

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

OXFAM AMERICA, INC.,

Plaintiff,

v.

UNITED STATES SECURITIES AND  
EXCHANGE COMMISSION,

Defendant.

**COMPLAINT**

Civil Action No. \_\_\_\_\_.

**I. INTRODUCTION**

1. This is a civil action brought under the Administrative Procedure Act, 5 U.S.C. § 706(1), to compel the U.S. Securities and Exchange Commission (“SEC”) to promulgate a final Extractive Payments Disclosure Rule (“Final Rule”) implementing Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 2220-22 (“Section 1504” and “Dodd-Frank”) (Ex. A).
2. Section 1504 amends Section 13 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m (“Exchange Act”), to require that “resource extraction issuers”—publicly traded oil, gas, and mining companies—disclose payments made to a foreign government or to the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals in annual reports to the SEC.
3. Dodd-Frank became law on July 21, 2010. Section 1504 requires the SEC to promulgate a Final Rule “[n]ot later than 270 days after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act.” That statutory deadline expired on

April 17, 2011. As of the filing of this Complaint, the SEC has been in violation of Section 1504 for one year and one month.

## **II. JURISDICTION AND VENUE**

4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 702-706, and, in the alternative, pursuant to 28 U.S.C. § 1361. Venue is properly within this Court because Plaintiff, a Massachusetts nonprofit corporation, maintains its principal place of business at 226 Causeway Street, Boston, Massachusetts. Therefore, venue in this Court is proper under 28 U.S.C. § 1391(e)(1)(c).

## **III. PARTIES**

5. Plaintiff Oxfam America, Inc. ("Oxfam America") is a nonprofit international development and relief organization dedicated to finding lasting solutions to poverty and related injustice. A core mission of Oxfam America 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 America's core values and is integral to its activities and work around the world.
6. Oxfam America engages in a variety of activities designed to advance resource revenue accountability in thirteen countries across Africa, Asia, and Latin America, in which extractive resource revenues are often corruptly diverted from poverty reduction and economic development. 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.

7. Timely implementation of Section 1504's disclosure requirements is crucial to Oxfam America's mission of ensuring that government revenues from the extraction of natural resources are managed accountably, transparently, and in the public interest. Oxfam America would rely heavily upon the disclosures mandated by Section 1504 to advance its work in this area.
8. Oxfam America also owns securities of several resource extraction issuers that would be subject to a Final Rule implementing Section 1504. 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.). Access to the disclosures mandated by Section 1504 would allow Oxfam America to better assess investment risks associated with these and other resource extraction issuers' payments to governments.
9. Oxfam America is an engaged and active shareholder. Information disclosed pursuant to Section 1504 would significantly inform Oxfam America's participation in the governance of the resource extraction issuers of which it is a shareholder.
10. Oxfam America has been an active participant in the Section 1504 rulemaking process and has 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. *See* Disclosure of Payments by Resource Extraction Issuers, 75 Fed. Reg. 80,978 (Dec. 23, 2010) (to be codified at 7 C.F.R. pts. 229, 249) ("Proposed Rule").
11. Defendant SEC is the federal agency that Congress instructed to promulgate regulations implementing the provisions of Section 1504 by April 17, 2011.

#### IV. BACKGROUND

**A. Section 1504 Mandates That The SEC Publish Rules Requiring Resource Extraction Issuers To Disclose Payments Made To Foreign Governments And The Federal Government.**

12. Section 1504 amends Section 13 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m (“Exchange Act”), to require that “resource extraction issuers” disclose payments to a foreign government or to the Federal Government in annual reports to the SEC.<sup>1</sup>
13. Specifically, Section 1504 requires that:

Not later than **270 days after the date of enactment** of the Dodd-Frank Wall Street Reform and Consumer Protection Act, **the Commission shall issue final rules** that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including (i) 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; and (ii) the type and total amount of such payments made to each government.

124 Stat. at 2220-21 (emphasis added).

**B. Congress Enacted Section 1504 To Make More Data Available To Investors And To Address The “Resource Curse” That Plagues Resource-Dependent States.**

14. Section 1504, like other disclosure provisions of the Exchange Act, informs and protects investors in certain securities. At the same time, Section 1504 embodies “the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.” 124 Stat. at 2221. In passing Section 1504, Congress recognized that investors in resource extraction issuers are

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<sup>1</sup> Section 1504 defines “resource extraction issuer” to mean an issuer that “(i) is required to file an annual report with the [SEC] . . . and (ii) engages in the commercial development of oil, natural gas, or minerals.” 124 Stat. at 2220.

particularly exposed to expropriation and other political risks—in addition to unique legal and reputational risks—because resource extraction issuers frequently operate in autocratic and unstable jurisdictions. As Senator Ben Cardin explained when presenting the legislative amendment that became Section 1504,

[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. So this amendment provides greater disclosure for investors to be able to make intelligent decisions as to whether to invest in an oil or gas or mineral company.

