UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

OXFAM AMERICA, INC., Plaintiff, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	Civil Action No. 14-cv-13648-DJC

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Section 1504 is a key provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. No. 111-203, 124 Stat. 1376, requiring companies to disclose information critical to investors and others. Defendant Securities and Exchange Commission ("SEC") has been in violation of a congressional deadline for enacting a rule to implement Section 1504 of Dodd-Frank for nearly three years in total. Although Section 1504 required the SEC to enact a Final Rule by April 17, 2011, the SEC did not do so until September 2012. On July 2, 2013, that rule was vacated by the U.S. District Court for the District of Columbia on narrow grounds and remanded to the SEC for further consideration, at which point the SEC was once again in violation of the congressional deadline. To date, the SEC has given no indication of its intended timeline for finalizing a new rule, and has already postponed once its projected date for releasing a new proposed rule. This failure constitutes agency action unlawfully withheld and unreasonably delayed, and Section 706(1) of the Administrative Procedure Act ("APA")

entitles Plaintiff, Oxfam America, Inc. ("Oxfam"), to summary judgment and an order requiring the SEC to: 1) issue a proposed rule within 30 days of the issuance of summary judgment or on August 1, 2015, whichever comes first; 2) open a 45-day period for public notice and comment; and 3) promulgate a final rule implementing Section 1504 within 45 days after the end of this period, with the final rule promulgated no later than November 1, 2015.

BACKGROUND

To ameliorate the ongoing financial crisis then at its nadir, and to prevent a recurrence of the practices that caused it, Congress passed, and on July 21, 2010 President Obama signed, Dodd-Frank. By many accounts, Dodd-Frank is the most important financial reform since the Great Depression. Section 1504 of Dodd-Frank , an important provision of the law, requires oil and mining companies to disclose the payments they make to foreign governments on a project-by-project basis.

The disclosure rule mandated by Section 1504 is designed to protect investors like Oxfam who invest in oil and mining companies -- investments uniquely susceptible to geopolitical risks.[1] It is also designed to address the "resource curse" that plagues many developing economies dependent on resource extraction. The "curse" refers to the paradox that many resource-rich countries that should be well-off actually experience lower growth and far greater poverty than their resource-poor countries. *See* 155 Cong. Rec. S9746 (daily ed. September 23, 2009); S. Comm. on Foreign Relations, 110th

[1] Oxfam's Complaint asserts standing based on the deprivation of information to which Oxfam is entitled, its rights as an investor in companies that will be regulated under Section 1504, and the diversion of its resources to compel the SEC to implement the disclosure rule required by Section 1504. *See* Declaration of Paul O'Brien; Complaint (Document No. 1), ¶¶ 13-20, 65-72. The SEC does not challenge Oxfam's standing in its Answer (Document No. 10).

Cong., *The Petroleum and Poverty Paradox: Assessing U.S. and International Community Efforts to Fight the Resource Curse* 9-10 (Oct. 2008) (Exhibit 1).[2]

Finally, Section 1504 expresses the congressional aim to support the Federal government's "international transparency promotion efforts." 15 U.S.C. § 78m(q)(2)(E). Other foreign jurisdictions, including the European Union, have enacted transparency legislation since the SEC's first rulemaking effort in September 2012 (Oxfam Complaint ("Cmplt.") (Docket No. 1) ¶ 35; SEC Answer ("Ans.") (Docket No. 10) ¶ 35). Some foreign governments have already enacted implementing regulations. *See* The Reports on Payments to Governments Regulations, 2014, S.I. 2014/3209 (U.K.) (Exhibit 2); Forskrift om land-for-land rapportering [Regulations on country-by-country reporting] (Dec. 20, 2013) (Norway) (attached in Norwegian original and in English translation as Exhibits 3 and 4, respectively). The Extractive Industries Transparency Initiative (EITI), a voluntary multi-stakeholder initiative wherein governments, extractive companies, and civil society organizations work together to verify and publish information on extractive companies' payments to governments, has enacted a new standard requiring project-level reporting "consistent with the United States Securities and Exchange Commission rules and the . . . European Union requirements." *See* EITI, *The EITI Standard* at 31 (July 2013) (Exhibit 5). However, the EITI is divided on whether implementation of this standard is mandatory pending the SEC's rulemaking for Section 1504. *See* EITI, 28th EITI Board Meeting Minutes at 11 (Exhibit 6). The SEC's continued failure to promptly reissue a Final Rule is thus undermining progress towards a global transparency standard.

