'l Ass'n of Mfrs.*, 956 F.Supp.2d at 77.

intermediate scrutiny test,[131] upholding the disclosure requirement as "directly advancing" a "substantial" government interest with a "reasonable relation" between the ends and the means.[132] The test as applied in *NAM*, which only examined the public disclosure requirement of the SEC's conflict mineral rule,[133] is applicable when the government compels commercial speech.[134] While the resource extraction issuer disclosure is similar on its face, the court in *API* declined to examine the First Amendment claim until the SEC creates a new final rule.[135]

2. The SEC

As previously discussed, the SEC must still create a rule that meets the component parts of Section 1504.[136] To emphasize this point, many of the Section's original supporters, including Senators Cardin and Lugar, wrote a letter expressing their desire for the SEC to quickly announce a new rule that would follow the original intent of the law and comply with the court's concerns.[137] In their letter, the Senators stressed that they supported the original rule in its entirety, including full public disclosure and excluding exceptions for resource extractions issuers in any situation.[138] Finally, the Senators asked the SEC to consider similar rules under consideration in the United Kingdom and France when designing the next iteration of the rule.[139] However, the API has attempted to complicate this interpretation by claiming the congressional mandate is not concerned with investor protections; the API claims that final rule should be "intended solely for broad social and foreign policy purposes associated with resource transparency" and not to increase information available to investors.[140]

Other commentators have noted that while the court threw out the rule, the SEC could pass another *Chevron* test if the SEC can show a rational basis for the choice.[141] Oxfam makes specific mention of the court's outcome in *NAM*, suggesting that reissuing the same rule with stronger rationale would be enough to push the law into, and past, the second step of the *Chevron* analysis.[142] Finally, Oxfam notes that after the court rejected the SEC rule, both the EU and EITI modified their public disclosure regimes to more closely follow the

131. *Id.* at 79 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1984)). In *Central Hudson*, the Supreme Court ruled that regulations on commercial speech are subject to intermediate scrutiny, which includes showing a "substantial" government interest. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564–65 (1984). The government must then show that the chosen regulatory action directly advances the government interest, and must be the least restrictive means to achieve that end. *Id.*

132. *Nat'l Ass'n of Mfrs.*, 956 F.Supp.2d at 77–82.

133. *Id.* at 78.

134. *Id.* at 77.

135. Am. Petroleum Inst. v. SEC, 953 F.Supp.2d 5, 23–24 (D.D.C 2013).

136. *See supra* Part III.C(1)(a)(explaining that the court's rejection of the SEC Rule left a hole that must be filled).

137. Letter from Senate to Mary Jo White, Chair of the SEC (Aug. 2, 2013), *available at* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-2.pdf.

138. *Id.*

139. *Id.*

140. *See* Letter from American Petroleum Institute to Elizabeth M. Murphy, Secretary of SEC (Apr. 15, 2014), *available at* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextraction issuers-34.pdf (discussing how additional information would be immaterial to most investors, and could actually harm shareholders).

141. Letter from Oxfam, *supra* note 94.

142. *Id.*

definitions set forth by the SEC.[143] Oxfam's letter also mentions that many other developed nations are moving toward adopting similar disclosure rules.[144]

IV. RECOMMENDATION

A. Eventual Section 1504 SEC Rule

Section 1504's final rule will undoubtedly resemble the rejected rule in some ways, but will be subject to the same analysis if it is challenged in court. The SEC will have to consider where to find authority for the new rule, and then address the public disclosure requirement, possible exemptions, and further litigation when redesigning the rule. This Part will examine each of these concerns and offer suggestions on how the SEC could address them in turn.

