UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

SECURITIES AND EXCHANGE COMMISSION'S REPLY
IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

As the Securities and Exchange Commission ("SEC" or "Commission") explained in its opening brief ("SEC Mem.," Dkt. No. 24), the agency's response to the rulemaking directive in Section 1504 of the Dodd-Frank Act,[1] including the statutory deadline for implementation, has been and continues to be reasonable under the circumstances. Those circumstances include the unprecedented volume of rulemaking that both the Dodd-Frank Act and the JOBS Act[2] required the Commission to undertake, and that the Commission *did* adopt a rule under Section 1504 and defended it against a court challenge that resulted in the rule being vacated in 2013. Although Oxfam attempts to dismiss these facts, they are self-evidently relevant to why the Commission's response to Section 1504's rulemaking requirement is not the sort of "egregious" failure to act that would warrant an order compelling agency action, let alone the unreasonable schedule for proposing and adopting a rule that Oxfam seeks.

[1] The Dodd-Frank Wall Street Reform and Consumer Protection Act.

[2] The Jumpstart Our Business Startups Act.

Oxfam contends that the only facts relevant to whether the Commission has "unlawfully withheld and unreasonably delayed" implementation of Section 1504 through rulemaking are that Congress set a deadline for that rulemaking, that date has passed, and there is currently no rule on the books. "Simple math," Oxfam asserts, compels the "simple task" of ordering the Commission to propose and adopt such a rule by November 1, 2015—a date selected by Oxfam—and requires this Court to ignore every fact demonstrating both the reasonableness of the Commission's past and ongoing efforts to comply with Section 1504 and why it would be inequitable to impose Oxfam's deadline.

But Oxfam's approach, while undeniably simple, is also flatly inconsistent with the way the First Circuit has responded to similar demands to compel agency action. Instead, recognizing that such an order is an extraordinary remedy, the First Circuit has repeatedly applied the multi-factor guidelines set out in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"), to determine whether an agency's delay in acting was sufficiently "egregious" under the circumstances to justify an order mandating action. And although the First Circuit has not been called upon to apply the *TRAC* framework to a request for an order compelling rulemaking, its decisions applying those factors offer no reason to doubt that it would. Indeed, there is even greater reason to follow the same measured approach in this context: the *TRAC* factors reflect courts' understandable reluctance to intrude into the business of ordering agency priorities and allocating agency resources, a concern that is particularly acute when the action in question is as resource-intensive as rulemaking. Contrary to Oxfam's view, missing a statutory deadline for agency action does not end the inquiry; it is only one of the *TRAC* factors and, as the D.C. Circuit correctly ruled in *In re Barr Laboratories*, 930 F.2d 72 (1991), can be outweighed by other factors that make it inappropriate to compel agency action.

The same is true here. Moreover, application of the *TRAC* factors strongly counsels deference to the Commission's assessment of how best to employ its finite resources in order to fulfill its law enforcement and other competing regulatory obligations. Because those responsibilities are not static, the sort of rigid schedule that Oxfam demands is neither realistic nor consistent with the Commission's duty to protect investors and the markets. The Commission's attentions necessarily shift, and a recent assessment of its overall regulatory agenda concluded that the Commission may not take further action until Spring 2016 on this rule, as well as several other rules with statutory deadlines previously slated to proceed by this Fall. The revised estimates are necessitated by, and are a reflection of, the Commission's myriad obligations. Accordingly, this Court should deny Oxfam's motion for summary judgment and grant judgment in favor of the Commission.

II. ARGUMENT

A. Applying *TRAC* in this case is both consistent with First Circuit precedent and a reasonable approach to what courts have recognized as the sensitive issue of compelling agency action.

1. The First Circuit's past application of the *TRAC* factors supports applying that framework to Oxfam's request for an order compelling rulemaking.