[2] Exhibits referenced herein are attached to the Declaration of Jonathan Kaufman in Support of Plaintiff's Motion for Summary Judgment.

Until the SEC issues implementing rules, Section 1504 cannot assist investors to better analyze investment risk, help communities combat the resource curse, or support the federal government's transparency promotion efforts. Given the importance of Section 1504, Congress mandated that the SEC "shall" issue such rules within 270 days of the law's enactment. The SEC missed that statutory deadline once, and it continues to violate that deadline now.

UNDISPUTED MATERIAL FACTS

A. The SEC Was Statutorily Required to Adopt a Final Disclosure Rule by April 17, 2011

Section 1504 of Dodd-Frank amends Section 13 of the Securities Exchange Act of 1934 to require "resource extraction issuers" -- *i.e.*, publicly traded oil, gas, and mining companies -- to disclose payments made to foreign governments or to the United States government for the purpose of the commercial development of oil, natural gas, or minerals. *See* 15 U.S.C. § 78m(q)(2)(A). This disclosure must be made in annual reports filed with the SEC.

Section 1504 requires the SEC to promulgate a final rule implementing the new disclosure requirements. Specifically, Section 1504 requires that:

> **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 Federal Government for the purpose of the commercial development of oil, natural gas, or minerals…

15 U.S.C. § 78m(q)(2)(A) (emphasis added).

Dodd-Frank became law on July 21, 2010. The SEC's statutory deadline for promulgating a final disclosure rule expired on April 17, 2011.

B. The SEC Adopted its Original Final Disclosure Rule More than Sixteen Months after the Statutory Deadline

Between November 2010 and August 2012, the SEC posted projected dates on its website for promulgating a final rule for Section 1504, only to revise and push those dates back at least two times. (Cmplt. ¶ 4; Ans. ¶ 4). On September 12, 2012, the SEC adopted its original final rule implementing Section 1504 only after Oxfam filed a lawsuit before this Court seeking an Order to compel the SEC to promulgate a final rule. *See Oxfam America v. SEC,* No. 1:12-cv-10878-DJC (D. Mass. 2012).

C. The SEC Still Has Not Published a New Final Rule Eighteen Months After a District Court Vacated and Remanded the 2012 Final Rule

On July 2, 2013, the U.S. District Court for the District of Columbia issued a judgment vacating the 2012 Final Rule on narrow procedural grounds. Without ruling on the content of the regulation, the court found that the SEC had incorrectly concluded that Congress had unambiguously both required full public disclosure of all payment information and restrained the Commission from granting disclosure exemptions to issuers in particular cases. The court therefore vacated the rule and remanded to the SEC for the limited task of reformulating the rule with adequate justification for the agency's regulatory choices; that is, justification not predicated on the incorrect view that Congress mandated these choices. *API v. SEC*, 953 F. Supp. 2d 5 (D.D.C. 2013). The SEC chose not to appeal and Oxfam was not permitted to appeal alone. *Pueblo of Sandia v. Babbitt*, 231 F.3d 878 (D.C. Cir. 2000).

Despite the modest task before it, the SEC has not issued a new proposed rule. When the Complaint in this action was filed, the SEC listed a projected proposed rule date of March 2015 on the Unified Regulatory Agenda, a list of federal rulemaking actions on which the SEC lists its intended rulemakings. (Cmplt. ¶¶ 9, 55; Ans. ¶¶ 9, 55). Since that time, the SEC has pushed the projected date for a proposed rule back to October 2015. *See* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=3235-AL53. The new agenda does not commit the SEC to issue a new proposed rule by that date. It provides only that the Division of Corporate Finance "is considering recommending that the Commission propose rules to implement Section 1504." Office of Information and Regulatory Affairs, *Disclosure of Payments by Resource Extraction Issuers*, *at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=3235-AL53. The SEC is not required to consider or act on any matter that is included in the agenda. 5 U.S.C. § 602(d). The SEC has not published any indication of its projected time frame for promulgating a new final rule.

