UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

MEMORANDUM OF LAW IN SUPPORT OF THE SEC'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO OXFAM'S MOTION FOR SUMMARY JUDGMENT

In July 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which contains more than 90 provisions requiring rulemaking by the Securities and Exchange Commission ("SEC" or "Commission"). That volume of congressionally mandated rulemaking is unprecedented and has required, and continues to require, a correspondingly unprecedented amount of the SEC's finite resources, on which the Commission must also rely to meet all of its other responsibilities as the principal civil law enforcement and regulatory agency for the nation's securities markets. This case involves the SEC's ongoing response to one of those rulemaking mandates.

Section 1504 of the Dodd-Frank Act, which added Section 13(q) to the Securities Exchange Act of 1934 ("Exchange Act"), directed the SEC to issue a final rule requiring resource extraction issuers to report information relating to payments made to governments for the purpose of the commercial development of oil, natural gas, or minerals. In August 2012, the Commission issued this rule. In July 2013, the United States District Court for the District of

Columbia vacated that rule, and remanded it to the SEC to address certain deficiencies that the court identified with the rule. *See American Petroleum Inst. v. SEC,* 953 F. Supp. 2d 5 (D.D.C. 2013) ("*API*"). The Commission has stated that it expects to consider a revised proposed rule by October 2015.

Arguing that the Commission has "unlawfully withheld" or "unreasonably delayed" that rulemaking, Oxfam America, Inc. ("Oxfam") now seeks the extraordinary remedy of an injunction imposing an Oxfam-determined schedule under which the SEC would be required to promulgate a revised proposed rule by August 1, 2015, allow a 45-day period for public notice and comment, and then promulgate a final rule no later than November 1, 2015. But Oxfam has not demonstrated that it is entitled to an order compelling agency action under the test set forth in *Telecommunications Research & Action Center v. FCC* ("*TRAC*"), 750 F.2d 70 (D.C. Cir. 1984), that the First Circuit applies in assessing such claims. Applying the *TRAC* factors to the undisputed material facts demonstrates that Oxfam's claim for relief fails as a matter of law. Far from establishing any unlawful or unreasonable delay warranting judicial intervention in the assessment of agency priorities and allocation of resources, the facts show that the SEC's approach to the Section 1504 mandate has been and continues to be reasonable. The Commission proposed and adopted a rule as Congress directed; the rule was struck down by a court that identified several particular defects and withheld judgment on other asserted problems with the rule (including a First Amendment challenge). Moreover, any revised rule proposal necessarily requires work to address the issues identified by the district court and will have to be considered by the Commissioners, a majority of whom were not at the SEC during the first rulemaking; and this particular rulemaking is one of a large number of regulatory matters on the agency's agenda—which includes mandated rules that (unlike this rule) have not already been

issued by the SEC once—as well adjudicatory and enforcement matters to which agency resources also must be devoted.

In short, because Oxfam has identified no supportable basis for interfering with the SEC's ongoing efforts to comply with its considerable rulemaking and other obligations, including revising a rule to implement Section 1504, the SEC respectfully requests that the Court grant its motion for summary judgment and deny Oxfam's motion. Alternatively, the SEC respectfully requests that the Court not adopt the timeframe requested by Oxfam and instead allow the Commission to report on its progress in promulgating the proposed rule no later than October 31, 2015, the time by which the SEC expects to consider a revised proposed rule.

I. BACKGROUND

A. In 2012, the SEC Promulgated a Final Rule under Section 1504.

The Dodd-Frank Act became law on July 21, 2010. Statement of Undisputed Material Facts ("SOF") 1. Section 1504 of the Dodd-Frank Act added Section 13(q) to the Exchange Act, 15 U.S.C. § 78m, which directed the SEC to issue rules relating to disclosures by resource extraction issuers. Specifically, the Dodd-Frank Act directed the SEC to issue a rule requiring resource extraction issuers to include in an annual report information relating to any payment by the issuer, or by a subsidiary or another entity controlled by the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. SOF-2. On December 15, 2010, the SEC proposed amendments to the annual reporting requirements for resource extraction issuers to implement the provisions of Section 1504 of the Dodd-Frank Act. SOF-3. The proposing release totaled 102 pages, and posed 91 questions for commenters to address. *Id.* Between December 17, 2010 and August 21, 2012, the SEC received over 100 unique comment letters as well as over 4000 form letters and a petition

