



July 14, 2014

Anne K. Small, General Counsel
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Ms. Small,

Oxfam America (“Oxfam”) writes to insist again that the Commission comply with its legal obligation to swiftly enact a new rule implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Section 1504”). We note with concern the recent non-binding announcement that the Commission may propose a new rule in March 2015 and strongly believe that this delay is both unwarranted and inconsistent with the Commission’s legal obligations. Instead, the Commission should take swift action consistent with its previous approach to Section 1504, which showed leadership that set the stage for similar action around the world.

Oxfam is committed to taking legal actions to implement and defend Section 1504. As you will recall, when four industry and trade associations sued the Commission, seeking to vacate the rules, Oxfam intervened on behalf of the Commission to defend them. Prior to this, Oxfam filed a lawsuit to remedy the Commission’s improper delay. Although we sincerely hope that a similar lawsuit will prove unnecessary, Oxfam is prepared to return to court to ensure the Commission promulgates a new rule in a timely manner.

When Congress enacted Section 1504 on July 21, 2010, it gave the Commission a 270-day deadline to promulgate rules. 15 U.S.C. § 78m(q)(2)(A). The Commission failed to enact a Final Rule for more than two years. On May 16, 2012, Oxfam sued the Commission in the U.S. District Court for the District of Massachusetts, requesting relief under the Administrative Procedure Act for the Commission’s unjustified delay. *Oxfam America, Inc. v. SEC*, No. 1:12-cv-10878 (D. Mass.) More than three months later, the Commission finally promulgated a final rule implementing Section 1504 (“August 2012 Rule”). The U.S. District Court for the District of Columbia issued a judgment on July 2, 2013, vacating the August 2012 Rule and remanding it to the Commission for reevaluation of certain key points in light of what it determined was a failure to exercise discretionary leeway that was granted by Congress. *American Petroleum Institute v. SEC*, 953 F. Supp. 2d 5 (D.D.C. 2013). The Commission chose not to appeal, and Oxfam was not permitted to appeal alone.

Once the district court vacated the August 2012 Rule, the agency once again was – and remains – in violation of the statutory deadline. The legal effect of the vacatur order was to reinstate the status quo prior to the enactment of the August 2012 Rule. See *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 855 (D.C. Cir. 1987) (vacatur of a regulation returns conditions to “the status quo ante, before the [] rule took effect.”). The agency is thus required to enact new rules to comply with the

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mandate of Congress. *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (explaining that normally when a rule is vacated the status quo is restored and the agency must again take action). As far as we are aware, every court that has considered mandatory agency action in a similar posture has agreed that after vacatur an agency is in violation of a statutory deadline until it has taken new final action and Congress's aims are fulfilled. See, e.g., *Sierra Club v. EPA*, 850 F. Supp. 2d 300, 303 (D.D.C. 2012) (holding vacatur of rule "restore[d] the status quo before the invalid rule took effect," and thus finding that EPA was presently out of compliance with the statutory deadline); *Sierra Club v. Johnson*, 374 F. Supp. 2d 30, 33 (D.D.C. 2005) (holding that the "EPA's duty to act is still (or again) unfulfilled" in light of rule vacatur, which "left unfulfilled EPA's duty" to take final action on state implementation plans).

As 1,453 days have now passed since July 21, 2010, and over a year has passed since the District Court's ruling, the Commission is clearly well out of compliance with the statutory deadline for Section 1504. Yet the Commission did not add Section 1504 to its rulemaking agenda until this May, and according to the Spring 2014 Agency Rule List, the Commission is not contemplating the proposal of a new rule until March 2015.¹ Indeed, the agenda only provides that the Division of Corporate Finance "is considering recommending that the Commission propose rules to implement Section 1504[.]"² Since the Commission is not required to abide by the timetables set in its rulemaking agenda,³ there is no guarantee that the proposed rule will in fact be released by March 2015. In the meantime, the Commission has indicated that it plans to take action on numerous other "nonsignificant" items that are either not statutorily mandated⁴ or have no statutory deadline⁵ before turning to Section 1504. The Commission has thus made it clear that it will remain out of compliance with its legal obligations until at least mid-2015 while prioritizing other rules that Congress does not require.

Since the vacatur order was issued, events in other parts of the world have made the Commission's job easier. As Publish What You Pay (PWYP) and Global Witness have explained in comments to the Commission, the European Union and Norway have adopted mandatory disclosure laws that parallel in all relevant respects the August 2012 Rule, and Canada has committed to pass similar legislation by early 2015.⁶ In March 2014, the United States was accepted as a candidate country in the Extractive Industries Transparency Initiative (EITI), which specifically requires project-level disclosures that parallel the European and SEC requirements.⁷ The United Kingdom has publicly committed to implement the EU Directives by the end of 2014 and has proposed an approach that includes project-level, public reporting with no exemptions (as required by EU law) for all financial years commencing on or after January 1, 2015.⁸ Prime Minister David Cameron has publicly called on the U.S. to follow suit.⁹

¹ Office of Information and Regulatory Affairs, Agency Rule List - Spring 2014: Securities and Exchange Commission, Disclosure of Payments by Resource Extraction Issuers, RIN: 3235-AL53, available at <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=3235-AL53> (last accessed June 20, 2014).

² *Id.*

³ See Securities and Exchange Commission, Regulatory Flexibility Agenda, Preamble (Mar. 21, 2014), available at http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201404/Preamble_3235.html (last accessed June 20, 2014) (noting that the Commission is not "required to consider or act on any matter that is included in the agenda").