The First Circuit has applied *TRAC* and its progeny in three cases assessing whether to compel an agency to take specific action,[3] and Oxfam's briefing identifies no persuasive reason why this Court should not apply the same analytical framework in ruling on Oxfam's request for an order compelling the SEC to propose and adopt a rule implementing Section 1504 under the schedule Oxfam has determined to be appropriate.

[3] The cases are *In re Sierra Club*, No. 12-1860, 2013 WL1955877 (1st Cir. May 8, 2013); *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988); and *Wellesley, Concord and Norwood, Mass. v. FERC*, 829 F.2d 275 (1st Cir. 1987).

Oxfam attempts to dismiss the relevance of the cases in which the First Circuit has applied the *TRAC* framework by arguing that the First Circuit "has never applied the *TRAC* factors" to a case addressing whether to compel action where an agency has missed a rulemaking deadline. But Oxfam does not—and cannot—cite any First Circuit case holding that *TRAC* should *not* apply in this context. To the contrary, what the cases show is that whenever the First Circuit has been confronted with deciding whether to compel an agency to take action, it has applied the *TRAC* factors, acknowledging expressly that those guidelines are "relevant" to assessing whether the agency's delay in acting has been so "egregious" that the extraordinary step of judicial intervention is warranted.

And because *TRAC* included as one factor to be weighed whether "Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed," 750 F.2d at 80, there is no reason to assume that the existence of a "timetable" in the form of a statutory deadline for agency action would lead the First Circuit to conclude *either* that it should not apply *TRAC* in deciding whether to compel agency action *or* that the statutory deadline should be given dispositive weight. Indeed, in *Barr Labs.*, the D.C. Circuit applied *TRAC* where an agency had not met a statutory deadline; recognized that the existence of the statutory deadline implicated the congressional "timetable" factor under *TRAC*; and ruled that although the failure to meet the deadline was one factor in assessing whether to compel agency action, other factors made it inappropriate to do so. *See* 930 F.2d 74-76. Although Oxfam cites two cases from other circuits that did not follow the *Barr Labs.* approach,[4] there is no reason to

[4] *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166 (9th Cir. 2002); *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999).

believe that the First Circuit would follow those cases instead of *Barr Labs*.[5]

2. Applying the *TRAC* framework in assessing whether to impose the relief Oxfam is seeking in this case is reasonable.

As noted in *TRAC*,"[i]n the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant [court intervention]." 750 F.2d 79. The issue before the Court, then, is not whether the SEC has violated a statutory mandate, but whether the Court should exercise its equitable powers. *Barr Labs.*, 930 F.2d at 74. "Equitable relief . . . does not necessarily follow a finding of a violation: respect for the autonomy and comparative institutional advantage of the executive branch has traditionally made courts slow to assume command over an agency's choice of priorities." *Id.* To that end, *TRAC* identified six principles that have helped courts determine when injunctive relief is an appropriate remedy for agency delay. *Id.*

And while the foregoing supports using a *TRAC*-type approach whenever a court assesses a request to take the extraordinary step of intervening in an agency's ordering of its agenda and allocation of its resources, there are particular reasons for the Court to reject Oxfam's rigid approach to the Section 1504 rulemaking deadline at issue here. This is not a case in which an agency faced with a congressional directive has simply refused to act or lacks a plausible explanation for the failure to complete the required action within a congressionally established timeframe. *Cf. Barr Labs.*, 930 F.2d at 75 ("Where the agency has manifested bad faith, as by singling someone out for bad treatment or asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities. Accordingly,

[5] Although it has not expressly adopted the holding in *Barr Labs.*, the First Circuit cited it favorably in *In re Sierra Club*, noting parenthetically that the D.C. Circuit had declined to compel agency action in that case even though "all the other *TRAC* factors [besides allowing the agency to order competing priorities] favored it . . . ." 2013 WL 1955877 at *1.

the absence of bad faith . . . is relevant to the appropriateness of mandamus. "). To the contrary, the Commission responded to Congress's mandate by proposing and adopting a rule under Section 1504. When the rule was challenged, the Commission vigorously defended it in the Court of Appeals and the district court. Throughout and presently, the Commission has undertaken and is undertaking myriad other rulemakings under the Dodd-Frank and JOBS Acts and carried out its other vitally important regulatory and enforcement functions. Although Oxfam persistently urges the irrelevance of all of these facts, they are compelling reasons for this Court to reject Oxfam's "simple math" argument for jettisoning the *TRAC* framework that the First Circuit has consistently applied in assessing whether an agency's inaction meets the "egregiousness" threshold for judicial intervention.