with 100,000 signatures. SOF-4. Among them were seven comment letters, totaling 125 pages, to which Oxfam was a signatory. *Id.* In addition, Commissioners or Commission staff conducted 30 meetings with commenters regarding the proposed rules. The comments and meetings continued throughout the spring of 2012. SOF-5.

On May 11, 2012, Oxfam filed suit against the SEC in the United States District Court for the District of Massachusetts under the Administrative Procedure Act ("APA") alleging that because the SEC had not promulgated a final rule at that time, agency action had been unreasonably delayed and unlawfully withheld. SOF-6. On July 2, 2012, the SEC announced that it intended to issue a final rule implementing Section 1504 at an open meeting on August 22, 2012. SOF-7. On August 22, 2012, in a 232-page release, the SEC promulgated Rule 13q-1, 17 C.F.R. § 240.13q-1, to implement Section 13(q)'s public disclosure requirement ("2012 Final Rule"). SOF-8.[1] The 2012 Final Rule was published in the Federal Register on September 12, 2012. SOF-9. Oxfam and the SEC stipulated to the dismissal of the case on December 3, 2012, after the 2012 Final Rule was published. SOF-10.

B. <u>The 2012 Final Rule Was Challenged in Court and Vacated in July 2013.</u>

On October 10, 2012, the American Petroleum Institute ("API") and others (collectively, "API Plaintiffs") filed suit against the SEC in the United States District Court for the District of

[1] Oxfam suggests that the 2012 Final Rule was only finalized at that time because of its prior lawsuit. Oxfam Mem. at 5. But, as evidenced by the volume of comments that had to be considered and the number of meetings that took place between Commission members/staff and commenters (including throughout the spring of 2012), the size and detail of the proposing release, the need for consideration by the Commissioners, and the fact that the SEC announced it was promulgating a final rule weeks after Oxfam first filed suit, see SOF 3-7, the SEC was well on its way to finalizing the rule when Oxfam filed that prior lawsuit.

Columbia requesting that the court vacate the 2012 Final Rule.[2] SOF-11. Oxfam subsequently intervened to defend the 2012 Final Rule. SOF-12.

On July 2, 2013, the district court issued a judgment vacating the 2012 Final Rule and remanding it to the SEC for further proceedings. SOF-14. In its decision, the district court found: (1) that the SEC erred in reading Section 13(q) to compel public disclosure of the actual annual reports that extraction issuers submit to the Commission, because statutory language affords the Commission discretion to make public only an anonymized compilation of the issuers' payment information, *id*.; and (2) that the Commission's explanation for not granting an exemption in situations where the payment disclosure is prohibited by a foreign government was insufficient. *Id*.

In light of these defects, the court determined that it was unnecessary to reach the API Plaintiffs' other challenges to the rule, including their arguments that: the SEC failed to adequately consider the economic implications of the rule, and that Section 13(q) and the rule violate their First Amendment rights by compelling issuers to publicly disclose the payment information.[3] SOF-15.

In the Current Regulatory Plan and the Unified Agenda of Regulatory and Deregulatory Actions, the SEC has stated that it expects to consider a revised proposed rule under Section 1504 by October 2015. SOF-17.

[2] The API Plaintiffs at the same time filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, but that matter was ultimately dismissed for lack of jurisdiction. SOF-13.

[3] The API Plaintiffs also argued that the SEC's cost-benefit analysis was flawed, that the SEC was required to solicit additional comments before relying on a particular set of data, and that the SEC arbitrarily declined to define the word "project." SOF-16.

C. The SEC Has Managed, and is Managing, Numerous Complex and Competing Priorities since the 2012 Final Rule Was Vacated.