156 Cong. Rec. S5870-02 (daily ed. July 15, 2010) (statement of Sen. Cardin); *see also* Statement of Sen. Cardin in support of Amendment No. 3732 to the Restoring American Financial Stability Act (S3217), 156 Cong. Rec. S3316 (daily ed. May 6, 2010) (“Secrecy of payments carries real bottom-line risks for investors . . . . Investors should be able to know how much money is being invested up front in oil, gas, and mining projects.”).

15. Section 1504 also represents Congress’s strategy for addressing the “resource curse” that plagues many developing economies dependent on resource extraction. 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 likely to successfully translate 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. *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. Overwhelmingly, “oil and mineral dependence are linked to heightened levels of poverty and immiseration.” *Id.* at 16.

16. The disclosures mandated by Congress under Section 1504 are intended to help end the resource curse by holding governments accountable for revenue received from resource extraction issuers. As Senator Richard Lugar, one of Section 1504’s principal sponsors, stated: “We cannot force foreign governments to treat citizens as we would hope, but [Section 1504] would make it much more difficult to hide the truth.” 156 Cong. Rec. S3816 (daily ed. July 15, 2010) (statement of Sen. Lugar). Thus, in enacting Section 1504, the United States is “not only protecting investors and helping in energy security, 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.” 156 Cong. Rec. S5870-02 (daily ed. May 17, 2010) (statement of Sen. Lugar).
17. The SEC’s unlawful failure to promulgate a Final Rule within Section 1504’s 270-day deadline frustrates both of Congress’s objectives. The SEC’s unlawful failure simultaneously denies investors an important tool for assessing investment risk and impedes Congress’s plan to use transparency to tackle the resource curse. Oxfam America is thus doubly injured, both as an investor and as an organization that would rely heavily upon information disclosed under a Final Rule in its work to promote transparency and accountability in the management of extractive resource revenues.

**C. Congress Enacted Section 1504 To Make The United States The Global Leader In The Field Of Extractive Payments Disclosure.**

18. In enacting Section 1504, Congress also sought to have the United States set the “global standard” in the field of extractive industries payments disclosure. *See* 156 Cong. Rec.

S3316 (daily ed. May 6, 2010) (statement of Sen. Cardin). Congress intended for the standard set by the United States in this field to be the model for other jurisdictions' extractive payments disclosure regulations.

19. A short statutory deadline for promulgating a Final Rule was therefore essential to Congress's objective that the United States set the "global standard" in extractive payments disclosure.
20. If the SEC does not promptly issue a Final Rule, Congress's intent that the United States set the "global standard" in this area will be frustrated. Other jurisdictions, including the European Union, are currently considering extractive industry payments disclosure requirements of their own. They are likely to defer to U.S. policy if the SEC takes action to implement Section 1504. On the other hand, the SEC's continued failure to promulgate a Final Rule is irreconcilable with Congress's determination that the United States' extractive payments disclosure regime should set the global standard.

**D. The SEC Has Failed To Issue A Final Rule By The Statutory Deadline.**

21. Section 1504 requires the SEC to promulgate a Final Rule on extractive payments disclosure no later than April 17, 2011. As of filing, the SEC has missed Section 1504's statutory deadline by three hundred and ninety-six days. The SEC's continuing failure to issue a Final Rule constitutes *per se* "agency action unlawfully withheld or unreasonably delayed." *See* 5 U.S.C. § 706(1).
22. The SEC's failure to comply with Section 1504's statutory deadline reflects a pattern of unlawful delay and postponement.
23. On November 3, 2010, the SEC initially projected the release of a Final Rule in April–July 2010. The SEC then published its Proposed Rule on December 23, 2010.

24. Two days before Section 1504's deadline expired, Senators Cardin and Lugar called upon the SEC to timely implement Section 1504 and warned that "[t]he law clearly states that final rules must be issued within 270 days from final passage." *See* Letter from Senators Benjamin L. Cardin and Richard G. Lugar to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Apr. 15, 2011).
25. Section 1504's 270-day statutory deadline for the SEC's promulgation of a Final Rule expired on April 17, 2011.
26. On April 27, 2011, ten days after missing Section 1504's statutory deadline, the SEC projected the promulgation of a Final Rule no earlier than "August–December 2011."
27. On April 28, 2011, the SEC's Office of Legislative and Governmental Affairs responded to the April 15, 2011 letter from Senators Cardin and Lugar, acknowledging that the SEC had recently updated its website to reflect a new projected timeframe for issuance of a Final Rule. *See* Letter from Eric J. Spitzer, Dir., Office of Legislative and Intergovernmental Affairs, to Senator Benjamin L. Cardin (Apr. 28, 2011). The SEC indicated its intent "to approve final rules in August [of 2011], if not earlier." *Id.*
28. The SEC failed to issue a Final Rule in August of 2011.
29. On April 16, 2012, counsel for Plaintiff Oxfam America wrote to SEC Chairman Mary L. Schapiro. *See* Letter from Richard L. Herz, Jonathan G. Kaufman, & Marco B. Simons to Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n (Apr. 16, 2012) (Ex. B). Oxfam America's April 16, 2012 letter noted that the SEC's failure to issue a Final Rule placed the SEC "in violation of Section 1504 itself." *Id.* Oxfam America advised the SEC that it would "file suit to compel issuance of a Final Rule" if the SEC did not comply with Section 1504's rulemaking mandate within thirty days. *Id.*



30. To date, the SEC has not responded to Oxfam America's April 16, 2012 letter. The SEC has not even scheduled a date for the SEC Commissioners to vote on a Final Rule.