1. Court Deference

Even though the *API* court rejected the SEC's first rule, the SEC still has an obligation to create a rule that complies with the statutory language of the Dodd–Frank Act.[145] As noted before, Oxfam America has suggested that the SEC could reissue the same rule, provided the SEC offers sufficient evidence that it has made a decision within the intent of the legislation.[146] Oxfam suggests that the SEC's belief in a mandatory course of action is the key to the case; if the SEC can introduce evidence of independent evaluation, the rule would pass a *Chevron* analysis.[147]

While this analysis is theoretically sound, it seems that attempting to pass a rule that has been rejected by the court—but under a different rationale—would prove to be a poor choice for the SEC. The court in *API* made it clear that when multiple rationales are offered for one rule, and at least one of those rationales is "deficient," the court will still invalidate the rule unless the agency can show it would have adopted the rule "absent the flawed rationale."[148] When creating the new rule, the SEC should be wary that even if it can come up with new rationales, another court would likely examine the *API* decision and could invalidate the rule again. This could prolong the implementation of the rule for years, and force the SEC to continue to expend resources to create a new rule. It seems that the best course of action for the SEC would include extensive analysis to support any new rationales, as well as modify some specific provisions to address the *API* ruling. This rationale must avoid the assumption that the statute requires a particular reading, and should instead focus on the public policy considerations behind each step recommended by the SEC. This approach would likely assure a future court that the SEC is no longer relying on an improper assumption about the role of the statute.

143. *Id.* (describing how the EU rules cover more industries, private companies, and a broader definition of "project;" the EITI amendments include following the EU's standards).

144. *Id.* (mentioning countries like Switzerland, Norway, and Canada).

145. *Supra* Part III.C.1.a (discussing the how Dodd–Frank requires the SEC to implement a disclosure standard).

146. *Id.*

147. Letter from Oxfam, *supra* note 94.

148. Am. Petroleum Inst. v. SEC, 953 F.Supp.2d 5, 22 (D.D.C. 2013).

2. Public Disclosure Requirement

The first component to consider is the public disclosure requirement. In the original rule, the SEC required resource extraction issuers to file Form SD disclosures on the SEC's public EDGAR system.[149] This would allow the general public to get detailed information about individual projects by resource extraction issuers in each country. The court specifically rejected this full public disclosure, noting that Congress had not provided the clear mandate the SEC assumed.[150]

To better accommodate the original intent of the legislation, the SEC needs to first define the goal of this legislation. Senators Cardin and Lugar's remarks at the time of proposal, coupled with their comments after the *API* ruling, should help create a foundation for this analysis.[151] After establishing legislative intent, the SEC should create a rule that would meet this intent but that would also accommodate the court's concerns about disclosure of proprietary information and compilation. First, the SEC should allow firms to confidentially file Form SD. Confidential reporting should allay fears that the EDGAR reporting system would reveal any trade secrets or proprietary methods. The SEC should then compile and report this information to the public in an interactive data format—including data about total expenditures by resource extraction issuer and total paid in each country.

By only basing the public disclosure on two levels, the SEC can meet the legislation's intended goals while still protecting proprietary information of resource extraction issuers. This would allow investors to evaluate the resource extraction issuers, and allow international citizens to examine how much money their governments have taken in from foreign companies. By compiling the data in aggregate instead of by project, the SEC can maintain institutional access to project-level data. This approach preserves the legislative intent of project accountability without creating an unnecessary cost for resource extraction issuers. This rule is likely sufficiently different from the original that the court would not invalidate the provision.

3. Exemptions

The SEC's original rule offered no exemptions to the disclosure of payments requirement.[152] In rejecting the rule, the *API* court decided that prohibiting exemptions for companies operating abroad actually violated the SEC's mandate to not impose regulations that would unnecessarily burden competition.[153] The court noted that the SEC not only has the authority to grant exemptions, but that some situations may require the SEC to grant those exemptions. Occasionally, this inherent obligation could override normal deference to the rules.[154]

One way to address these concerns is to grant an exception for companies in very limited circumstances. The court considered offering exemptions to resource extraction

149. *Supra* Part II.B.3.

150. *Supra* Part III.A.2.

151. *See supra* Parts II.A.2 and III.C.2 (discussing the Senators' comments about the legislation at the time of adoption).

