No. 12-1398

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, et al.,

Petitioners,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondents,

and

OXFAM AMERICA,

Proposed-Intervenor-Respondent.

OXFAM AMERICA'S EMERGENCY MOTION TO INTERVENE AS RESPONDENT, OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 15(d), Oxfam America ("Oxfam") respectfully seeks to intervene as a respondent in this action challenging the Securities and Exchange Commission's ("SEC") implementing regulation for Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereafter "Cardin-Lugar," after the provision's sponsors), Pub. L. No. 111-203, 124 Stat. 1376, 2220-22. Alternatively, Oxfam seeks leave to participate as Amicus Curiae. Oxfam seeks to participate on an emergency basis to ensure that it may be heard in response to Petitioner's "Emergency Motion To Determine Jurisdiction" ("Pet. Mot.") (Docket No. 1399710, Oct. 15, 2012).

Cardin-Lugar mandates that the SEC require "resource extraction issuers" – publicly traded oil, natural gas, and mining companies – to disclose payments made to governments associated with the extraction of these natural resources. The provision – and the SEC's implementing regulation, 77 Fed. Reg. 56,365 (Sept. 12, 2012) (hereafter "Disclosure Rule") – will provide vital information to investors such as Oxfam, while at the same time allowing people in communities where these natural resources are found, and their international allies, to hold governments accountable for natural resource revenues.

As explained below, Oxfam is both an investor and a nonprofit international development and relief organization. Declaration of Paul O'Brien ("O'Brien Decl."), ¶¶ 1, 14. Oxfam's interests as an investor, as well as its core

organizational mission, would be impaired by the relief Petitioners seek, which would deprive Oxfam of information to which it – and the public – is statutorily entitled. *Id.*, ¶¶ 2-19.

Counsel for Oxfam contacted counsel for Petitioner and Respondent regarding their position on this motion. The SEC consents to both Oxfam's motion to intervene and Oxfam's alternative request to participate as Amicus Curiae. Petitioners take no position at this time on Oxfam's motion or request.

BACKGROUND

A. Congress Passed Cardin-Lugar To Protect Investors And Foster International Accountability Concerning Resource Extraction Payments.

Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") in 2010, amending the Securities Exchange Act to improve corporate accountability and consumer protection. Cardin-Lugar is a key component of the Exchange Act, mandating that the SEC require companies engaged in the commercial development of oil, natural gas, or minerals to publicly disclose "information relating to any payment made by the [company] for the purpose of the commercial development of oil, natural gas, or minerals . . . ." 15 U.S.C. § 78m(q)(2)(A).

Under Cardin-Lugar, the payments that must be disclosed include "taxes, royalties, fees (including license fees), production entitlements, bonuses, and other

material benefits, that the Commission, consistent with the guidelines of the Extractive Industries Transparency Initiative ["EITI"] (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals." *Id.* at § 78m(q)(1)(C)(ii).[1] Any such payment is to be disclosed so long as the payment is "made to further the commercial development of oil, natural gas, or minerals," unless such a payment qualifies as "*de minimis*." *Id.* at § 78m(q)(1)(C)(i).

The payment information that must be disclosed includes "the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas, or minerals," as well as "the type and total amount of such payments made to each government." *Id.* at § 78m(q)(2)(A)(i)-(ii).[2] The SEC is also required, "[t]o the extent practicable," to "make available online, to the public, a compilation of the information required to be submitted" under the Rule. *Id.* at § 78m(q)(3).

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[1] The EITI, endorsed by the World Bank Group and supported by numerous countries, is a coalition of oil, natural gas, and mineral companies, governments, and other international organizations dedicated to fostering transparency and accountability in resource extraction payments. 77 Fed. Reg. at 56,366, n.14.

[2] Cardin-Lugar further directs that the SEC's implementing regulations require that "the information included in the annual report . . . be submitted in an interactive data format" – *i.e.*, include "electronic tags that identify, for any payments made by a" company: (a) "the total amount of the payments by category"; (b) "the currency used to make the payments"; (c) the financial period

Like other disclosure provisions of the Exchange Act, Cardin-Lugar informs and protects investors.[3] The provision also reflects "the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals." *Id.* at § 78m(q)(2)(E).[4]

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in which the payments were made"; (d) "the business segment of the [company] that made the payments"; (e) "the government that received the payments, and the country in which the government is located";(f) "the project of the [company] to which the payments relate"; and (g) "such other information as" the SEC "may determine is necessary or appropriate in the public interest or for the protection of investors." *Id.* § 78m(q)(2)(D)(ii).

[3] *See, e.g.*, 156 Cong. Rec. S5870-02 (daily ed. July 15, 2010) (statement of Sen. Ben Cardin) ("[I]nvestors have a right to know. If you are going to invest in an oil company, you have a right to know where they are doing business, where they are making payments. . . . [T]his is information that may affect your decision as to whether you want to take this risk in investing in that company. ").