ARGUMENT

Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The issues of material facts that entitle Oxfam to summary judgment are undisputed here. There is no dispute that Section 1504 required the SEC to adopt final rules on or before April 17, 2011, 15 U.S.C. 78(m)(q)(2)(A), or that the SEC originally missed that deadline by almost seventeen months. There is also

no dispute that now, almost four years after the deadline that Congress established for the promulgation of rules to implement Section 1504 and an additional eighteen months after the rule was remanded to the SEC, the SEC has not promulgated a new rule or even published a projected schedule for finalizing the rule. This repeated failure to meet statutorily required deadlines presents a clear and indisputable instance of agency action "unlawfully withheld." 5 U.S.C. § 706(1). The APA -- and the weight of authority in this Circuit and elsewhere -- require an order compelling the SEC to adopt the statutorily mandated rules.

I. AN ORDER COMPELLING THE SEC TO ACT IS REQUIRED UNDER SECTION 706(1) OF THE APA

A. The District Court's Remand Order Reinstated the SEC's Obligation to Issue a Rule According to the Original Statutory Deadline

The SEC is currently under a statutory obligation to issue a final rule to implement Section 1504 within 270 days of the enactment of Dodd-Frank, an obligation that it is now almost four years overdue. Congress's deadline remains binding -- and the failure to meet it continues to constitute agency action unlawfully withheld -- despite the fact that the SEC promulgated a final rule in September 2012 that was later vacated and remanded by court judgment. This is because remand orders typically restore "the status quo ante, before the . . . [vacated] rule took effect," *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987), requiring the agency to take action again. *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002). Nonetheless, even if the SEC's period for action were measured from the date of the remand order, the SEC has still delayed considerably longer than the 270 days originally provided, with no indication of when a final rule will come.

When an agency, operating under a statutory deadline, misses that deadline, issues a final rule late, and is then required to reformulate the rule by court order, courts have uniformly found that the agency is not relieved of its nondiscretionary duty to promulgate regulations within the original deadline. *See, e.g.*, *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 64-65 (D.D.C. 2004); *Sierra Club v. EPA*, 850 F. Supp. 2d 300, 303-04 (D.D.C. 2012). The agency's "duty to act is still (or again) unfulfilled." *Sierra Club v Johnson*, 374 F. Supp. 2d 30, 33 (D.D.C. 2005). Thus, in the absence of a new final rule to implement Section 1504, the SEC remains in violation of its nondiscretionary duty to issue regulations by April 17, 2011.

B. The SEC's Failure to Meet the Congressional Deadline Constitutes Agency Action Unlawfully Withheld

Oxfam is entitled to relief under APA Section 706(1) because when an agency violates a statutory deadline, the agency has "unlawfully withheld" action. *See, e.g.*, *Forest Guardians*, 174 F.3d at 1191 (10th Cir. 1999) ("[W]hen an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act."); *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002); *In re Paralyzed Veterans of Am.*, 392 F. App'x 858, 860 (Fed. Cir. 2010). Thus, under Supreme Court precedent, "when an agency is compelled by law to act within a certain time period," agency action can be ordered as unlawfully withheld. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

Courts in the First Circuit have not directly ruled on delayed or withheld agency action in the context of a congressionally imposed deadline, but a court in this district has acknowledged that agency violation of a "fixed deadline" in a separate statute would be

an obvious example of "unlawfully withheld" action under Section 706(1). *See Tang v. Chertoff*, 493 F. Supp. 2d 120, 155 (D. Mass. 2008).

The existence of a fixed deadline distinguishes this case from others addressing delays in rulemakings that have no specified deadlines, which are often analyzed under the "unreasonably delayed" prong of APA Section 706(1). "When the administrator misses a statutorily-imposed deadline, his failure is not reviewed on a 'reasonableness' basis. Only when a statute requires agency action at indefinite intervals, such as 'from time to time', can 'unreasonable delay' be a meaningful standard for judicial review." *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 262-63 (2d Cir. 1992).[3] The "unreasonably delayed" analysis does not apply in cases involving mandatory congressional deadlines because Congress has already told us how much agency delay is too much. The Court cannot second-guess the judgment of Congress. The SEC's failure here is clear and unequivocal: it had a deadline to promulgate a final rule and it has failed to meet that deadline twice -- in the original rulemaking *and* subsequent to remand. The SEC has unlawfully withheld the action required by Congress, and this Court must grant relief to remedy that violation.

