CASE WILL BE SUBMITTED WITHOUT ARGUMENT ON MAY 15, 2013

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, Petitioners, vs. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Respondent, AMNESTY INTERNATIONAL USA; AMNESTY INTERNATIONAL LTD., Intervenors for Respondent	)	No. 12-1422

PETITIONERS' MOTION TO TRANSFER
AND FOR LEAVE TO FILE UNDER CIRCUIT RULE 27(g)

Pursuant to 28 U.S.C. § 1631, Petitioners respectfully move the Court to transfer this case to the U.S. District Court for the District of Columbia. Petitioners have consulted with the SEC concerning this motion, and the SEC has advised that it does not oppose the transfer.

28 U.S.C. § 1631 provides that when "a petition for review of administrative action" is filed with a court, "and that court finds that there is a

want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed." Following such a transfer, "the action or appeal shall proceed as if it had been filed in … the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred." *Id.*

On August 22, 2012, the SEC adopted Rule 13p-1 and Form SD, *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012), promulgated pursuant to Section 1502 of the Dodd-Frank Act, 15 U.S.C. § 78m(p). Petitioners filed a petition for review of this Rule on October 22, 2012. On April 26, 2013, this Court decided *American Petroleum Institute v. SEC*, No. 12-1398, 2013 WL 1776467. The Court held that it lacked jurisdiction over a petition for review challenging an SEC rule adopted pursuant to 15 U.S.C. § 78m(q), because the rule was not an "order" within the meaning of 15 U.S.C. § 78y(a)(1), and was not promulgated pursuant to one of the provisions enumerated in 15 U.S.C. § 78y(b). *Id.*, Slip Op. at 6-7. Accordingly, the Court held, "a party must first proceed by filing suit in district court pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq." *Id.*, Slip Op. at 6.

As Petitioners noted in their opening brief, this case presents the same jurisdictional issue as *American Petroleum Institute v. SEC*. As in that case, Petitioners are challenging an SEC rule adopted pursuant to a provision not

enumerated in 15 U.S.C. § 78y(b). Therefore, under this Court's holding in *American Petroleum Institute*, this Court lacks jurisdiction over this case as well; jurisdiction instead lies in the district court.

Because this Court lacks jurisdiction, Petitioners request that the case be transferred to the U.S. District Court for the District of Columbia. The suit "could have been brought" in that district court "at the time it was filed" in this Court. 28 U.S.C. § 1631. The petition for review was filed on October 22, 2012, well within the applicable statute of limitations, and venue is proper in the U.S. District Court for the District of Columbia. 28 U.S.C. § 2401(a) (providing a six-year statute of limitations for suits against the government); *Harris v. FAA*, 353 F.3d 1006, 1009 (D.C. Cir. 2004) (holding that 28 U.S.C. § 2401(a) applies to APA actions unless another statute prescribes otherwise); 5 U.S.C. § 703 (authorizing suit for judicial review of agency action "in a court of competent jurisdiction"); 28 U.S.C. § 1391(e) (suit may be brought against the government in any district where a defendant resides or a substantial part of the events at issue occurred).

Furthermore, transferring this case is "in the interest of justice." 28 U.S.C. § 1631. A transfer is in the interest of justice when a party understandably believed that it had filed in the proper forum. *Sharon v. United States*, 802 F.2d 1467, 1468 (D.C. Cir. 1986) ("Transfer is warranted when it would aid litigants who were confused about the proper forum for

review."(internal quotation marks omitted)); *Five Flags Pipe Line Co. v. Dep't of Transp.*, 854 F.2d 1438, 1442 (D.C. Cir. 1988) (transfer under section 1631 is "the fairest and most appropriate course" when petitioners made an "understandable mistake" in "seeking initial review in this court").

Those are precisely the circumstances here. Prior to this Court's ruling in *American Petroleum Institute v. SEC*, this Court had not addressed the question whether the term "order" in 15 U.S.C. § 78y(a)(1) encompassed rules. Petitioners reasonably believed that it did, because other cases had read the term "order" in other review provisions to encompass rules. *Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1276-78 (D.C. Cir. 1977); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985) ("Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts," courts "will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals."). For the same reason, the SEC likewise believed that 15 U.S.C. § 78y(a) gave "this Court, rather than a district court, jurisdiction over this petition for review." Respondent's Br. at 4.