B. Application of the *TRAC* factors demonstrates that the extraordinary remedy of judicial intervention is not warranted.

The *TRAC* factors weigh strongly against the mandated rulemaking schedule that Oxfam demands be imposed.

1. The timing of the SEC's response to Section 1504's rulemaking requirement has been and continues to be reasonable.

The first two *TRAC* factors assess the overall reasonableness of the time it takes an agency to act. 750 F.2d at 80. There is "no per se rule as to how long is too long." *In re Core Comm., Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). Rather, the "issue cannot be decided in the abstract," but depends 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).[6] And while a

[6] If, however, Oxfam suggests that the length of time, without consideration of the particular circumstances, were the appropriate yardstick, the SEC notes that the First Circuit has held that a five-year delay was merely "approaching the threshold of unreasonableness." *Kokajko*, 837 F.2d

congressionally established timeframe is a consideration in determining the reasonableness of the agency's timetable, there is no merit to Oxfam's arguments that the reasonableness of the SEC's response to the Section 1504 mandate must be measured from the original statutory deadline, ignoring the promulgation of the 2012 Final Rule and the subsequent order vacating that rule. Nor is Oxfam correct in urging the Court to ignore the relative complexity of the tasks remaining (both substantive and procedural) following the district court's order vacating and remanding the 2012 Final Rule.

Oxfam offers no logical reason why the Court should not recognize, in assessing the reasonableness of the SEC's response to Section 1504 and its statutory deadline, *see Barr Labs.*, 930 F.2d at 75, that the SEC already promulgated a rule only to have it vacated by the district court in *American Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5 (D.D.C. 2013) ("*API*"). The SEC recognizes that it still has a duty to promulgate a final rule and that the initial 270-day deadline may be weighed as part of the consideration of the reasonableness of the SEC's efforts to re-promulgate such rule. But it makes little sense to ignore the substantial steps that the SEC has already taken to comply with that mandate and the time taken by those good-faith efforts. Moreover, for the reasons discussed in the SEC's opening brief, in assessing the reasonableness of the SEC's actions, the Court should consider the time that has elapsed from July 2, 2013, the date when the 2012 Final Rule was vacated.

Oxfam cites cases stating that if an agency acts to fulfill a mandatory duty, and that act is vacated by a court, "conditions return to the *status quo ante*." *See* Oxfam Reply at 4, *citing Independent U.S. Tanker Owners Cmte. v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987). Those

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at 526; *see also Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987) (six-year delay "tread[ed] at the very lip of the abyss of unreasonable delay"). Assuming the appropriate starting point for consideration of the relevant deadline is the decision in *API*, the SEC has not approached those markers.

cases stand for the reasonable proposition that the requirement to take an action does not disappear if an agency attempts to comply but ultimately fails. As noted, the Commission has never disputed that it remains obligated to promulgate a rule implementing Section 1504. But those cases *do not* hold that if an agency had a duty to act by a particular deadline, but its action is later vacated by a court, the original deadline still applies.