[4] Many resource-rich developing economies experience lower growth and far greater poverty than other countries, as profits from resource extraction are easily captured and often flow directly into the hands of corrupt governments in developing countries. Societies heavily dependent upon resource extraction usually have exceptionally low standards of living and unusually high rates of corruption, authoritarian government, ineffective governance, ethnic violence, and civil war. *See generally* Michael Ross, Oxfam America, *Extractive Sectors and the Poor* (2001), *available at* http://www.oxfamamerica.org/files/extractive-sectors-and-the-poor.pdf . Cardin-Lugar was also enacted to address this concern. *See, e.g.*, 156 Cong. Rec. S3816 (daily ed. July 15, 2010) (statement of Sen. Richard Lugar) (in passing Cardin-Lugar "we are helping to alleviate poverty internationally by allowing the people of the countries that have mineral wealth to hold their officials accountable, to use those payments to help the people of that nation").

Cardin-Lugar requires the SEC to promulgate regulations implementing its requirements, directing that the agency, "[n]ot later than 270 days after" the law was passed (*i.e.*, April 2011) "shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer" the information that Cardin-Lugar requires to be disclosed. *Id.* at § 78m(q)(2)(A).

B. The SEC's Implementing Regulation Faithfully Carries Out The Mandate In Cardin-Lugar.

In December 2011, the SEC issued its Proposed Rule to implement Cardin-Lugar. 75 Fed. Reg. 80,978 (Dec. 23, 2010). The Proposed Rule closely conformed to the statute, tracking the statutory definitions of which payments must be disclosed and what information must be included. *Id.* The agency subsequently received and considered extensive public comments on all aspects of the Rule, considering all comments received.[5]

The SEC's Final Regulation – "Disclosure of Payments By Resource Extraction Issuers") (hereafter "Disclosure Rule") – was published in the Federal Register on September 12, 2012. 77 Fed. Reg. 56,365. The Disclosure Rule

[5] *See* http://www.sec.gov/comments/s7-42-10/s74210.shtml (website containing public comments on proposed rule). After the SEC had long missed the statutory deadline, Oxfam filed a lawsuit under Section 706(1) of the Administrative Procedure Act ("APA") concerning the agency's unlawful delay. *Oxfam Am. v. SEC*, No. 12-10878 (D. Mass., filed May 16, 2012). In that suit, SEC claimed that it had "not unlawfully withheld or unreasonably delayed the promulgation of a final rule," requesting that the court "deny that Oxfam is entitled to the relief requested or any relief whatsoever." Answer of SEC at 7-8 (No. 12-10878, ECF No. 10).

closely tracks the precise language of Cardin-Lugar, in many respects adopting Cardin-Lugar almost word for word. *Compare, e.g.*, 15 U.S.C. § 78m(q)(1)(A) *with* 77 Fed. Reg. at 56,417 (codified at 17 C.F.R. § 240.13q-1(b)(2)) (defining "commercial development of oil, natural gas, or mineral"); *compare* 15 U.S.C. § 78m(q)(1)(C) *with* 77 Fed. Reg. at 56,418 (codified at 17 C.F.R. § 249b.400, Sec. 2, Item 2.01(c)(6)) (defining "payment"); *compare* 15 U.S.C. § 78m(q)(2) *with* 77 Fed. Reg. at 56,418 (codified at 17 C.F.R. § 249b.400, Sec. 2, Item 2.01(a)) (defining reporting that is required).

In other respects, the SEC narrowed the scope of the Disclosure Rule in order to accommodate concerns raised by the regulated industry. For example, the SEC defined "*de minimis*" as $100,000, exempting from any reporting requirements projects that do not meet this threshold. 77 Fed. Reg. at 56,419. The SEC also did not include payments associated with "the removal of the resource from the place of extraction to the refinery, smelter, or first marketable location," *id.* at 56,375, instead limiting the term "export" to removal outside of the country. Marketing payments are also entirely excluded, as are transportation payments for any purposes other than export. *Id.* at 56,376. Finally, while the Disclosure Rule – like Cardin-Lugar – generally mandates disclosures on a project-by-project level, it permits companies to "disclose payments at the entity level if the payment is

made for obligations levied on the issuer at the entity level rather than at the project level." *Id.* at 56, 386.

In response to concerns about being required to report the information in their annual reports, the SEC created a new form – Form SD – in which the disclosure information will be provided, which avoided the broader exposure to officers had the disclosure been included in reports filed on Form 10-K. *See* 77 Fed. Reg. at 56,296. To allow companies sufficient time to collect the required information, the Commission is not requiring the first reporting until 150 days after an issuer's fiscal year ends, starting with the fiscal year that ends after September 30, 2013. *Id.* at 56,365.

ARGUMENT

Federal Rule of Appellate Procedure 15(d) provides that an applicant for intervention in a petition for review must file a motion to intervene within 30 days after the petition is filed, supported by a concise statement of interests and the grounds for intervention. Fed. R. App. P. 15(d).