The SEC is headed by a five-member commission that approves by majority vote all of the SEC's rulemaking, regulatory, and law enforcement activities. SOF-18; *see also* 17 C.F.R. § 200.10; 5 U.S.C. § 552b(d). In view of the sheer magnitude of their responsibilities, by necessity, projects must be prioritized.

Since the court vacated the SEC's 2012 Final Rule on July 2, 2013, the Commissioners have considered and voted to, among other things: (1) institute and/or settle over 1700 actions or proceedings to enforce the federal securities laws; (2) issue over 180 opinions and orders in formal adjudications at the agency involving law enforcement proceedings and securities-industry disciplinary matters; and (3) issue approximately 23 releases proposing or adopting rules under the federal securities laws in response to the Dodd-Frank Act and additional ones implementing provisions of the Jumpstart Our Business Startups Act ("JOBS Act"). SOF-19.

Further, the SEC's agenda on its upcoming calendar includes work on over 50 pre-, proposed, and final stage rulemakings, many of which are rulemakings mandated by deadlines under the Dodd-Frank Act and the JOBS Act. SOF-20.

D. The Present Action.

On September 18, 2014, Oxfam filed the present action against the SEC under the APA to compel the SEC to promulgate a final rule implementing Section 1504, alleging that the SEC's failure to act constitutes "action unlawfully withheld or unreasonably delayed." SOF-24. Oxfam asks this Court to compel the SEC to: (1) issue a proposed rule within 30 days of the granting of summary judgment in its favor 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. *See* Oxfam Memorandum of Law in Support of its Motion for Summary Judgment, Dk. No. 18 ("Oxfam Mem."), at 19.

II. ARGUMENT

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Rockwood v. SKF USA Inc.*, 687 F.3d 1, 9 (1st Cir. 2012); *see also* Fed. R. Civ. P. 56(a). Under this standard, the Court should grant the SEC's motion for summary judgment because the undisputed material facts set forth by the SEC demonstrate that its process of implementing Section 1504 cannot be construed as action "unlawfully withheld or unreasonably delayed." Conversely, Oxfam is not entitled to summary judgment because it fails to allege sufficient facts to substantiate its claim that the Court should compel the SEC to re-promulgate the rule on the schedule Oxfam has proposed.

A. The Mandatory Injunction Sought by Oxfam to Compel Agency Action Is An Extraordinary Remedy.

Oxfam seeks relief under Section 706(1) of the APA, which authorizes federal courts to "compel agency action unlawfully withheld or unreasonably delayed." But "[a] mandatory injunction is an extraordinary remedy, especially when directed at the United States Government." *Sierra Club v. Johnson*, 374 F. Supp. 2d 30, 33 (D.D.C. 2005); *see also Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235 (1972) (a mandatory injunction is "an extraordinary remedy [to] be employed only in the most unusual case"). This is because, as a leading treatise has explained,

> [w]hen a court is called upon to order an agency to take action in a given matter by a certain date, the court is being asked, in effect, to reorder the agency's priorities and to reallocate its resources. An agency cannot expedite its decisionmaking in one matter without diverting resources from other matters, thereby slowing the process of decisionmaking in those matters. Thus, in deciding whether to grant relief under APA § 706(1), a court must focus not on the detail of the agency's method of proceeding with respect to the particular

> matter, but rather on a broad assessment of the temporal urgency of that matter in comparison with the temporal urgency of the scores, hundreds, or even thousands of other matters for which the agency has decisionmaking responsibility.

RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 12.3, at 1068 (5th ed. 2010).

In determining whether to take the extraordinarily rare step of compelling agency action under Section 706(1), courts—including the Court of the Appeals for the First Circuit, *see In re Sierra Club*, No. 12-1860, 2013 WL 1955877, at *1 (1st Cir. May 8, 2013)—have generally followed the six-part balancing test set forth in *TRAC*, 750 F.2d at 80:

> (1) the time that 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 effect of expediting delayed action on agency activities of a higher or competing priority;
>
> (5) 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.