Here, the complexity of the task at hand counsels strongly in favor of finding that the SEC is acting reasonably.[7] Oxfam portrays the *API* court's remand as "exceedingly narrow" and the SEC's task at hand as minimal because of the "extensive rulemaking process" the SEC engaged in to issue the now vacated rule. Oxfam Reply at 7. But as noted in the SEC's opening brief, based on the *API* court's holding, a core assumption underlying the 2012 Final Rule—that the statute required a particular form of disclosure—is no longer valid. Instead, the Commission must now consider various alternative approaches and determine the proper level of disclosure, and address the economic and First Amendment implications of those approaches. Far from being a minor, technical fix to the existing rule, the remand in *API* requires the Commission to address important, substantive components of the rule. The significance of the task remaining is reflected in the 42 comment letters (which total approximately 370 pages) that the Commission has received and is considering, and the 24 meetings which Commission officials have

[7] Oxfam suggests that the Commission has engaged in a "pattern of protracted delay." However, in promulgating the 2012 Final Rule, the Commission reviewed exhaustive commentary by strong interests on both sides of the issue, and met repeatedly with commenters, before promulgating the rule in August 2012. *See* SEC's Statement of Undisputed Material Facts ("SOF"), Dkt. No. 25, at 4-5, 7. It did this despite the competing priorities of an unprecedented number of mandatory rulemakings placed on the Commission by the Dodd-Frank Act, in addition to its many other mission-critical responsibilities. *Id.* at 22. Moreover, the SEC acted to expedite judicial resolution of the challenge to those regulations. *See API*, 953 F. Supp. 2d at 11. In light of these facts, Oxfam's characterization of the SEC's actions as a "pattern of protracted delay" is unavailing.

conducted, since the 2012 Final Rule was vacated. *See* http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resource-extraction-issuers.shtml.

Moreover, any rule promulgated by the Commission must be approved by a majority of participating Commissioners. *See* SEC Mem. at 6. Crafting the revised rule here will likely require negotiation among the Commission's members, which makes this a more time-consuming process than a decision vested in an agency that has a single director. *See, e.g.*, Donald G. Langevoort, The SEC as a Bureaucracy: Public Choice, Institutional Rhetoric, and the Process of Policy Formation, 47 Wash. & Lee L. Rev. 527, 532 (1990) ("[E]ven at the Commission level, the presence of five separate persons who must come to a collegial decision in favor of the proposal itself creates another point requiring consensus-building."). Oxfam's attempt to minimize the SEC's task fails to take into account the practical realities of promulgating this rule.

2. The SEC's competing priorities—including other statutorily mandated deadlines—support denying Oxfam's request to impose its mandatory rulemaking schedule.

The First Circuit has recognized that the fourth TRAC factor—"the effect of expediting delayed action on agency activities of a higher or competing priority"—provides a basis to deny court intervention "even [when] all other *TRAC* factors favor[] it." *In re Sierra Club*, 2013 WL 1955877, at *1, *citing Barr*, 930 F.2d at 75. As detailed in the SEC's opening brief, the Commission is responsible for a substantial number of required, mission-critical tasks, including other statutorily mandated rulemakings, in addition to promulgating a revised rule pursuant to Section 1504. *See* SEC Mem. at 12-15; SOF-19-23.[8]

[8] Oxfam's claim that the agency has offered "no admissible evidence" (Oxfam Reply at 7) is unpersuasive at best. In the Joint Motion for Stipulated Briefing Schedule on Motions for Summary Judgment, (Dkt. No. 14), the parties stipulated to a briefing schedule that expressly

Oxfam asserts that the Commission's non-rulemaking duties and rulemakings without statutory deadlines are not properly considered as "competing priorities" vis-a-vis the Section 1504 rulemaking requirement. Without citing any legal support, Oxfam argues that "[a]s a matter of administrative law . . . no magnitude of agency burden lifts agency preference over Congress's demands." Oxfam Reply at 8. This reasoning is flawed. It is certainly the will of Congress that the Commission bring timely enforcement cases (whether federal court actions or administrative proceedings), many of which have statutes of limitations or require urgent action to protect investors. *See* SEC Mem. at 12-13. Moreover, other rulemakings, even if they do not have congressional deadlines, can involve major issues that are of critical importance to investors and the capital markets, and are part of the SEC's fundamental mission. *See id*. at 13. It is entirely proper and appropriate for the Court to consider these competing interests under this *TRAC* factor.

