

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

|                                  |   |                       |
|----------------------------------|---|-----------------------|
| NATIONAL ASSOCIATION OF          | ) |                       |
| MANUFACTURERS, CHAMBER OF        | ) |                       |
| COMMERCE OF THE UNITED STATES    | ) |                       |
| OF AMERICA, BUSINESS             | ) |                       |
| ROUNDTABLE,                      | ) |                       |
|                                  | ) |                       |
| Plaintiffs,                      | ) |                       |
|                                  | ) |                       |
| vs.                              | ) |                       |
|                                  | ) | No. 1:13-cv-00635-RLW |
| UNITED STATES SECURITIES AND     | ) |                       |
| EXCHANGE COMMISSION,             | ) |                       |
|                                  | ) |                       |
| Defendant,                       | ) |                       |
|                                  | ) |                       |
| AMNESTY INTERNATIONAL OF THE     | ) |                       |
| USA, AMNESTY INTERNATIONAL LTD., | ) |                       |
|                                  | ) |                       |
| Intervenors-Defendants.          | ) |                       |
|                                  | ) |                       |

**NOTICE OF SUPPLEMENTAL AUTHORITY: *API v. SEC***

Plaintiffs write to bring to the Court’s attention the recent decision in *American Petroleum Institute v. Securities and Exchange Commission*, No. 12-1668 (D.D.C. July 2, 2013) (“*API v. SEC*”) (attached). The decision vacated a Commission rule, created under Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, requiring disclosures of payments to foreign governments for extractive resources. Slip. Op. at 1. The Court held that the agency’s refusal to exercise its exemptive authority was a “serious error that independently invalidates the Rule.” *Id.* at 22.

The SEC, the Court held, must exercise its statutory exemptive authority on the basis of “reasoned decisionmaking,” and consistently with its “competing statutory obligations, such as the requirement that the Commission ‘shall not adopt any ... rule or regulation which would impose a

burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.” *Id.* at 24, quoting 15 U.S.C. § 78w(a)(2). The Commission violated those obligations by refusing to create an exemption for payments to countries that prohibit such disclosure. *Id.* at 22. The Court rejected the Commission’s reasoning that “adopting such an exemption would be inconsistent with the structure and language of Section 13(q)” and “would undermine Congress’ intent to promote international transparency efforts.” *Id.* at 23. Indeed, the Court held that the argument was “no answer at all,” and “ignores the meaning of ‘exemption,’ which, by definition, is an exclusion or relief from an obligation, and hence will be inconsistent with the statutory requirement on which it operates.” *Id.* at 24; *see id.*, quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (“[N]o legislation pursues its purposes at all costs. .... and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute’s primary objective must be the law.”).

For similar reasons, the SEC’s refusal to create a *de minimis* exception here was erroneous. The SEC reasoned that “[t]he statute itself does not contain a *de minimis* exception” and “we believe it would be contrary to the Conflict Minerals Statutory Provision and Congressional purpose to include one in the final rule.” 77 F.R. 56298. As *API v. SEC* held, this is “no answer at all,” because every exemption is necessarily “inconsistent with the statutory requirement on which it operates.” Slip Op. at 24. Further, as in *API v. SEC*, the agency failed to consider whether the burden imposed by its refusal to create an exemption was justified, instead “impermissibly rest[ing] on the blanket proposition that avoiding all exemptions best furthers” the statutory purpose. *Id.* at 25; *see* Pltfs Opening Br. at 37-40; Reply Br. at 11, 15-17.

Additionally, *API v. SEC* rejected the agency’s argument that the Court should not consider the exemption issue because “the Commission is also authorized to make exemptions at a later time ‘upon application.’” Slip Op. at 22 n.7, quoting 15 U.S.C. § 78(h). The Court held that the issue

was ripe because “a rule requiring disclosure without providing exemptions immediately affects parties contracting in the shadow of its requirements,” and “the Commission’s reasoning forecloses most arguments these issuers would have for exemptions by individual application.” *Id.*

The agency makes the same contention here—raised for the first time at oral argument—and it should be rejected for the same reasons. The lack of a *de minimis* exemption “immediately affects parties” that must expend substantial sums attempting to determine the origin of minute amounts of minerals that may be contained in their products. *Id.*; *see, e.g.*, Pltfs Opening Br. at ADD-113-115. And the SEC’s conclusion in the release that a *de minimis* exemption is “contrary to the Conflict Minerals Statutory Provision and Congressional purpose” and that therefore issuers with “even minute or trace amounts of a conflict mineral” in their products are subject to the rule, 77 F.R. 56298, would “foreclose[] most arguments”—if not all arguments—for individual *de minimis* exemptions, Slip Op. at 22 n.7.

Dated: July 3, 2013

Respectfully submitted,

s/ Peter D. Keisler

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Peter D. Keisler, Bar No. 417204

*Counsel of Record*

Jonathan F. Cohn, Bar No. 476551

Sidley Austin LLP

1501 K St., NW

Washington, DC 20005

202.736.8027

*Counsel for Plaintiffs the National*

*Association of Manufacturers, the*

*Chamber of Commerce of the United*

*States of America, and Business*

*Roundtable*

*Of Counsel:*

Rachel L. Brand

Steven Lehotsky

National Chamber Litigation  
Center, Inc.

1615 H St., NW

Washington, DC 20062

202.463.5337

*Counsel for Plaintiff the Chamber of  
Commerce of the United States of  
America*

*Of Counsel:*

Quentin Riegel

National Association  
of Manufacturers

733 10th St., NW

Suite 700

Washington, DC

20001

202.637.3000

*Counsel for Plaintiff the  
National Association of  
Manufacturers*

*Of Counsel:*

Maria Ghazal

Business Roundtable

300 New Jersey Ave., NW

Suite 800

Washington, DC 20001

202.496.3268

*Counsel for Plaintiff Business  
Roundtable*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of July, 2013, I caused the foregoing Notice of Supplemental Authority to be filed with the Clerk of Court for the United States District Court for the District of Columbia using the CM/ECF system. Service was accomplished on all parties via the Court's CM/ECF system.

s/ Peter D. Keisler

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Peter D. Keisler