(Internal citations and quotation marks omitted). This standard is highly deferential to government agencies. PIERCE, *supra*, § 12.3, at 1069 ("It is hard for a petitioner to prevail under this deferential standard, and most do not."). *See, e.g.*, *Independence Mining Co. v. Babbitt*, 105 F.3d 502 (9th Cir. 1997) (denying an order to compel agency action after assessing a six-year delay in acting on mineral patent claims under the *TRAC* test). Moreover, a finding of unreasonable delay under the *TRAC* factors is appropriate only "when the delay is egregious." *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001).

B. Oxfam Has Failed to Demonstrate that This Case Is One of the Extraordinarily Rare Cases Where an Order Compelling Agency Action Is Appropriate.

In this case, the relevant *TRAC* factors demonstrate that there is not a basis for an order compelling the Commission to act.

1. *The Rule of Reason and Statutory Timeline.*

The first two *TRAC* factors seek to assess the overall reasonableness of the time the agency's action has taken. *TRAC*, 750 F.2d at 80. "That issue cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part . . . upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). In other words, "[t]here is no per se rule as to how long is too long to wait for agency action." *In re Core Comm., Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008).

That said, as recognized by Oxfam, "[c]ourts considering rulemaking delays have typically considered four years and upwards to be unreasonable . . . ." Oxfam Mem. at 15. *See, e.g.*, *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003) (five-year delay unreasonable).[4] By contrast, here it has been only 20 months since the July 2013 remand—the relevant time period in which to assess Oxfam's application for relief under Section 706(1). This relatively short period does not support a finding of unreasonable delay.

[4] In the non-rulemaking context, *see also Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975) (delay of ten years unreasonable); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026 (D.C. Cir. 1983) (eight-year delay unreasonable); *TRAC*, 750 F.2d 70 (five-year delay unreasonable); *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980) (four-year delay unreasonable).

And while Congress did provide a timetable for the implementation of regulations under Section 1504, that timetable is not a controlling consideration in whether the delay here is unreasonable. *TRAC*, 750 F.2d at 80. Under the *TRAC* analysis, a congressionally established timeframe is but one factor in determining whether extraordinary relief should be granted. In this case, the relative importance of the timeframe must be assessed against the fact that Congress in the Dodd-Frank Act directed the Commission to undertake an unprecedented volume of rulemaking actions. Indeed, among all of the agencies covered by the Dodd-Frank Act, the SEC was assigned the largest number of rulemakings. SOF-22; *See* Kathleen L. Casey, Commissioner, SEC, Speech by SEC Commissioner: The Regulatory Implementation and Implications of Dodd-Frank (Jan. 23, 2011) (discussing the effect of Dodd-Frank on the SEC, noting that "the SEC has to do nearly six times (95) the rulemakings and nearly three times the number of studies it had to do under Sarbanes-Oxley, most of them within one year"). Moreover, the Commission has already once undertaken and completed a rulemaking process for this rule while it is still in the process of completing final rules for the first time for a number of the other Dodd-Frank directed rulemakings. In light of these considerations, the statutory deadline should not be understood to warrant the imposition of extraordinary relief here given that the Commission's delay has been only 20 months.

In arguing that the SEC's delay has been unreasonable, Oxfam relies heavily on *Tang v. Chertoff*, 493 F. Supp. 2d 148 (D. Mass. 2007). Yet that decision offers little, if any, guidance to this Court. First, *Tang* involved a four-year delay by the agency in processing the plaintiffs' applications for permanent residency, not the 20 month delay in this case. Second, far from the complexities involved with promulgating a regulation (particularly one that has already been

invalidated by a district court[5]) at a multi-member agency, the delayed agency action in *Tang* was straightforward, as the court recognized. *See id.* 157-58 ("It has taken over four years and counting for the government simply to acknowledge what is already known to them, to plaintiffs, and to the Court: that there are no FBI records pertaining to Tang."). Comparing the complexities of the resource extraction rulemaking with the relatively straightforward issue in *Tang*, the holding in that case—that a four-year delay was unreasonable under the circumstances—does not support a conclusion that the SEC has unreasonably delayed action here.