And even if the Court were to consider as "competing priorities" only other rulemakings with statutory deadlines, the Commission has nine other outstanding congressionally imposed statutory deadlines that have also passed for rulemakings under the Dodd-Frank and JOBS Acts.[9]

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contemplates that either may rely on the "administrative record or public records" in crafting their filings in this case; indeed, Oxfam's summary judgment motion is replete with citations to public documents. Moreover, the Court may take judicial notice of the existence of any or all of the SEC's rulemakings or enforcement proceedings as they are all matters of public record.

[9] *See* SOF-21: RIN 3235-AK74 (implementing Section 765 of Dodd-Frank regarding mitigation of conflicts of interest for security-based swap clearing agencies and security-based swap execution facilities and national securities exchanges); RIN 3235-AK77 (implementing Section 763(g) of Dodd-Frank prohibiting fraud in the security-based swaps); RIN 3235-AK88 (implementing Section 763 of Dodd-Frank regarding the end-user exception to mandatory clearing of security-based swaps); RIN 3235-AK91 (implementing Section 764 of Dodd-Frank regarding registration of and regulation of security-based swap transactions, execution facilities, dealers and major participants); RIN 3235-AK93 (same); RIN 3235-AL05 (same); RIN 3235-AL10 (same); RIN 3235-AL04 (implementing Section 621 of Dodd-Frank regarding material conflicts of interest in connection with certain securitizations); and RIN 3235-AL37

Significantly, the Commission is still in the process of completing rulemakings for these other mandated rules, while by contrast the Commission has completed a rulemaking, albeit unsuccessfully, for the rule required under Section 1504. These mandated rules, even disregarding the agency's other responsibilities, underscores both the appropriateness of applying the *TRAC* factors, and the conclusion that the SEC's timeline for considering this rule is reasonable.[10]

Finally, Oxfam errs in contending that "the First Circuit has rejected the notion that competing priorities excuse delay." Oxfam Reply at 9. That blanket statement entirely ignores the holdings in *Sierra Club* and *Kokajko*. *See Sierra Club*, 2013 WL1955877 (stating that an agency must balance competing priorities where the petitioner did not show that permits at issue should be moved ahead of the queue by the court); *Kokajko*, 837 F.2d 524 (providing that the court "cannot ignore the impact that court-ordered deadlines in the petitioner's case could have on agency activities of a competing or higher priority"). Nor does *Caswell v. Califano*, 583 F.2d 9 (1st Cir. 1978)—the pre-*TRAC* case upon which Oxfam relies—support Oxfam's argument. In that case, which involved the setting of administrative hearing dates for applicants seeking disability benefits, the court held that hearings must be provided "at a meaningful and reasonable time"; it did not hold that it should not consider competing priorities. *Id.* at 15. Significantly, although the court put a time constraint on when the hearings at issue must be held, the court

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(implementing Title III of the JOBS Act governing the offer and sale of securities through crowdfunding). A recent assessment of the overall regulatory agenda led to the determination that the Commission may be unable to take further action with respect to these mandated rulemakings until Spring 2016.

[10] Oxfam's argument that promulgation of these rules are not "equally-weighted priorities" (Oxfam Reply at 8) is without support. Notably, many of these rulemakings have prompted ongoing attention from Congress and members of the public including investors, securities professionals, and academics, among others.

declined to impose time constraints "as to the time in which a decision must be rendered after a hearing has been held"; rather, "the ALJs [were] free to give as much attention to a particular case as its complexity requires." *Id.* at 17. In that manner, *Caswell* endorses the same principle that underlies the rationale set forth in *TRAC*'s fourth factor—that courts should respect the authority of agencies to manage competing priorities.

Fundamentally, the SEC agrees that where Congress sets priorities, the agency must endeavor to meet them. But Oxfam's view that the *only* relevant priority set by Congress for the SEC is writing a regulation implementing Section 1504 ignores the SEC's other congressionally mandated responsibilities and core agency functions. For this reason, *TRAC* factor four weighs heavily in favor of the SEC.