⁴ For example, the Rule for Principal Trades With Certain Advisory Clients, which the agency is planning to propose in December 2014, see <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=3235-AL56>, is authorized but not required by the Investment Advisers Act. See 15 U.S.C. § 80b-6a; 15 U.S.C. § 80b-11(a).

⁵ For example, the compensation clawback rules that the Commission is planning to propose in October 2014, see <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201404&RIN=3235-AK99#>, are mandated by the Dodd-Frank Act but have no statutory deadline. See 15 U.S.C. 78j-4.

⁶ Comment submitted by Publish What You Pay – United States at 2-4 (Mar. 14, 2014), at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-28.pdf>. See also Comment submitted by Global Witness at 4-7 (Dec. 18, 2013), at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-22.pdf>.

⁷ Press Release, U.S. Department of the Interior, Extractive Industries Transparency Initiative Board Approves U.S. Candidacy Application (Mar. 19, 2014) <http://www.doi.gov/news/pressreleases/extractive-industries-transparency-initiative-board-approves-us-candidacy-application.cfm>.

⁸ See United Kingdom Dep't of Business Innovation & Skills, *UK IMPLEMENTATION OF THE EU ACCOUNTING DIRECTIVE – Chapter 10: Extractive industries reporting – Consultation* at 11 (March 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299454/bis-14-622-uk-implementation-of-the-eu-accounting-directive-chapter-10-extractive-industries-reporting-consultation.pdf. The term "project" is defined as "the operational activities which are governed by a single contract, licence, lease, concession or similar legal agreement, and form the basis for payment liabilities with a government[.]" *Id.* at 7 n.4.

These and other developments towards a global transparency standard over the past year validate the Commission's judgment as to the potential costs and benefits of public, project-level disclosures with no exemptions. Moreover, because many SEC-listed extractive companies are also regulated by European, Norwegian, and Canadian securities authorities, they will soon begin disclosing precisely the information that would have been published under the August 2012 Rule. The way is therefore clear for the Commission to act swiftly and adopt a new rule reflecting this global consensus. Indeed, when the courts remand rules to an agency for failure to exercise discretion granted by Congress, the agency may properly re-adopt *precisely identical rules* if it concludes that its original choices represent a reasonable interpretation of the statute. See, e.g., *Prime Time Int'l Co. v. United States Dep't of Agric.*, No. 13-5200, 2014 U.S. App. LEXIS 10698 (D.C. Cir. June 10, 2014).

We wrote to you on September 26, 2013, pointing out that the Commission could propose a new rule by November 1, 2013 and enact a Final Rule by March 1, 2014, just over 270 days after the vacatur order – a similar amount of time that Congress originally provided for the Commission to adopt its rule after the enactment of Dodd-Frank. But the Commission took no action. Members of Congress have repeatedly called on the Commission to promptly re-issue a strong rule in 2014, reminding the Commission of its statutory obligation to do so.¹⁰ Industry groups and individual companies have also urged the Commission to act promptly to issue new rules.¹¹

The Commission's inaction and its plan to further delay the initiation of rulemaking until March 2015 are unreasonable. We insist that the Commission commit to enacting a final rule implementing Section 1504 by December 31, 2014. Since the statutory deadline is clear, we would hope to avoid unnecessary litigation; Oxfam therefore suggests negotiating a Consent Decree with the Commission to submit for court approval establishing binding deadlines for implementation. If by August 1, 2014, the Commission has not committed to finalizing the rule by year's end or agreed to the terms of a Consent Decree, Oxfam intends to promptly return to court to enforce the Commission's legal obligations.

Our efforts to ensure that the Commission acts in a timely manner derive from our commitment to fulfilling the mandate of the Dodd-Frank Act through strong transparency rules. The Commission has demonstrated that it shares that commitment through its original adoption of a strong rule implementing Section 1504. As always, we are eager to serve as a resource for any information or assistance the Commission may need in promulgating appropriately strong rules in a timely manner. Please do not hesitate to contact us through our legal counsel, Jonathan Kaufman and Rick Herz at EarthRights International (jonathan@earthrights.org and rick@earthrights.org) and Howard Crystal at Meyer Glitzenstein & Crystal (hcrystal@meyerglitz.com).

Sincerely,

⁹ David Cameron, *The Corruption Cure: Transparency, Trade, Taxes*, WALL STREET JOURNAL (June 4, 2014), at <http://online.wsj.com/articles/david-cameron-the-corruption-curetransparency-taxes-trade-1401913005>.

¹⁰ See Letter from Rep. Maxine Waters, et al to Mary Jo White, Chair, SEC (June 11, 2014) at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-50.pdf>; Letter from Senator Benjamin L. Cardin, et al, to Mary Jo White, Chair, SEC (May 1, 2014) at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-41.pdf>; Letter from Senator Benjamin L. Cardin, et al. to Mary Jo White, Chair, SEC (Aug. 2, 2013) at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-2.pdf>.

¹¹ See Letter from Chevron to Mary Jo White, Chair, SEC (May 7, 2014) at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-40.pdf> (urging the Commission "to move ahead with new rulemaking ... as soon as possible in 2014"); Letter submitted by Royal Dutch Shell plc and Exxon Mobil Corporation (May 1, 2014) at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-37.pdf> (emphasizing the increasing "urgency for the Commission to consider Dodd-Frank 1504 in calendar year 2014"); Letter submitted by Patrick T Mulva and Stephen Comstock, American Petroleum Institute, at 10 (Nov. 7, 2013) at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-12.pdf> (urging "new rulemaking ... as early as practicable in 2014.").

A handwritten signature in black ink, appearing to read "Raymond C. Offenheiser". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Raymond Offenheiser
President, Oxfam America

CC:
Michael Conley, Deputy General Counsel
William Shirey, Assistant General Counsel