31. The extractive payments disclosures that Congress mandated nearly two years ago will not take place unless and until the SEC issues a Final Rule. Unfortunately, the SEC's pattern of delay gives no assurance that it will ever promulgate a Final Rule without the involvement of this Court.

**E. Oxfam America Is Directly Injured By The SEC's Unlawful Failure To Issue A Final Rule By The Statutory Deadline.**

32. Oxfam America is directly injured by the SEC's failure to issue a Final Rule by the statutory deadline. The information that would be disclosed pursuant to Section 1504—and that, as a matter of law, should already be subject to disclosure—would be of direct value to Oxfam America, both as a shareholder and as an organization with a mission to advance accountability in the management of extractive resource revenues worldwide.

33. As an investor, Oxfam America would carefully review disclosures by such issuers for indications of investment risk reflected in otherwise-undisclosed patterns of payments. Oxfam America would also rely upon disclosures made pursuant to Section 1504 to inform its participation in the governance of the resource extraction issuers of which it is a shareholder. Finally, Oxfam America would use these disclosures to advance and inform its mission of promoting resource revenue accountability, including through actions taken to advance that mission in its capacity as a shareholder. Such actions would include, without limitation, introduction of shareholder resolutions by Oxfam America, as well as votes cast as a shareholder.

34. Furthermore, the disclosures mandated by Congress in Section 1504 are critical to Oxfam America's work to end the resource curse. Oxfam America advocated for passage of

Section 1504 and intends to make heavy use of the disclosures it requires once a Final Rule is in place. Oxfam America 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.

35. Without these disclosures, Oxfam America's work to promote accountable stewardship of extractive resource revenues in developing countries is made vastly more difficult than it would be had the SEC complied with Section 1504's statutory deadline. It is difficult to promote accountable management of extractive resource revenues in the absence of reliable information about such revenues.
36. Oxfam America 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 issuance of a Final Rule.
37. If the SEC had complied with its statutory obligation to promulgate a Final Rule, Oxfam America would 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 America would use the resources diverted on account of the SEC's failure to issue a Final Rule to prepare and advance shareholder initiatives in furtherance of both its economic interests and its extractive resource accountability mission.
38. Oxfam America's inability to access information that would otherwise be disclosed pursuant to Section 1504 is directly traceable to the SEC's unlawful failure to issue a

Final Rule by the statutory deadline. Oxfam America's injury can only be redressed by an order from this Court compelling the SEC's prompt performance of its obligation to issue a Final Rule pursuant to Section 1504.

**V. CLAIM FOR RELIEF**

39. The allegations contained in paragraphs 1-38 are re-alleged and incorporated by reference.
40. The Administrative Procedure Act provides a remedy to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).
41. In addition, the federal mandamus statute, 28 U.S.C. § 1361, gives a federal district court jurisdiction to compel an agency of the United States to perform a nondiscretionary duty owed to a plaintiff as a matter of law.
42. The SEC has failed to comply with Section 1504's statutory deadline for issuance of a Final Rule. Accordingly, the SEC has unreasonably delayed and unlawfully withheld action on a Final Rule within the meaning of 5 U.S.C. § 706(1).
43. The SEC has likewise failed to perform its nondiscretionary duty owed to Plaintiff to issue a Final Rule within the statutory deadline set by Section 1504.
44. Plaintiff has no administrative remedies to pursue under the Exchange Act or other applicable provisions of law. A proceeding under 5 U.S.C. § 706(1), or in the alternative, 28 U.S.C. § 1361, is the only available means to compel the SEC's compliance with Section 1504.
45. The SEC's demonstrated unwillingness to act on Section 1504's straightforward statutory mandate and the urgency of the disclosures that Section 1504 is intended to compel mean

that only injunctive relief pursuant to 5 U.S.C. § 706(1), or a writ of mandamus, will be effective in this case.

**WHEREFORE**, Plaintiff prays that the Court:

- (1) Issue an order or writ of mandamus to compel the SEC to issue a Final Rule as required by Section 1504 not later than thirty days from the issuance of the Court's order;
- (2) Award Plaintiff its attorneys' fees and costs, including without limitation pursuant to 28 U.S.C. § 2412; and
- (3) Grant such other and further relief as this Court deems proper.

Respectfully Submitted,

Dated: Washington, D.C.  
May 16, 2012

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