I. Oxfam's Interests

Oxfam is an international relief and development organization dedicated to finding lasting solutions to international poverty and related injustice. O'Brien Decl., ¶ 1. One of Oxfam's core missions is to advance resource revenue accountability by engaging with companies, governments, and international

organizations, as well as local communities and civil society organizations, to promote responsible and accountable stewardship of these revenues. *Id.*, ¶ 2. Oxfam has spent more than $1 million dollars during 2011-12 on global initiatives related to extractive industry revenue transparency, including researching extractive industry payment information in select countries; supporting civil society organizations and national level campaigns to improve these transparency efforts; and publishing reports concerning these issues. *Id.*, ¶¶ 5-10.

Oxfam has also been a leader in the campaign to enact mandatory extractive payment disclosure legislation in the United States, and has actively participated in the Cardin-Lugar rulemaking process. *Id.* Oxfam also owns securities in several resource extraction issuers subject to the Disclosure Rule. *Id.*, ¶ 14. Oxfam will use the Cardin-Lugar disclosures to better assess investment risks in these companies. *Id.* As an active shareholder, Oxfam will also use the information to inform its participation in the governance of these companies. *Id.*, ¶ 14-16.

II. Oxfam Should Be Permitted To Intervene As Of Right.

Although Fed. R. Civ. P. 15(d) does not specify a standard for intervention, Courts generally look to the principles underlying intervention under Rule 24 of the Federal Rules of Civil Procedure. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001); *Sierra Club, Inc. v. EPA*, 358 F.3d 516, 518 (7th Cir. 2004) ("Rule 15(d) does not provide standards for intervention, so

appellate courts have turned to the rules governing intervention in the district courts under Fed. R. Civ. P. 24"); *Ala. Mun. Distribs. Group v. FERC*, 300 F.3d 877, 879, n.2 (D.C. Cir. 2002) (suggesting that an intervenor in a petition for review must demonstrate Article III standing); *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 814-15 (D.C. Cir. 2006) (same). Under Rule 24(a), Oxfam is entitled to intervene as of right, as the motion is timely; Oxfam has a legally protected interest at stake; and the SEC will not adequately protect that interest on behalf of Oxfam. *See* Fed. R. Civ. P. 24(a); *e.g.*, *Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008).

A. Oxfam Is Entitled To Protect Its Interests In The Disclosure Mandate Of Cardin-Lugar And The SEC's Disclosure Rule.[6]

In this Circuit, the interests required for intervention are co-extensive with the interests that must be demonstrated to satisfy Article III standing. *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998); *see also Fund for Animals v. Norton*, 322 F.3d 728, 732-33 (D.C. Cir. 2003). Here, Oxfam meets all the prerequisites for Article III standing – *i.e.*, injury in fact, causation, and redressability, *see, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) – by virtue of both: (a) the informational injury it will suffer should

[6] Oxfam's motion is plainly timely, as it is filed within a few weeks after the Petition for Review was filed, well before the 30 day deadline in Fed. R. App. P. 15(d), and before any action has been taken. *See, e.g.*, *Karsner*, 532 F.3d at 886 (reversing denial of intervention sought "before the district court took any action").

Petitioners prevail, and (b) the resource and economic injury Oxfam would suffer should Petitioners prevail, in light of both Oxfam's role as an investor, and because of the significant resources Oxfam currently expends trying to obtain from other sources the information the Disclosure Rule will require companies to affirmatively disclose – resources that will be freed up for other uses as a result of the Disclosure Rule's timely implementation. O'Brien Decl., ¶¶ 5-19.

1. Petitioners' Challenge Risks Informational Injury To Oxfam, Impairing Its Mission And Profitability.

As the Supreme Court has explained, a "plaintiff suffers an 'injury-in-fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see also Pub. Citizen v. DOJ*, 491 U.S. 440, 448-51 (1989); *ASCPA v. Feld Entm't., Inc.*, 659 F.3d 13, 22 (D.C. Cir. 2011) ("Following *Akins*, we have recognized that a denial of access to information can work an 'injury in fact' for standing purposes, at least where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them.") (citations omitted); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 583 F.3d 871, 873-74 (D.C. Cir. 2009). Here, similar to other disclosure mandates, such as those contained in the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, Cardin-Lugar and the Disclosure Rule require companies to publicly disclose information – *i.e.*, payments made to governments associated with the commercial

development of oil, natural gas, and minerals. In light of Oxfam's statutory right to this information under Cardin-Lugar, and the concrete uses to which Oxfam would put this information, the relief sought by Petitioners, which would deny Oxfam this information, plainly gives rise to the requisite injury-in-fact.

Oxfam owns securities of several resource extraction issuers that are subject to the Disclosure Rule. O'Brien Decl. ¶ 14. The disclosures will allow Oxfam to assess risks associated with these and other resource extraction issuers' payments to governments, and to make investment and divestment decisions pursuant to its goals as an investor. *Id.* Oxfam will carefully review disclosures by such issuers for indications of investment risk reflected in otherwise undisclosed patterns of payments. *Id.*; *see also*, *e.g.*, 77 Fed. Reg. at 56,398 ("the new disclosure requirements would help investors assess the risks faced by resource extraction issuers operating in resource rich countries"); *id.* at 56,399 ("To the extent that the required disclosures will help investors in pricing the securities of the issuers subject to the [Disclosure Rule], the rules could improve informational efficiency.").