C. Section 706(1) of the APA Requires this Court to Compel Agency Action Unlawfully Withheld

Because the SEC's failure to act according to Congress's deadline constitutes action unlawfully withheld, the APA requires this Court to compel the SEC to act. 5 U.S.C. § 706(1) ("reviewing court *shall* compel agency action unlawfully withheld or

[3] To Oxfam's knowledge, unlike the Second, Ninth, Tenth and Federal Circuits, only the D.C. Circuit does not distinguish between "unlawfully withheld" (our case) and "unreasonably delayed" under Section 706(1) of the APA when Congress has mandated a deadline for agency action. Thus, the D.C. Circuit, unlike any other court to have considered the issue, has determined that it need not compel agency action despite a missed congressional deadline under some circumstances. *See In re Barr Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991). Regardless, even if the standard that is applied to "unreasonably delayed" cases were appropriate, Oxfam easily meets it here. *See* Section III, *infra.*

unreasonably delayed.") (emphasis added). The APA's use of the word "shall" places a mandatory duty on this Court, just as Section 1504's use of the word "shall" places a mandatory duty on the SEC. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001); *United States v. Green*, 407 F.3d 434, 443 (1st Cir. 2005). Thus, this Court must compel agency action that the SEC has unlawfully withheld. *See Tang*, 493 F. Supp. at 154 (APA requires that reviewing courts "compel agency action unlawfully withheld or unreasonably delayed."); *Forest Guardians*, 174 F.3d at 1178, 1187, 1190.[4]

The SEC's failure to take the discrete, mandatory act required by Section 1504 is precisely the type of agency failure that APA Section 706(1) is meant to remedy. *See Norton*, 542 U.S. at 64 (Section 706(1) compels agencies to "take a *discrete* agency action that it is *required to take*.") (emphasis in original). Section 1504 imposed a 270-day mandatory deadline for adopting a final disclosure rule. Whereas the content of the final rule may implicate the SEC's discretionary function, the act that Section 1504 makes imperative -- promulgating a rule by April 17, 2011 -- does not. The SEC had a clear rulemaking deadline, and it failed to meet it twice. This Court must compel the SEC to act.

II. THE CLEARLY ORDERED PRIORITIES OF DODD-FRANK REQUIRE AN ORDER COMPELLING THE SEC TO ACT

An order compelling the SEC to promulgate a final rule is also required because by delaying the rulemaking, the SEC impermissibly tampers with Congress's clearly expressed order of priorities under Dodd-Frank. Whereas it made the promulgation of

[4] While courts in the First Circuit have not had occasion to compel agency action in the context of a statutory deadline, they have recognized Section 706(1)'s "clearly mandatory" language and have enforced that language to compel agency action "unreasonably delayed." *See Tang*, 493 F. Supp. 2d at 155 (D. Mass. 2007); *Abdi v. Chertoff*, 589 F. Supp. 2d 120, 121 (D. Mass. 2008).

other Dodd-Frank rules discretionary, Congress made the promulgation of Section 1504's disclosure rule mandatory. *See* Congressional Research Service, *Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act* (November 3, 2010) at 12-16 (Exhibit 7). And while Congress assigned other rules later deadlines or no deadlines at all, it assigned a tight statutory deadline to Section 1504's rule. *See id*. at 12 & Appendix A (p. 58). It is hard to imagine a more unequivocal statement of congressional priorities. "[I]t is . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation." *TVA v. Hill*, 437 U.S. 153, 194 (1978). And Section 706(1) of the APA exists to ensure that those priorities are realized. *See Shawnee Trail Conservancy v. Nicholas*, 343 F. Supp. 2d 687, 701-702 (S.D. Ill. 2004) ("Congress enacted the judicial enforcement provisions of the APA in part to provide a mandatory mechanism to enforce its own statutory commands.").

