

I. FACTS AND QUESTION

Im Anschluss an den Erhalt der Ausführungen im Gutachten 18-055 hat sich das Bundesamt für Justiz mit einer erneuten Anfrage an das Schweizerische Institut für Rechtsvergleichung gewendet. Dabei wurde folgende Frage formuliert:

«Gelten die Ausführungen im Kurzgutachten [18-055] eigentlich auch für die Section 1504?»

II. LEGAL STATUS OF DODD-FRANK ACT, SECTION 1504

1. Overview

The Dodd-Frank Wall Street Reform and Consumer Protection Act¹ (“Dodd-Frank Act”) emerged as a legislative response to the excessive risk-taking in the financial sector (in particular the banks) during the early 2000s, which led to the 2007-2008 recession in the United States. Hotly debated, the Act has become a highly politicized piece of legislation, with the Republican Party and the Trump Administration striving to neutralize its effects and ultimately, to repeal it.² The Act is extremely broad, however, containing not only technical rules affecting banks, but also a number of rules to enhance the transparency and integrity of industrial supply chains.

2. Section 1504

Section 1504 is an example of one of the latter provisions. Found within the Chapter titled “Miscellaneous provisions”, the section seeks to redress the so-called “resource curse”, wherein countries with substantial natural resource wealth are often home to widespread and deep poverty. The solution proposed by many experts to the lost wealth is to require resource extraction companies to publish the amount they pay to the government and/or officials in exchange for the right to extract the resources. Transparency in payments, it is envisioned, will allow the public to hold the government accountable for its spending. The object of §1504, then, is to require companies registered on a US stock exchange to publish its payments annually. It does this by requiring the Securities and Exchange Commission (SEC) to promulgate and implement a reporting rule.

The relevant provision sets out:

2) DISCLOSURE.—

(A) INFORMATION REQUIRED.—Not later than 270 days after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commission shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the

¹ Pub. L. No. 111-203, 124 Stat. 1376, 2220 (2010).

² Taking direct aim at a number of Dodd-Frank Act provisions, on May 24, 2018 U.S. President Donald Trump signed the legislation known as the Economic Growth, Regulatory Relief, and Consumer Protection Act into law. The new law, Public Law No: 115-174 helps large banks by allowing more investment activities to be combined in the banking activities, eases compliance for smaller banks by excluding them from a number of requirements, limits the number of banks considered “significant”, and reduced reporting requirements among other things. For a fuller description of the content of the new law, see EveryCRSReport.com, Economic Growth, Regulatory Relief, and Consumer Protection Act (P.L. 115-174) and Selected Policy Issues (available at <https://www.everycrsreport.com/reports/R45073.html>; last viewed 18 June 2018).

Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—

(i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, and

(ii) the type and total amount of such payments made to each government.³

2.1. Enforcement

The SEC promulgated such a rule on 22 August 2012, but this rule was swiftly and strongly attacked by the affected oil industry. A court case overturned the rule as an impermissible violation of the companies' first amendment rights.⁴

A second SEC rule was then promulgated in 27 June 2016. This rule, too, fell – this time to the political opponents. Using the mechanism of the Congressional Review Act, the Congress overturned the new rule with majorities on both the House of Representatives and the Senate. This leaves §1504 in a state of being unenforceable, although still valid law. The SEC technically had until February 2018 to pass a new rule (which, however, could not be substantially the same as the rule struck by the Congressional Review action), but practically viewed, its failure to do so would need to be challenged in court to force it to act.⁵

2.2. Attempt to Repeal

A further attack on §1504 comes in the form of a bill introduced in the House of Representatives to repeal the section. HR 4519 was introduced into the House on 1 December 2017 and has since been considered and approved in a vote (33-27) by the Committee on Financial Services.⁶ The bill is now on the House calendar.

Wir hoffen, dass Ihnen diese Informationen nützlich sind, und stehen Ihnen für weitere Auskünfte gerne zur Verfügung.

³ Dodd-Frank Act, §1504.2

⁴ American Petroleum Institute v. SEC, 953 F.Supp. 2d 5 (D.D.C., 2013)

⁵ See Nicholas Grabar and Sandra L. Flow, Congress Rolls Back SEC Resource Extraction Payments Rule, Harvard Law School Forum on Corporate Governance and Financial Regulation, 16 February 2017 (available at <https://corpgov.law.harvard.edu/2017/02/16/congress-rolls-back-sec-resource-extraction-payments-rule/>; last viewed 18 June 2018).

⁶ See Congress.gov, H.R.4519 - To amend the Securities Exchange Act of 1934 to repeal certain disclosure requirements related to resource extraction, and for other purposes, 115th Congress (2017-2018) (<https://www.congress.gov/bill/115th-congress/house-bill/4519/all-actions?q=%7B%22search%22%3A%5B%22hr4519%22%5D%7D&r=1&overview=closed#tabs>; last viewed 18 June 2018).