Oxfam is also an engaged and active shareholder, and the information disclosed pursuant to the Disclosure Rule will inform Oxfam's participation in the governance of companies it owns, including, without limitation, introduction of shareholder resolutions by Oxfam, as well as votes cast as a shareholder. O'Brien

Decl. ¶¶ 15-16. Without the disclosures mandated by Cardin-Lugar, Oxfam would be hindered in carrying out its goal of active participation in corporate governance as an informed and educated shareholder. *Id.*

Petitioners are the direct cause of Oxfam's informational injury, as they seek to foreclose the public disclosure of information to which Oxfam is statutorily entitled. Oxfam would receive the information to which it has a statutory right if the Court were to deny Petitioners' challenge. Thus, Oxfam has Article III standing, and the requisite interest, to intervene. *See also, e.g.*, *Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008) ("Shay's injury in fact is the denial of information he believes the law entitles him to").[7]

2. Petitioners' Challenge Also Threatens To Reduce And Otherwise Divert Oxfam's Financial Resources.

Because the disclosures required by Cardin-Lugar will also make companies more profitable in the long-term, Oxfam also satisfies Article III standing requirements – and thus the requisite "interest" for intervention – by virtue of its status as an investor in this regard. O'Brien Decl. ¶ 14; 77 Fed. Reg. at 56,399 (noting comment that disclosures will "promote capital formation by reducing

[7] In this respect, the nature of Petitioners' challenge is noteworthy. Not only do Petitioners seek to overturn the Disclosure Rule; they also claim that Cardin-Lugar violates their First Amendment rights. If successful, this challenge would not only force the SEC to reconsider and narrow the Disclosure Rule, but would foreclose the government from requiring *any* such disclosure.

information asymmetry and providing more security and certainty to investors as to extractive companies' levels of risk exposure").[8]

However, even more concretely, the Disclosure Rule will impact Oxfam's need to spend over one million dollars yearly to promote resource revenue accountability and obtain the information that the Disclosure Rule requires issuers to affirmatively disclose. O'Brien Decl. ¶¶ 6-13. Oxfam's expenditures include supporting local civil society coalitions, engaging in direct public advocacy, and researching the status of natural resource revenues in countries such as Ghana, Mali, and Peru. *Id.* Because the Disclosure Rule mandated by Cardin-Lugar will require the public disclosure of much of the information Oxfam seeks through its advocacy work, Oxfam will be able to reduce the resources it has diverted to achieving resource revenue disclosures and use them instead for other activities to alleviate poverty and combat the resource curse. *Id.*

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[8] Oxfam's status as an investor plainly satisfies Article III. *E.g.*, *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 518 (D.C. Cir. 2009). In *Stilwell*, the agency contested an investor's right to challenge a regulation that related to the activities of "mutual holding company subsidiaries, not investors." *Id.* at 518. Although Stilwell was not the object of the regulation, the Court concluded that he had standing because of the "substantial probability" that the regulation would "harm [his] economic interests . . . ." *Id.* Similarly, here, given that the relief Petitioners seek – the vacatur of Cardin-Lugar and the Disclosure Rule – will concretely impact Oxfam's economic interest as an investor in companies covered by the Rule, Oxfam has standing. *See also Chamber of Commerce v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005) (finding the Chamber of Commerce had standing to challenge an SEC regulation "because it would like to invest in shares of funds that may engage in transactions regulated by" the rules at issue).

This resource injury fully supports Article III standing, as the Supreme Court has explained, *see, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), and this Court has reaffirmed in many cases. *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136 (D.C. Cir. 2011); *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006); *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) ("*Havens* makes clear, however, that an organization establishes Article III injury if it alleges that purportedly illegal action increases the resources the group must devote to programs independent of its suit challenging the action.").

Oxfam will use these disclosures to inform, educate, and train stakeholders from government, the private sector, civil society, and communities affected by extractive resource development in the transparent and accountable management of extractive resource revenues derived from projects in their countries and communities. O'Brien Decl. ¶¶ 6-13. Until Cardin-Lugar disclosures become available, however, resources that would be marshaled to undertake these activities are instead being diverted to advocating for revenue transparency and seeking the information through other means. *Id.* Thus, public disclosure of extractive

issuers' payments to governments will concretely impact Oxfam's resources by freeing them for other uses.[9]

Petitioners are also the direct cause of Oxfam's resource injury, as Oxfam will be required to divert resources as described, *see supra* at 12-14, only if Petitioners' challenge to Cardin-Lugar and the Disclosure Rule succeeds. This Court would redress Oxfam's injury by denying Petitioners' challenge, thereby ensuring disclosures that will profit Oxfam and enable it to free resources for other uses.