2. *Human Health and Welfare.*

The third *TRAC* factor weighs against an order compelling agency action, because any delay in promulgating the resource extraction rule will not result in the kind of direct threat to human health and welfare that might warrant a court order compelling agency action. *TRAC*, 750 F.2d at 80 ("[D]elays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake."). The resource extraction rule is generally designed to disclose information about payments to foreign countries so that citizens in those countries (and other actors) can use that information to advocate that the money can be used consistent with the country's best interests. Although significant, the rule is designed to address long term objectives and thus a modest delay would not likely lead to direct harm to individuals' health or welfare.

[5] The stakes here are also vastly greater than in *Tang*. As the *API* court noted, the SEC had calculated that "the total initial cost of compliance for all issuers is approximately $1 billion and the ongoing cost of compliance is between $200 million and $400 million" and that "the rules will impose a burden on competition, but [the SEC] believe[s] that any such burden that may result is necessary in furtherance of the purposes of Exchange Act Section 13(q)." *API*, 953 F. Supp. 2d at 10.

3. *Competing Agency Priorities.*

The fourth *TRAC* factor focuses on the "effect of expediting [the] delayed action on agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80. Courts have refused to grant relief, even though all the other factors considered in *TRAC* favored it, where "a judicial order putting [the petitioner] at the head of the queue [would] simply move[] all others back one space and produce[] no net gain." *Mashpee Wampanoag Tribal Council*, 336 F.3d 1094 at 1100 (reversing a lower court decision for disregarding the importance of competing priorities) (quoting *In re Barr Labs*, 930 F.2d at 75). "While not wishing to denigrate the importance of [a plaintiff's] claim or the necessity of it receiving a prompt resolution, [the Court] cannot ignore the impact that court-ordered deadlines in [a] case could have on agency activities of a competing or higher priority." *Kokajko v. FERC*, 837 F.2d 524, 526 (1st Cir. 1988) (declining to compel agency action even though it observed that the "five year delay [was] approaching the threshold of unreasonableness").

In evaluating whether the SEC has unreasonably delayed promulgating a revised rule since the district court vacated the SEC's 2012 Final Rule on July 2, 2013, the Court should look to all of the other activities undertaken by the SEC during that time period and those currently on its agenda. As discussed above, *see supra* p. 6, since July 2013, the Commission has undertaken scores of regulatory and law enforcement actions that have involved considerable effort. Each of these tasks was accomplished only upon the approval of a majority vote of the participating Commissioners. SOF-18.

In the coming months the pace of the Commission's institution of civil enforcement actions or administrative proceedings to address potential ongoing securities law violations—which are often considered in the face of either looming deadlines or on an emergency basis—is

unlikely to abate.[6] Moreover, the SEC is also working on over 50 rules at various stages in the rulemaking process, many of which are rulemakings mandated by the Dodd-Frank Act and the JOBS Act, and some of which also have statutory deadlines. SOF-25. In particular, the SEC is under statutory deadlines to write rules under:

(1) Section 765 of the Dodd-Frank Act regarding the mitigation of conflicts of interest for security-based swap clearing agencies and security-based swap execution facilities and national securities exchanges (Jan. 2011);

(2) Section 763(g) of the Dodd-Frank Act regarding the prohibition of fraud in the security-based swaps (July 2011);

(3) Section 763 of the Dodd-Frank Act regarding the implementation of the end-user exception to mandatory clearing of security-based swaps (July 2011);

(4) Section 764 of the Dodd-Frank Act regarding the registration of and regulation of security-based swap transactions, execution facilities, dealers and major participants (July 2011);

(5) Section 621 of the Dodd-Frank Act regarding material conflicts of interest in connection with certain securitizations (April 2011); and

(6) the JOBS Act regarding the offer and sale of securities through crowdfunding (Dec. 2012).