3. Oxfam does not dispute the SEC's analysis that *TRAC* factors three and five weigh in the SEC's favor.

In its reply, Oxfam neither disputes nor otherwise addresses the SEC's analysis of the third and fifth *TRAC* factors, effectively conceding that these factors weigh against the extraordinary relief Oxfam is seeking. The third *TRAC* factor weighs against an order compelling agency action, because a delay in promulgating a revised rule under Section 1504 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. Similarly, the fifth *TRAC* factor advises the Court to "take into account the nature and extent of the interests prejudiced by delay," *id.*, and Oxfam has not identified any specific people or groups that face a direct or imminent threat of harm from any additional delay.[11] Thus, these two factors weigh in favor of allowing the SEC discretion to manage its priorities.

[11] At one point Oxfam suggests that by failing to promulgate a rule quickly, the SEC is "undermining" global transparency initiatives. Oxfam Reply at 8 n.8. This argument is

C. Oxfam's proposed timeframe is unrealistic and unreasonable.

In light of the fundamental issues raised by the *API* court's invalidating the initial rule, the Commission's unprecedented rulemaking burdens and other mission-critical obligations, and the realities of the rulemaking process, Oxfam's proposed timeframe for completing this work is unrealistic and unreasonable. *See* SEC Mem. at 18-19. Rather than disputing these case-specific conditions, Oxfam argues that its timeframe is "well within applicable precedent," citing isolated examples of shorter timeframes for requiring agency action. *See* Oxfam Reply at 11-12.

Each of the cases cited by Oxfam is inapposite to the situation presented here. Several involved delays far longer than the time since the *API* court vacated the Commission's initial rule.[12] Several also involved health and safety issues,[13] to which the *TRAC* framework assigns greater urgency and weight. Those cases also generally involved matters less complex than the promulgation of regulations with important economic, First Amendment, and other

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weakened, however, by its simultaneous acknowledgement that there has been "legislative and regulatory action in the European Union, Norway and Canada" on parallel provisions. *See id*. at 3 n.2.

[12] *See Abdi v. Chertoff*, 589 F. Supp. 2d 120, 120 (D. Mass. 2008) (four-year delay on individual application to adjust immigration status); *United Steelworkers of Am., AFL-CIO-CLC v. Pendergrass*, 819 F.2d 1263, 1270-71 (3d Cir. 1987) (noting that "[s]ixteen years after Congress directed" OSHA to prescribe warnings to apprise employees of all hazards to which they are exposed, "no standard has been promulgated covering" two-thirds of affected workers); *In re: American Rivers & Idaho Rivers Unite*d, 372 F.3d 413, 414 (D.C. Cir. 2004) (petitioners' petition to FERC "has gone unanswered for more than six years").

[13] *See Pendergrass*, 819 F.2d at 1265 (concerning warnings to apprise employees in non-manufacturing sectors of all health and safety hazards to which they are exposed); *Raymond Proffitt Found. v. EPA*, 930 F. Supp. 1088, 1102 (E.D. Pa. 1996) (noting that "the environmental effects of Defendants' delay . . . are significant"). In addition, *In re Paralyzed Veterans of America*, 392 Fed. Appx. 858, 859 (Fed. Cir. 2010), concerned the entitlement to disability benefits for servicemembers based on exposures to herbicides in Vietnam.

considerations like those presented here,[14] or they did not require the courts to consider competing agency priorities.[15] Moreover, neither *Raymond Proffitt*, *Pendergrass*, *Abdi*, nor *Paralyzed Veterans* involved decision-making by a multi-person body, like the Commission, that must decide what regulation to promulgate by majority vote, necessitating negotiation and accommodation. *See* SOF-18, 25.