Rather than following Congress's priorities, the SEC is effectively reordering them.[5] During the first rulemaking period, the SEC repeatedly deferred action on Section 1504, giving preference instead to Dodd-Frank rules with no deadline, *see, e.g.*, SEC, *Mine Safety Disclosure*, Release Nos. 33-9286, 34-66019 (final rule) (Dec. 21, 2011), or that were completely discretionary, *see, e.g.*, SEC, Suspension of the Duty to File Reports for Classes of Asset-Backed Securities Under Section 15(D) of the Securities Exchange Act of 1934, Release No. 3465148 (final rule) (Aug. 23, 2011). Since the D.C. District Court's July 2013 remand order, the SEC has followed a similar pattern. *See, e.g.*, SEC, *Asset-Backed Securities Disclosure*, Release Nos. 33–9638; 34–72982, 79 Fed. Reg.

[5] For a complete list of SEC actions that are discretionary or have no deadline, but have either been completed or are scheduled to be taken faster than or on the same timeline as Section 1504, *see* Exhibit 8.

57,184 (final rule) (Sept. 24, 2014) (regulation with no statutory deadline, standardizing information disclosures pursuant to Dodd-Frank Section 942). Indeed, the SEC's projected rulemaking actions continue to prioritize rulemakings that Congress has not expressly prioritized, such as regulations under the Securities Act of 1933 to provide more "user-friendly disclosure" for variable annuity investors. *See, e.g.*, Office of Information and Regulatory Affairs, *Enhanced Disclosure for Separate Accounts Registered as Unit Investment Trusts and Offering Variable Annuities, at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=3235-AK60 (notice that SEC is considering proposal of discretionary rules in October 2015).

The SEC's failure to abide by congressional priorities goes beyond the failure to promulgate a final rule within the statutory deadline, as its inaction is undermining Congress' goal to support the federal government's "international transparency promotion efforts" through the rulemaking for Section 1504. 15 U.S.C. § 78m(q)(2)(E). The Commission concluded in its original rulemaking that this provision was intended at least partially to ensure that the rule would be consistent with the standards of the Extractive Industries Transparency Initiative. 77 Fed. Reg. 56,366-7. However, because the EITI standard requires project-level reporting consistent with legal requirements in the U.S. and Europe, the Implementation Committee of the EITI Secretariat has not yet been able to agree on whether the EITI's new project-level reporting requirement is operative pending the SEC's enactment of a new Final Rule. *See* Exhibit 6 at 11. Moreover, the lack of a final rule has obstructed the work of the U.S. EITI Multi-stakeholder Group ("MSG"), which is tasked with developing standards for the EITI in the United States. The MSG has been unable to implement project-level reporting for 2015 EITI reports and

has determined to write to the SEC requesting action on Section 1504. *See* United States Extractive Industries Transparency Initiative, *Decisions, Approvals, and Actions: December 2014 MSG* at 2 (Exhibit 9). Thus, by postponing a final rule, the SEC is hindering -- rather than supporting -- the development of the EITI.

III. SECTION 706(1) REQUIRES THIS COURT TO COMPEL AGENCY ACTION BECAUSE THE SEC HAS UNREASONABLY DELAYED ISSUANCE OF A FINAL RULE.

Even if the SEC's failure to meet a nondiscretionary rulemaking deadline does not trigger the requirement to compel agency action under APA Section 706(1) *per se*, Oxfam is entitled to an injunction because the SEC's long delay is unreasonable.

A. Under the *TRAC* Factors, the SEC's Delay Is Unreasonable.

This Court should follow the guidance of other courts in this District in declining to apply a multi-factor balancing test to actions seeking to compel agency action that is subject to a congressional deadline, *see Tang*, 493 F. Supp. 2d at 155. Even if the Court does not follow *Tang*'s guidance, however, the SEC's long delay in promulgating rules is unreasonable under the factors enunciated by the D.C. Circuit in *Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

The *TRAC* factors provide that:

> (1) the time agencies take to make decisions must be governed by a 'rule of reason,' (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'

750 F.2d at 80 (internal quotations and citations omitted). The First Circuit has adopted the *TRAC* analysis for unreasonable delay -- at least for agency actions not subject to a mandatory deadline. *See Wellesley v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987). All the *TRAC* factors point toward the issuance of an injunction in this case.