SOF-21. Unlike the second rulemaking the SEC must undertake pursuant to Section 1504, the SEC has not yet promulgated the foregoing rules. Moreover, the SEC has been engaged in numerous rulemakings and other major projects which, although without deadlines mandated by Congress, are critical to the SEC's oversight of the financial markets. *See, e.g.*, "SEC Adopts Money Market Fund Reform Rules: Rules Provide Structural and Operational Reform to Address Run Risks in Money Market Funds" (July 23, 2014). SOF-23.

[6] *See, e.g., Gabelli v. SEC*, 133 S. Ct. 1216, 1220-24 (2013) (on claim for civil penalties, five-year statute of limitations under 28 U.S.C. § 2462 started when the fraud occurred, not when it was discovered); *SEC v. Johnson et al.*, No. 1:15-cv-00299-REB (D. Col. Feb. 12, 2015) (seeking TRO to stop an ongoing Ponzi scheme to protect misappropriated investor funds).

As discussed, the Commissioners of the SEC must vote on every proposed rulemaking, final rulemaking, adjudication, and enforcement action. Any order by the Court to compel the promulgation of a final rule under Section 1504 within the time frame Oxfam urges could require reordering of agency priorities inconsistent with the Commission's assessment of the relative significance of competing priorities. *Sandoz, Inc. v. Leavitt*, 427 F. Supp. 2d 29, 39 (D.D.C. 2006) (observing that an order to compel agency action can "directly bottleneck" other agency actions).

Oxfam argues that because Congress set deadlines for these various rules, it "has set the agency's rulemaking priorities under Dodd-Frank." Oxfam Mem. at 17. But the original statutory deadline under Section 1504—for which the SEC has already written a rule—does not govern how the second Section 1504 rulemaking should be prioritized with respect to the rules and other pressing matters identified above.

The SEC must be allowed to use its discretion to determine which matters to devote its attention and resources to first. The SEC, like the FDA in *Barr Labs*, "is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for [the Court] to hijack." *In re Barr Labs*, 930 F.2d at 76 (finding that the court had "no basis for reordering agency priorities").[7] As the court in *Barr Labs* explained, "[i]n one of the exceptionally rare cases where this court has actually issued an order compelling an agency to press forward with a specific project," the court was persuaded "largely by agency

[7] Oxfam incorrectly argues that this case is not like *In re Barr Laboratories* because of the statutory deadline imposed by Congress. Oxfam Mem. at 17. The FDA in *Barr Labs* was also under a statutory deadline—180 days—which the court found had been violated "repeatedly," yet still did not compel agency action, holding that Congress "did not address the trade-off between strict compliance with the 180-day deadline and the FDA's disposition of its other projects with enough clarity to guide judicial intervention." *In re Barr Labs*, 930 F.2d at 76.

concessions, that the project backed by plaintiff was plainly more 'urgent' than any that the project's acceleration might retard." *Id.* (citing *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983)). No such statement has been made here. To the contrary, as the *API* court observed, the SEC has acknowledged that a rule under Section 1504, "with its global political concern, differs significantly from a typical provision of the Exchange Act that seeks to protect investors through public disclosure." *See API,* 953 F. Supp. 2d at 16, (comparing *Tcherepnin v. Knight*, 389 U.S. 332, 336 . . . (1967) ("One of [the Exchange Act's] central purposes is to protect investors through the requirement of full disclosure by issuers of securities[.]"), *with* 77 Fed.Reg. at 56397 ("This type of social benefit differs from the investor protection benefits that our rules typically strive to achieve.")).

4. *Interest Prejudiced by Delay*.

The fifth *TRAC* factor counsels the Court to "take into account the nature and extent of the interests prejudiced by delay." *TRAC,* 750 F.2d at 80. Oxfam offers little by way of argument on this point other than generally referring to the interests of unidentified citizens of resource-rich countries. Oxfam Mem. at 16-17. Because Oxfam has not identified particular people or groups that may be prejudiced, nor shown how their interests could be impacted, this factor weighs in favor of allowing the SEC discretion to manage its priorities.[8]

C. Contrary to Oxfam's Contention, the Mere Fact that A Statutory Deadline Has Passed Is Not Sufficient to Warrant A Court Order Compelling Agency Action.