B. The SEC Will Not Adequately Protect Oxfam's Interests.

As regards the existing representation here, Oxfam will not be adequately represented by the SEC. As a threshold matter, it is critical to emphasize that, especially in this Circuit, demonstrating the inadequacy of existing representation "is not onerous." *Dimond v. Dist. of Columbia*, 792 F.2d 179, 192 (D.C. Cir. 1986). Rather, "[t]he requirement of [Rule 24] is satisfied if the applicant shows that representation of his interest 'may be' inadequate," and "the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *Fund for Animals*, 322 F.3d at 735 (an

[9] As with informational injury, Oxfam need not demonstrate that upholding the Disclosure Rule will fully ameliorate this injury, only that it will aid in doing so. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) (parties satisfy the redressability requirement when they show that a favorable decision will relieve some of their injuries, and "need not show [it] will relieve [ ] *every* injury") (emphasis in original); *accord Meese v. Keene*, 481 U.S. 465, 476 (1987).

applicant "'ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee'") (quoting 7A Wright & Miller, Fed. Practice & Proc. § 1909 (1st ed. 1972)).

Applying those principles here, it is evident that the SEC may not adequately represent Oxfam's interests. Indeed, although Congress mandated that the Cardin-Lugar regulation be issued by April 2011, it was not until Oxfam filed suit against the SEC and moved for summary judgment that the agency finally came into compliance with that mandate. *See supra* at 6, n.6. Particularly where a regulation is the result of prior litigation, courts have allowed a prior plaintiff to intervene to defend the regulation, satisfied that the agency may not adequately represent the interests of its former adversary. *See, e.g.*, *Safari Club Int'l. v. Salazar*, 281 F.R.D. 32, 42 (D.D.C. 2012) (while intervenors are "clearly aligned with the Federal Defendants in this action, they have a legitimate basis for concern over the adequacy of the representation of their interests, in view of the prior lengthy litigation by these proposed intervenors against the" agency); *accord Coal. of Arizona/New Mexico Counties for Stable Economic Growth v. Dep't of the Interior*, 100 F.3d 837, 844-46 (10th Cir. 1996).

The interests asserted by the applicants also "need not be wholly 'adverse' before there is a basis for concluding that existing representation of a 'different' interest may be inadequate." *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967).

Rather, because the intervenor may "mak[e] a more vigorous presentation" of certain arguments "than federal officials who, by all appearances, adopted the regulation reluctantly and only because they were compelled to do so," courts have found intervention appropriate in these circumstances. *E.g.*, *Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (intervention appropriate despite "shared general agreement" between the government and the applicants).

In fact, SEC's interests may well not be completely aligned with Oxfam's. First, the Exchange Act charges the SEC with the interests of investors and issuers, 15 U.S.C. § 78b, and it may not zealously defend the interests of public interest investors like Oxfam. *See*, *e.g.*, *Norton*, 322 F.3d at 737 (government parties often "do not adequately represent the interests of aspiring intervenors" because intervenors may represent "'a more narrow and "parochial" financial interest,'" which the government party may not advance "'at the expense of its representation of the general public interest'") (quoting *Dimond*, 792 F.2d at 192-93).

Second, the SEC may consider itself foreclosed from making certain arguments that Oxfam would make, or it may not advance such arguments with similar vigor. For example, the Petitioners point out that the SEC itself has at least suggested that Section 25(a)(1) of the Exchange Act, 15 U.S.C. § 78y(a)(1), could provide authority for direct appellate review of certain SEC rules issued under a provision not specifically identified in Section 25(b)(1), 15 U.S.C. § 78y(b)(1).

See Pet. Mot. at 10. Oxfam contends, by contrast, that Section 25(a)(1) does not encompass rules, only orders – an argument that the SEC has, in the event, decided *not* to press. *See* SEC Resp. to Pet. Mot. ("SEC Resp.") (Dkt. No. 1401968, Oct. 23, 2012), at 2-4. Accordingly, Oxfam satisfies this aspect of the intervention test as well.

III. Alternatively, Oxfam Should Be Granted Permissive Intervention.

In the event the Court determines that Oxfam does not qualify for intervention of right, alternatively the Court should exercise its discretion by allowing Oxfam to intervene as a permissive matter. *See* Fed. R. Civ. P. 24(b) (permitting courts to grant intervention to anyone who "has a claim or defense that shares with the main action a common question of law or fact," after considering "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights"); *see also Nuesse*, 385 F.2d at 704 ("Rule 24(b) . . . provides basically that anyone may be permitted to intervene if his claim and the main claim have a common question of law or fact"). "As its name would suggest, permissive intervention is an inherently discretionary enterprise," *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998), and hence courts have "wide latitude" in determining whether to grant such status. *Id.*

Here, where Oxfam plainly seeks to pursue "question[s] of law or fact in common" with the existing parties by intervening to defend the Disclosure Rule, for which it has advocated, permissive intervention at the very least is appropriate. Oxfam's participation as a party will prejudice neither the SEC nor Petitioners, as Oxfam is intervening at the very beginning of the proceedings, and its participation would not in any way prevent any party from fully airing its positions.