152. *See supra* Part II.C.2 (explaining that the SEC's proposed rule for Section 1504 did not include exemptions for disclosures, drawing criticism from commentators before the rule was implemented).

153. *Am. Petroleum Inst*., 953 F.Supp.2d at 11.

154. *Id.* at 13.

issuers in four countries that already prohibit disclosure.[155] Another proposed solution includes setting a date by which countries must declare a prohibition on disclosure.[156] Neither of these seem particularly well suited to the goals of the legislation; under either proposal, a country could simply decide not to allow disclosure to limit information available to the public. A better solution is to include an exemption for resource extraction issuers that are already operating in those four countries. These companies would still be responsible for disclosing their operations in countries that do not prohibit disclosure. While this would not be a perfect rule, it would allow the SEC to limit the exemptions to those resource extraction issuers that are already subject to them, and would not deter other companies from entering those markets that choose to prohibit disclosure. The most significant problem with this course of action is that it does not address countries that may later prohibit disclosure, forcing resource extraction issuers to violate the laws of other countries to meet U.S. disclosure requirements. The impact of this exemption regime should diminish as more and more countries adopt the EITI criteria, which are very similar to the final Section 1504 suggestions.

B. Resource Extraction Issuers

While the API decision has allowed resource extraction issuers to temporarily avoid the new rule, issuers will eventually be subject to a new disclosure regime under Section 1504. Even though there are still some unresolved issues regarding disclosure (including the First Amendment implications of forced disclosure),[157] they will have to comply with a final rule as long as the underlying legislation requires an SEC disclosure rule. For resource extraction issuers, other cases indicate that they will most likely lose on their First Amendment claim under the *Central Hudson* test;[158] the SEC requires disclosure for any number of issues, and the D.C. District Court has recently upheld a similar rule issued under Dodd–Frank.[159]

For resource extraction issuers, the best way forward may be to begin designing a compliance regime in line with EITI standards. As the EITI standards are modified to better align with proposed U.S. requirements, complying with those standards should allow resource extraction issuers to easily comply with the SEC's eventual rules. Designing a compliance regime should now lower the eventual costs of compliance, and will allow resource extraction issuers to seamlessly work in countries around the world as the EITI standards continue to expand.

The SEC has the opportunity to release a rule that is substantially similar to the final rule rejected in *API*. In creating a new set of rules to comply with the *API* court and legislative intent, the SEC must ensure that it presents a sufficient record of investigation to validate its position. Regardless of its eventual form, the rule will likely have to survive a second *Chevron* analysis under another lawsuit, especially if the new rule adopts many of the original provisions. If the SEC can show that it considered many options and has

155. *Id.* at 10. These four countries—Angola, Cameroon, China, and Qatar—came up quite frequently in comments. *Id.*

156. *Id.*

157. *Am. Petroleum Inst.*, 953 F.Supp.2d at 23.

158. *See supra* Part III.C.1.B. This is a simple prediction based on prior court tests; an in-depth analysis about the tensions between First Amendment rights and disclosure requirements is outside the scope of this Note.

159. *See id.*

designed a sufficient rationale to justify the rule, the rule should pass the *Chevron* test. Finally, if the rule does pass *Chevron* scrutiny, the rule would force resource extraction issuers to comply with the new rule. It is in their best interest to begin designing compliance programs based on EITI now, as to better prepare themselves for the eventual SEC rule. While these groups originally looked to the EITI to fight the Dodd–Frank rule, adoption of SEC definitions by the EITI have eliminated many of the differences between the two forms, leaving resource extraction issuers with very few choices.

V. CONCLUSION

As a result of Dodd–Frank, the SEC's responsibilities include creating a resource extraction issuer disclosure rule. The first final rule did not survive review by the D.C. District Court, thanks in part to the SEC's failure to give a substantial rationale for public disclosure or at the minimum consider disclosure exemptions. By offering a rationale and modifying the rules to accommodate the court's concerns, the SEC has the opportunity to create a final rule that both fulfills congressional intent and the D.C. Court's concerns.