Furthermore, this Court had previously exercised jurisdiction over a petition for review of an SEC rule that was not issued pursuant to a provision enumerated in 15 U.S.C. § 78y(b), although without addressing the jurisdictional question. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir.

2011). Therefore, until this Court decided *American Petroleum Institute*, jurisdiction was unclear, and transfer of this case is "the fairest and most appropriate course." *Five Flags Pipe Line Co.*, 854 F.2d at 1442; *see Watts v. SEC*, 482 F.3d 501, 509-10 (D.C. Cir. 2007) (transferring case to the district court after rejecting petitioner's interpretation of 15 U.S.C. § 78y).

Additionally, transfer is in the interest of justice because it will avoid delay that would harm the parties and the public at large. "Normally transfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is 'time-consuming and justice-defeating.'" *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990), *quoting Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962); *see also Barnes v. Whelan*, 689 F.2d 193, 206 (D.C. Cir. 1982) (additional delay and expense are "certainly strong reasons" in deciding whether a transfer is in the interest of justice). A transfer here will help to avoid delay because this case was fully briefed in this Court. If this Court transfers the case file, including the record and completed briefing, to the district court, the case can then "proceed as if it had been filed" in the district court in October, 2012. 28 U.S.C. § 1631. If the case is instead dismissed, Petitioners will have to begin anew in the district court, resulting in a later filing date and requiring duplicative, costly, and time-consuming efforts to initiate the case and brief it for decision.

Avoiding the "time-consuming and justice-defeating" delay that would result from dismissal, *Goldlawr*, 369 U.S. at 467, is particularly critical here. As Petitioners explained in seeking expedition of this case—and as this Court recognized in granting Petitioners' motion to expedite—delay here "will cause irreparable injury" and "the public generally, or … persons not before the Court, have an unusual interest in prompt disposition." D.C. Circuit *Handbook of Practice and Internal Procedures* 33 (2011); Petr's Consent Mot. to Expedite (filed Nov. 21, 2012). The challenged Rule will impose extraordinary costs upon Petitioners. By the SEC's own estimation, initial compliance will cost companies $3 to $4 billion, and annual compliance will cost an additional $200 to $600 million per year. 77 Fed. Reg. at 56,334.

Petitioners' members will unavoidably have to incur some portion of the Rule's costs while this litigation is ongoing, as the first compliance period has already begun. 77 Fed. Reg. at 56,274. However, the second compliance period does not begin until January 1, 2014, and issuers must file the first Conflict Minerals Reports on May 31, 2014. *Id.* As Petitioners explained in seeking expedited consideration, a decision before those dates would, if Petitioners' challenge is successful, help Petitioners avoid the astronomical costs of finalizing compliance infrastructure, preparing disclosures, preparing and obtaining private sector audit reports, and beginning a second year of compliance.

Furthermore, transfer would also serve the strong interests of non-parties and the public at large in prompt disposition of this case. Additional companies who are subject to the rule will suffer the same harms described above, and other non-public companies from all across the globe will also incur costs because they are part of the global supply chains that provide products to public companies, and will thus have to participate in the "reasonable country of origin inquiry" and "due diligence" mandated by the Rule. 77 Fed. Reg. at 56,288. And transfer will help to ensure that outstanding uncertainty about the validity of the Rule—which received thousands of public comments, including comments from members of Congress, executive departments, and international organizations—will be resolved as soon as feasible.

Finally, pursuant to Circuit Rule 27(g), Petitioners seek leave to file this motion to transfer. There is "good cause" for Petitioners to file this motion more than 45 days after this case was docketed in this Court because, as explained above, Petitioners reasonably believed that this Court was the proper forum until April 26, 2013, when this Court held that it lacked jurisdiction in *American Petroleum Institute v. SEC.*

For the foregoing reasons and good cause shown, Petitioners respectfully request that this Court grant leave to file this motion, and that the Court issue an order transferring this case to the U.S. District Court for the District of Columbia under 28 U.S.C. § 1631.

Dated: April 30, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 30th day of April, 2013, I caused the foregoing document to be filed via the Court's CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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