Rule of Reason and Length of Delay. Because Congress has clearly indicated the "speed with which it expects the agency to proceed in the enabling statute," the first and second *TRAC* factors indicate that the reasonable timeframe within which the SEC should have promulgated a rule was 270 days -- the deadline specified in Section 1504. In fact, the amount of time the SEC has already taken to issue a rule (the total of the time that elapsed between the enactment of Dodd-Frank and the promulgation of the 2012 Final Rule, and the time that has elapsed since the D.C. District Court's remand order) is 1,354 days -- more than *five times* the congressionally mandated timetable. If the SEC holds to its currently projected timeline, the time needed just to issue a *proposed* rule will total nearly six times that number, and it is impossible to guess how much longer will be needed for a final rule.[6] *See Hong Wang v. Chertoff,* 550 F. Supp. 2d 1253 (W.D. Wash. 2008) (holding that three-year delay was unreasonable where time elapsed was six times the period Congress intended).

If the SEC does issue a proposed rule by October 2015 as projected, a final rule is unlikely to issue before January 2016 absent an order from this Court. In fact, if the SEC takes as long to proceed from proposed rule to final rule as it did during its first attempt at rulemaking for Section 1504, then the final rule will not issue before

[6] During the original rulemaking process, the SEC issued its proposed rule on December 23, 2010 but did not issue the final rule until September 12, 2012, a period of 629 days. If the upcoming rulemaking proceeds at a similar pace, the total amount of time needed would exceed *eight times* the congressionally mandated timeframe.

July 2017. This would constitute a delay of between four and six years beyond the congressional deadline.[7] This delay is presumptively unreasonable; "a reasonable time for an agency decision could encompass 'months, occasionally a year or two, but not several years or a decade.'" *See Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987). Courts considering rulemaking delays have typically considered four years and upwards to be unreasonable, even in the absence of a congressional deadline. *See, e.g.*, *Tang*, 493 F. Supp. 2d at 157-8 (four years unreasonable where similar actions took place in much shorter time period, projected timeframe for agency action was repeatedly revised, and agency already had information necessary to make decision); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 114 (D.D.C. 2003) (five-year delay "smacks of unreasonableness on its face"); *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1099-1100 (E.D. Pa. 1996) (finding 19-month delay unreasonable under statutory mandate to act "promptly," in light of statutory purpose and other, fixed deadlines within the statute); *Public Citizen Health Research Group (PCHRG) v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (three-year delay between announced intent to regulate and issuance of notice of proposed rulemaking unreasonable where date of notice was repeatedly postponed and issues relates to environmental health).

There is no evidence in the record to suggest that the SEC *could not* issue a rule within a reasonable timeframe; instead, evidence abounds that the SEC could

[7] In fact, there is no indication at all of the SEC's timeline for promulgating a final rule, even if it does issue a proposed rule in October 2015 as projected, because it has not released even a projected timeline for finalizing the rule. At least one district court has found that where an agency refuses to give the plaintiff a "definite time frame" for action, it deprives the court of a basis on which to evaluate the prospect of completion; such an "ambiguous, indefinite time frame" violates the "rule of reason" and constitutes unreasonable delay within the meaning of APA § 706(1). *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 37 (D.D.C. 2000).

promulgate a rule promptly. Specifically, the narrowness of the D.C. District Court's decision; the fact that other countries have passed statutes and implementing regulations in much shorter timeframes than the SEC, *see* Exhibits 2 and 3; the fact that the SEC is not beginning from scratch but is working from a robust prior rulemaking record that remains at the SEC's disposal; and the SEC's own original (now-revised) projection for a rule proposal undermine any argument that this rulemaking should be an exception to its own congressionally mandated deadline.