The case on which Oxfam primarily relies, *Pendergrass*, addressed a situation vastly different from the re-promulgation of the rule at issue here. There, the Third Circuit had previously ordered the Secretary of Labor to reconsider, based on the existing record, the application of the hazard communication standard—which was in place for employees in the manufacturing sector—to employees in non-manufacturing sectors. *See* 819 F.2d at 1264, *citing United Steelworkers of Am. v. Auchter*, 763 F.2d 728 (3d Cir. 1985). Contrary to the court's prior instructions, the Secretary issued an advanced notice of proposed rulemaking that sought to expand the record, posing nine new questions. 819 F.2d at 1267-68. Noting that several of the questions had answers that were "self-evident," and that most of the remaining questions "could have been equally applicable to manufacturing sector employees," but were not asked of their employers, *id.* at 1268-69, the court found the new proposed rule and questions unnecessary and contrary to the court's prior judgment. *Id*. at 1269.

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[14] For example, *Abdi* (like *Tang v. Chertoff*, 493 F. Supp. 2d 148 (D. Mass. 2007)) involved the consideration of an individual's immigration application. *Abdi*, 589 F. Supp. 2d 120. In *Raymond Proffitt*, the court noted that EPA already had "all of the information it needs to move forward with its part of the promulgation process," already assembled the administrative record, and already developed its position 19 months earlier. *Raymond Proffitt*, 930 F. Supp. 2d at 1101.

[15] *See American Rivers*, 372 F.3d at 420 (noting that FERC "offers no 'plea of . . . practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources'"); *Paralyzed Veterans*, 392 Fed. Appx. at 859 (noting that Veterans Affairs had already drafted the final rule but was merely awaiting review and clearance by OMB); *Abdi*, 589 F. Supp. 2d at 120-121.

Here, in contrast, the *API* decision, by making the level of public disclosure discretionary, may lead the Commission to propose a different approach to disclosure, with differing economic and First Amendment implications. Indeed, the Commission has already received and will likely continue to receive a wealth of new substantive public comments concerning possible revisions to the vacated rule. *See supra* pp. 8-9. In short, the nature of the Commission's responsibilities following the remand in *API* is readily distinguishable from the highly circumscribed task that faced the Secretary of Labor in *Pendergrass.*

Finally, Oxfam suggests that a short deadline is required here because the Commission has not stated with specificity when it will be finished with the rulemaking. But this is a function of the issues and competing priorities the Commission must address, as well as the complexities of the rulemaking process, as discussed in detail above. These issues counsel in favor of a much more realistic and reasonable timeline than demanded by Oxfam. The Commission submits that this proposal is entirely reasonable given the task at hand.[16]

[16] Oxfam argues that the Court must enter Oxfam's requested mandatory injunction, lacking discretion to do otherwise. *See* Oxfam Reply at 9-10. But for the reasons explained above and in the agency's opening brief, the Commission has neither unlawfully withheld action nor unreasonably delayed in promulgating regulations. Moreover, even if the Court were to find a violation, "Congress in Section 702 made its intent clear that courts shall retain equitable discretion" even in the face of Section 706's mandatory terms. *Center for Biological Diversity v. Pirie*, 201 F. Supp. 2d 113, 118 (D.D.C. 2002); *see also id.* at 119 (disagreeing with cases cited by Oxfam and noting that the D.C. Circuit "has held that all forms of relief under the APA are discretionary"). To the extent the Court must fashion some remedy if it finds a violation, rather than order no remedy at all, *see id*. at 120, it retains the discretion to fashion one that takes into account the realities of the SEC's competing interests and the requirements of the rulemaking process.

III. CONCLUSION

The Court should grant the SEC's motion for summary judgment and deny Oxfam's motion. If, however, the Court deems it appropriate to monitor the SEC's progress in promulgating this rule, the SEC respectfully requests that the Court establish a reporting schedule for the SEC to report on its progress in promulgating the proposed rule.

Dated: March 27, 2015

Respectfully submitted,

/s/ Thomas J. Karr

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CERTIFICATE OF SERVICE

I hereby certify that on March 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 regular U.S. Mail on:

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