Rather than causing any prejudice, Oxfam's participation would contribute to a fuller development of the factual and legal issues because, as noted *supra*, Oxfam may be in a position to make legal arguments that SEC may not. This includes the implications of Petitioners' intended request to stay implementation of the Disclosure Rule. *See* Pet Mot. at 2, n.1. While any such relief would directly implicate Oxfam's rights and interests, O'Brien Decl. ¶¶ 17-19, the Court may not have the benefit of a full briefing on this issue, including the serious adverse impacts of such a stay, *id.*, if Oxfam is not permitted to participate.

IV. At Minimum, Oxfam Should Be Permitted To Participate As Amicus Curiae.

If the Court determines that Oxfam's intervention is not appropriate, at minimum Oxfam requests leave to participate as *amicus curiae*. Fed. R. App. P. 29(b) requires prospective amici to list their interest in the litigation, and to explain why an amicus brief is desirable and how the matters asserted are relevant to the disposition of the case. Oxfam has a clear interest for the purposes of participation

as *amicus curiae* for the same reasons Oxfam's interests are at stake for purposes of intervention. *See supra* at 7-14. Thus, not only does Oxfam have significant interests as an investor and an intended user of extractive industry disclosures, it has been a participant in the notice and comment process and can provide insight to the Court as a member of both the civil society and investor communities. *Id.*

Moreover, Oxfam's participation is both desirable and relevant, as it will present dispositive arguments that neither side has chosen to present. *See* Circuit Rule 29(a); *Dean Transp. v. NLRB*, No. 07-1262, 2007 U.S. App. LEXIS 27905, at *2 (D.C. Cir. Nov. 27, 2007) ("*Amici* are cautioned to avoid repeating Dean Transportation's presentation and to concentrate on relevant points not adequately developed in its brief."). Specifically, at this juncture, Oxfam will argue that this Court does not have direct appellate jurisdiction over challenges to the Final Rule or over facial statutory First Amendment challenges, whereas both Petitioners and Respondent have argued that jurisdiction is proper in this Court. *See* Pet. Mot. at 5-11 and SEC Resp. at 2-4. Therefore, if the Court denies Oxfam's request to participate as an intervenor, the should at minimum grant Oxfam's alternative request for leave to participate as *amicus curiae*.

CONCLUSION

For the foregoing reasons, Oxfam's Motion to Intervene should be granted. Alternatively, Oxfam should be granted leave to participate as amicus curiae.

Respectfully submitted,

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ADDENDUM

CORPORATE DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULES 26.1

Oxfam America is not controlled by any parent company or publicly-held company, and no such company has a 10% or greater ownership interest. Oxfam America is a nonprofit international development and relief organization dedicated to finding lasting solutions to poverty and related injustice. A core mission of Amicus is to advance resource revenue accountability around the world. Oxfam America is an incorporated entity with no membership.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of September, 2012, I electronically filed the foregoing Emergency Motion To Intervene Or In The Alternative, Motion For Leave To Participate As Amicus Curiae, with the clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. I certify that all participants in the case are CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I have caused 4 copies to be hand delivered to the Clerk's office.

/s/ Howard M.Crystal

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PETROLEUM INSTITUTE, *et al.*,

Petitioners,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,

Respondents,

and

OXFAM AMERICA,

Proposed Intervenor-Respondent

.

Case No. 12-1398

DECLARATION OF PAUL O'BRIEN

I, PAUL O'BRIEN, hereby declare as follows:

1. I am the Vice President of Policy and Campaigns of Oxfam America ("Oxfam").Oxfam is a nonprofit international development and relief organization dedicated to finding lasting solutions to poverty and related injustice. Any decision challenging the constitutionality of Section 1504 of the Dodd-Frank Act ("Section 1504") or further delaying its implementation will substantially injure Oxfam both in its core work advancing resource revenue

accountability worldwide, and in its rights as a shareholder in a number of resource extraction issuers.

2. As Vice President of Policy and Campaigns, it is my job to oversee all advocacy campaigns and help to develop and approve all policy positions that Oxfam adopts. Oxfam was a leader in the campaign to enact mandatory extractive payment disclosure legislation in the United States, and it has been an active participant in the Section 1504 rulemaking process. Oxfam submitted comments in response to the SEC's Proposed Rule to implement Section 1504, urging the adoption of an effective disclosure regime governing payments by resource extraction issuers to the Federal and foreign governments. Oxfam is also the Plaintiff in a pending lawsuit against the Securities and Exchange Commission, *Oxfam America v. SEC*, Civil Action No. 1:12-cv-10878 (D. Mass.), regarding the delay in implementing Section 1504.

Resource Revenue Accountability Work

3. A core mission of Oxfam is to advance resource revenue accountability around the world, engaging with resource extraction issuers, governments and international organizations, as well as with local communities and civil society organizations to promote responsible and accountable stewardship of revenues from extractive resources. This mission reflects Oxfam's core values and is integral to its activities and work around the world.