Despite this lack of justification, at no point has the SEC used the congressional deadline as a reference point for the rulemaking. During the original rulemaking, the SEC postponed or missed its own projected timelines twice, and since the remand order, it has already pushed back the projected date for a proposed rule once. (Cmplt. ¶¶ 4, 9; Ans. ¶¶ 4, 9; *supra* at 5). Plaintiffs and Senators alike have written multiple letters to the SEC requesting that it comply with the dictates of Congress, likewise to no avail. (Cmplt. ¶¶ 27, 32, 42, 46, 54, 58, 59; Ans. *id.*). The SEC's decision to proceed in complete disregard of congressional priorities constitutes unreasonableness *per se*, *see Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987).

Human Health and Welfare. The third and fifth *TRAC* factors direct courts to consider the "nature and extent of the interests prejudiced" and find delays "less tolerable when human health and welfare are at stake than when commercial concerns are involved." *PCHRG*, 702 F.2d at 1157. Section 1504, while intended to protect investors in natural resource extraction companies from hitherto undisclosed risks, also seeks to alleviate poverty by empowering citizens of resource-rich countries to

hold government officials accountable for public expenditures of natural resource revenues. *See* 156 Cong. Rec. S5870–02 (daily ed. of July 15, 2010) (statement of Sen. Lugar). As in *Muwekma Tribe*, 133 F. Supp. 2d at 39, the "nexus between human welfare and 'economic' considerations" in this case "weighs in favor of compelling agency action."

Effect on Other Agency Priorities. Under the fourth *TRAC* factor, courts have refused to compel agency action when they conclude that to do so would merely reshuffle or delay equally or more important agency priorities. *See In re Barr Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) ("[A] judicial order putting Barr at the head of the queue simply moves all others back one space and produces no net gain."). But as explained above, it is *Congress* that has set the agency's rulemaking priorities under Dodd-Frank, and Congress has placed Section 1504 higher on the list than other regulatory actions. In *In re People's Mojahedin Org. of Iran*, the D.C. Circuit was faced with a congressionally mandated 180-day deadline for agency action. 680 F.3d 832 (D.C. Cir. 2012). The court concluded that the "specificity and relative brevity of the 180-day deadline manifests Congress's intent that the Secretary act promptly." and determined that this *TRAC* factor weighed in favor of compelling agency action. *Id.* at 837. Similarly here, this is not a case in which "the agency is in a unique -- and authoritative -- position to . . . allocate its resources in the optimal way." *In re Barr*, 930 F.2d at 76. That authority here belongs to Congress, and it is to Congress that this Court must defer.

Moreover, whereas courts in the D.C. Circuit have hesitated to compel agency action that would merely reshuffle the order of a first-in, first-out queue, the ordering

of SEC's rulemaking agenda is not such a process. Instead, that agenda is the product of congressional mandate, political prioritization, and the expert determinations of the Commission's staff.

Because the agency rulemaking process does not operate on a first-come-first-served basis, a decision to compel rulemaking in this case would not necessarily reshuffle equal or higher priorities. *Compare Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1101 (D.C. Cir. 2003) (finding no reason to disturb agency's "first-come" procedure, which processed applications from similarly situated parties in the order in which they were received) *with Sandoz, Inc. v. Leavitt*, 427 F. Supp. 2d 29, 39 (D.D.C. 2006) (remedying missed deadline upon finding that the agency's "process does not take the form of a first in, first out operation") *and Liu v. Novak*, 509 F. Supp. 2d 1, 10 (D.D.C. 2007) ("With regard to the fourth *TRAC* factor, defendants have not provided any information that would allow the Court to find this factor in their favor . . . . Defendants [ ] have failed to submit any information regarding the extent of this potential impact on the processing of the other applications."). This Court should not hesitate to compel agency action because doing so would not "directly bottleneck" other SEC actions. *Sandoz*, 427 F. Supp. 2d at 39.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Oxfam, and enter an order requiring that the SEC: 1) issue a proposed rule within 30 days of the issuance of summary judgment or on August 1, 2015, whichever comes first; 2) open a 45-day period for public notice and comment; and 3) promulgate a final rule implementing Section 1504 within 45 days after the end of said period, with the final rule promulgated no later than November 1, 2015.

Date: January 23, 2015

Respectfully submitted,

OXFAM AMERICA, INC.

By its attorneys,

/s/ Derek B. Domian

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and email and paper copies will be sent to those indicated as non-registered participants on the above date.

/s/ Derek B. Domian