Oxfam argues that because the statutory deadline for promulgating a rule implementing Section 1504 has passed, the Court must find that the Commission has "unlawfully withheld"

[8] The final *TRAC* factor, that the Court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed,'" *TRAC,* 750 F.2d at 80, is not applicable here. Oxfam has made no allegation of any impropriety.

action on the rule and order the Commission to re-promulgate the rule according to a schedule of Oxfam's choosing, without regard to any other factors. In advancing this argument, Oxfam erroneously gives no weight to the fact that the SEC has already promulgated a rule under Section 1504 and thus has not in fact "unlawfully withheld" action here.

And in any event, the failure to comply with a statutory deadline is just one of six factors to be considered in determining whether a court should issue an order to compel agency action. For instance, in *In re Sierra Club*, No. 12-1860, 2013 WL 1955877 (1st Cir. May 8, 2013), the First Circuit declined to order the EPA to issue permits to two power plants. Citing its prior application of the *TRAC* factors in *Towns of Wellesley, Concord & Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987), the Court wrote that:

> The EPA states that it is working on the permits, but the process is complex and it must balance competing priorities with its limited resources, explaining that it has a significant backlog of expired permits in this region, and that it has prioritized permits that have greater environmental impact. Petitioners have not shown why these two particular permits should be moved ahead of the queue by our court. *See, e.g.*, *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991).

2013 WL 1955877 at *1.[9] The citation to *Barr Labs* is telling. There, the court had declined to compel FDA action even though (as the *Sierra Club* panel noted) "all other *TRAC* factors favored" compelling action, in deference to the agency's weighing of its competing priorities. Among the "other *TRAC* factors" in *Barr Labs* was the fact that the FDA had "repeatedly violated" a statutory 180-day deadline. 930 F.2d at 74. The First Circuit's application of *TRAC* in *Wellesley*, and reliance on *Barr* in *Sierra Club*, counsel that in this Circuit, even if a statutory deadline has been missed, all of the *TRAC* factors should be weighed by the court in determining

[9] Notably, the *Sierra Club* panel declined to compel agency action even though the EPA estimated that it would issue the permits in question by three years after the date of the decision. *Id*. at *2.

whether any delay was so unreasonable as to necessitate the judiciary compelling an agency to act.[10]

Oxfam cites several cases which stand for the simple proposition that where a statute requires an agency to act, it must act, or that where an agency was required to act, and its action is vacated by a court, that the duty to act remains. *See* Oxfam Mem. at 7-10. But none of these cases stand for the proposition that where an agency's prior action is vacated by a court, that simply because the original deadline to act has expired, the agency has unlawfully withheld agency action, without any consideration of the reasons why it has not yet acted anew. Indeed, the Commission did not "unlawfully withhold" promulgation of these regulations. It promulgated them in 2012, only to have a court invalidate them. SOF-9, 14. Consequently, the court must consider the reasonableness of the Commission's having not yet promulgated revised rules.[11]

---

[10] The cases outside this circuit cited by Oxfam that would not apply the *TRAC* factors when a statutory deadline has not been met, *see* Oxfam Mem. at 8, are inapposite because they do not involve re-promulgation of rules that have been issued and vacated, rendering the original deadline inapplicable. Moreover, the D.C. Circuit rightly rejects their approach because although Section 706 of the APA uses mandatory terms, "Congress in § 702 made its intent clear that courts shall retain equitable discretion" to "deny relief on any . . . appropriate legal or equitable ground." *Ctr. for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 119 (D.D.C. 2002) (citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207-08 (D.C. Cir. 1985) and 5 U.S.C. § 702).