4. Ironically, many resource-rich developing economies experience lower growth and far greater poverty than their resource-poor neighbors. Profits from resource extraction are easily captured and often flow directly into the hands of corrupt officials. Therefore, the most resource-rich countries are often the least successful at translating oil and mineral reserves into roads, schools, clinics, or improved living standards. Instead, societies heavily dependent upon resource extraction usually have exceptionally low standards of living and unusually high rates of corruption, authoritarian government, ineffective governance, ethnic violence, and civil war. Oxfam's work on resource revenue accountability is intended to help combat this phenomenon, often referred to as the "resource curse."

5. Oxfam engages in a variety of activities designed to promote the rights of communities affected by oil, gas and mining activities in 13 countries across Africa, Asia, and Latin America, in which extractive resource revenues are often corruptly diverted or mismanaged in a way that reduces their contribution to poverty reduction and economic development. In seven of these countries, Oxfam has invested significant resources over the past seven years to bring more transparency and accountability to the management and use of government revenues derived from oil, gas and mining projects. In many such countries, little or no information is available regarding the payments that oil,

gas, and mining companies make in connection with the commercial development of extractive resources.

6. Oxfam has spent more than $1.4 million during 2011-2012 on global programs related to extractive industries revenue transparency. These activities have included, among others, research on the availability of extractive industry payment information in select countries; supporting the establishment of civil society coalitions to advocate; and specific national level campaigns designed to improve legal and voluntary frameworks around payment transparency. For example, Oxfam has conducted research on mining revenues in Mali; gas revenues in Peru; and oil revenues in Ghana.

7. In the last five years, Oxfam has expended significant resources researching and publishing reports on natural resource revenues. These include *Hidden Treasure: In Search of Mali's Gold Mining Revenues* (2007), *available at* http://www.oxfamamerica.org/publications/hidden-treasure; *People, Power and Pipelines: Lessons from Peru in the Governance of Gas Production Revenues* (2010), *available at* http://www.oxfamamerica.org/publications/people-power-and-pipelines; and *Ghana's Big Test: Oil's Challenge to Democratic Development* (2009), *available at* http://www.oxfamamerica.org/publications/ghanas-big-test. Because the Disclosure Rule mandated by Section 1504 will require the public disclosure of much of the information Oxfam seeks through its advocacy work, Oxfam will be able to reduce the resources it has diverted to achieving resource

revenue disclosures and use them instead for other activities to alleviate poverty and combat the resource curse.

8. Oxfam has also financially supported the establishment of civil society coalitions focused on transparency of extractive industry revenues in Ghana (the Civil Society Platform on Oil and Gas) as well as Cambodia (Cambodians for Resource Revenue Transparency). These coalitions both wrote to the SEC during the public comment period for Section 1504. *See* http://www.sec.gov/comments/s7-42-10/s74210-125.pdf and http://www.sec.gov/comments/s7-42-10/s74210-135.pdf.

9. In Ghana, Oxfam supported a legislative campaign by the Civil Society Platform on Oil and Gas designed to influence the Ghana Petroleum Revenue Management Act of 2011. This Act now requires the Government of Ghana to disclose payments received from oil companies. The Act also established the independent Public Interest and Accountability Committee, which is tasked with ensuring implementation of the Act.

10. In addition, Oxfam has supported the implementation of the voluntary Extractive Industries Transparency Initiative (EITI) by serving on the EITI global board and supporting the implementation of the initiative in such countries as Ghana, Mali, Burkina Faso, and Peru. The EITI relies on government political will to be transparent and is limited in its breadth and scope. Section 1504 disclosures will provide more detailed, timely, and regular

information in EITI implementing countries and valuable information in countries not subscribing to the voluntary initiative (such as Cambodia).

11. Timely implementation of Section 1504's disclosure requirements is crucial to Oxfam's mission of ensuring that government revenues from the extraction of natural resources are managed accountably, transparently, and in the public interest. Oxfam would rely heavily upon the disclosures mandated by the Section 1504 to advance its work in this area. Oxfam would, without limitation, use these disclosures to inform, educate, and train stakeholders from government, the private sector, civil society, and communities affected by extractive resource development in the transparent and accountable management of extractive resource revenues derived from projects in their countries and communities.

12. The required disclosures, beginning in 2014, will allow Oxfam and the local civil society groups it supports, to be more effective in the activities described above. For example, Cambodians for Resource Revenue Transparency have said that they will rely on Section 1504 disclosures to try to hold the Cambodian government accountable for the use of payments received from oil and mining companies. Oxfam will work with Cambodians for Resource Revenue Transparency to understand, analyze and use Section 1504 disclosures in their engagement and advocacy with the Cambodian government. In Ghana, Section 1504 disclosures will complement the disclosures under the Petroleum

Revenue Management Act and allow civil society, parliamentarians and journalists to cross-check payments reported as received. Additionally, Section 1504 project-level mining payment disclosures in Ghana will allow civil society groups, the Public Interest and Accountability Committee, and local government officials to verify whether the central government is making the required transfers of royalties to district governments. In Peru, the project-level disclosures required by Section 1504 will allow civil society groups and local government officials to verify that the required transfers of payments under the country's "canon minero" are happening and at the correct amounts.

13. Finally, Section 1504 disclosures will allow Oxfam to know and understand payments that are being made in countries that do not subscribe to the EITI or have strong local disclosure regimes. It is difficult to promote accountable management of extractive resource revenues in the absence of reliable information about such revenues.

Shareholder Rights and Governance

14. Oxfam also owns securities of several resource extraction issuers that would be subject to the Final Disclosure Rule. These resource extraction issuers include: Kosmos Energy Ltd. (U.S./Bermuda), AngloGold Ashanti Ltd. (South Africa), Barrick Gold Corp. (Canada), CNOOC Ltd. (China), Chevron Corp. (U.S.), and Newmont Mining Corp. (U.S.). Oxfam holds approximately $3,000 in securities

for each of the above issuers. Access to the disclosures required by the Section 1504 would allow Oxfam to better assess investment risks associated with these and other resource extraction issuers' payments to governments, and to decide whether to invest in or divest itself of particular securities based on its desire to participate in shareholder governance actions with particular issuers. Oxfam intends to carefully review disclosures by such issuers for indications of investment and other forms of risk reflected in otherwise-undisclosed patterns of payments.

15. Oxfam is also an engaged and active shareholder. For example, in 2009 Oxfam filed a shareholder proposal with Chevron calling on the company to adopt a policy of disclosing payments to governments in every country of operation. In 2010, the proposal was presented to the Chevron board of directors and voted on at the Annual General Meeting. Investors representing more than 160 million shares (or more than $10 billion in market value at the time) voted in favor of the proposal.

16. Information disclosed pursuant to the Final Disclosure Rule would significantly inform Oxfam's participation in the governance of the resource extraction issuers of which it is a shareholder. In addition, Oxfam would use these disclosures to advance and inform its mission of promoting resource revenue accountability; in fact, one of the principle reasons that Oxfam holds shares in resource extraction issuers is to advance that mission in its capacity as a

shareholder. Such actions would include, without limitation, introduction of shareholder resolutions by Oxfam, as well as votes cast as a shareholder. Oxfam has a policy on shareholding that emphasizes holding enough securities to enable it to utilize these tools of shareholder governance – in particular, it maintains shares in excess of $2,000 to ensure compliance with SEC rules excluding nominal shareholders from proposing resolutions. Without the disclosures mandated by Section 1504, Oxfam is hindered in its ability to carry out its goal of active participation in corporate governance as an informed and educated shareholder.

Further Delay Compounds Oxfam's Injury

17. The injury to Oxfam and its interests caused by the delay in implementation of Section 1504 is compounded by further delays. If the SEC had complied with the deadlines set by Congress, information required to be disclosed pursuant to Section 1504 would have been available to Oxfam in annual filings made by resource extraction issuers after April 17, 2012. Because the SEC delayed issuance of the rule by over one year, Oxfam will not have this information until issuers make their annual filings 150 days after their fiscal years end subsequent to September 30, 2013, or March 2014 at the earliest. Any further delay will likely push back reporting even further. Oxfam's core mission of

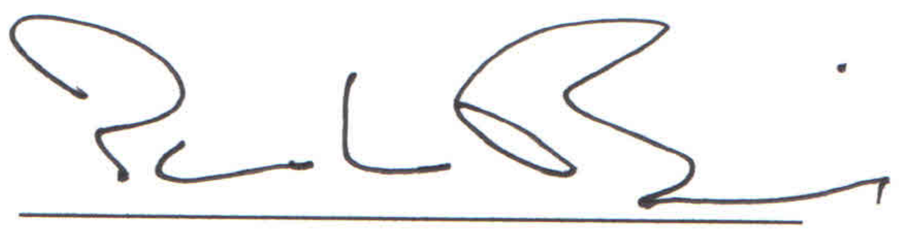
promoting resource revenue accountability will continue to be hampered for as long as the delay lasts, with consequent injury to Oxfam and its activities.

18. Oxfam has also been obliged to divert significant resources to efforts to hold the SEC to its obligations under Section 1504, including, without limitation, broad-based media, communications, and advocacy efforts directed at the final implementation of Section 1504. If the rule is suspended or otherwise delayed, Oxfam will have to continue expending resources to ensure full and timely implementation that it could otherwise use to promote resource revenue accountability and fight the resource curse. If, on the other hand, the rule is implemented according to schedule, Oxfam will be able to use these resources to engage with, educate, and train government, private sector, civil society, and community stakeholders to advance transparent and accountable management of extractive resource revenues. Equally, Oxfam will use the resources diverted to prepare and advance shareholder initiatives in furtherance of both its economic interests and its extractive resource accountability mission.

19. Oxfam's inability to access information that would otherwise be disclosed pursuant to Section 1504 is directly traceable to the continuing delay in implementation of Section 1504. Oxfam's injury can be redressed if the Court upholds Section 1504 and the regulations promulgated pursuant thereto, and if the Court denies or blocks any attempt to further delay or suspend the effectiveness of the Rule.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

October 24, 2012



PAUL O'BRIEN