[11] In support of its position, Oxfam cites three district court cases—*Environmental Defense v. Leavitt*, 329 F. Supp. 2d 55, 64-65 (D.D.C. 2004) and *Sierra Club v. EPA*, 850 F. Supp. 2d 300, 304 (D.D.C. 2012), and *Sierra Club v. Johnson*, 374 F. Supp. 2d 30 (D.D.C. 2005). In *Leavitt* and *Sierra Club v. EPA*, the EPA promulgated rules after applicable statutory deadlines had passed. Both of these rules were subsequently invalidated and the EPA was required to issue new rules. In neither case did the court impose any deadline within which the EPA was to act. *See* Oxfam Mem. at 8. In *Sierra Club v. Johnson*, where the EPA was ordered to act after its prior action was vacated by the D.C. Circuit, the court recognized that "[a] mandatory injunction is an extraordinary remedy, especially when directed at the United States Government." Although it ultimately ordered the EPA to act by May 3, 2005, it did so based on the EPA's "unblemished record of nonperformance" – among other things, the court previously had to enter

D. In the Event that This Court Should Determine to Compel Agency Action, It Should Not Adopt the Unachievable Timeframe Proposed by Oxfam.

The injunctive relief proposed by Oxfam—requiring the issuance of proposed rules within 30 days, and final rules just 90 days thereafter—is unrealistic and unreasonable. Competing with all of the Commission's other priorities and deadlines, the proposed rule would have to address various complex issues and the potential impact of the rules on issuers, including an analysis of any First Amendment implications and of the economic impact of the regulatory framework that was proposed. It would also likely involve the consideration of substantial public comment before the proposed rules could be finalized and issued.

And once the Commission has issued a new proposed rule, allotting only 90 days for a comment period and to finalize the rules is grossly insufficient to allow for the issuance of final rules. Depending on how much the new rules deviate from the old ones, it may take commenters some time to digest and comment upon the new proposal, particularly given the court ruling that the SEC has discretion to determine various aspects of the rule. *See API*, 953 F. Supp. 2d at 23-24.[12] These comments on the new rules may well be complex and voluminous. The Commission received 100 substantive comments on the 2012 Final Rule, some of which were lengthy and detailed.[13] In addition, it can be expected that various commenters with differing perspectives and interests will seek to meet with Commissioners and/or Commission staff to

---

an order to get the EPA to take its initial action – and because the EPA had told the court that it expected to take final action on that date *Id.* at 33.

[12] The original proposing release was 102 pages, and posed 91 questions for commenters' response. SOF-3.

[13] Oxfam, for example, was a signatory to seven comment letters totaling 125 pages. SOF-4.

discuss the issues raised in the new proposing release.[14] And given the strong difference in views among the Commissioners who voted on the 2012 Final Rule, SOF-25, it is reasonable to anticipate that Commissioners considering a revised rule would require significantly more time than contemplated by Oxfam's accelerated schedule. At a minimum, for the Commission to review and address the issues raised in these comment letters, consider the potential economic impacts of various alternatives, and then develop a final rule, will be a complex process that again will need to be juggled with the Commission's other priorities. To require that all of this be accomplished within 90 days[15] of the re-issuance of proposed rules would be simply unrealistic.

[14] There were 30 such meetings in connection with the original proposal. SOF-5.

[15] In contrast, in *Environmental Defense v. Leavitt*, upon which Oxfam relies, the court approved a consent decree under which a revised final rule was due one year after the proposed rule was issued. *See* 329 F. Supp. 2d at 61.

CONCLUSION

For the foregoing reasons, the Court should grant the SEC's motion for summary judgment and deny Oxfam's motion. Alternatively, the SEC respectfully requests that the Court not adopt the timeframe requested by Oxfam and instead allow the Commission to report on its progress in promulgating the proposed rule no later than October 31, 2015, the time by which the SEC expects to consider a revised proposed rule.

Dated: February 27, 2015

Respectfully submitted,

/s/ Thomas J. Karr

THOMAS J. KARR
KRISTIN S. MACKERT
SARAH E. HANCUR (BBO# 652607)

Office of the General Counsel
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9612
202-551-5163
karrt@sec.gov

Counsel for Defendant United States Securities and Exchange Commission

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to counsel of record registered to receive notice of electronic filings, and that I served paper copies via overnight mail on:

Michelle Harrison
EarthRights International
1612 K St. NW
Suite 401
Washington, DC 20006

/s/ Thomas J. Karr