

[Securities Regulation Daily Wrap Up, TOP STORY—D. Mass.: Judge tells SEC to say when it will rewrite oil fee disclosure rule, \(Sept. 2, 2015\)](#)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

A federal judge has ordered the SEC to file a plan in court detailing an expedited schedule to rewrite the vacated resource extraction issuers rule as mandated by Dodd-Frank Act Section 1504. The SEC has 30 days to comply with the court's order (*Oxfam America, Inc. v. SEC*, September 2, 2015, Casper, D.).

Unlawfully withheld. The SEC had argued that it did adopt a final rule, even though the rule was ultimately vacated by a court, and that was good enough. But the court sided with Oxfam America, Inc. and instead found the SEC had unlawfully withheld the new rule, which is now four years past its deadline, and a full year past any renewed deadline after the original rule was vacated.

Judge Casper explained the logical limits of the SEC's view. "Were the rule otherwise, an agency could take inadequate action to promulgate a rule and forever relieve itself of the obligations mandated by Congress."

As for the remedy part of the case, the SEC wanted the court to use the TRAC factors instead of take Oxfam's advice that these factors are too easy and have not been applied to a situation where a rulemaking was unlawfully withheld because the agency missed a clear statutory deadline.

After first noting the lack of agreement among federal appeals courts, and the First Circuit's own lack of a decision exactly on point, Judge Casper opted for the Tenth Circuit's view, which says essentially that "[s]hall means shall" such that a court has no discretion if Congress set a clear deadline for agency action.

The troubling factor for Judge Casper was how to resolve the difference between an agency action that was "unlawfully withheld" and one that was "unreasonably delayed." The judge decided she had to take some action because the SEC unlawfully withheld the rewritten rule.

The long road to here. The Dodd-Frank Act required the SEC to adopt a resource extraction issuers rule as part of the agency's new specialized disclosure regime targeting more socially-themed corporate issues. The original rule was [vacated](#) because it went too far in mandating public disclosures, and it lacked an exemption for companies beholden to the laws of countries that bar these disclosures.

According to the court's order today, the original deadline for the SEC to adopt the rule was April 17, 2011, but the agency did not issue its original rule until September 2012, seventeen months later. Since the rule was vacated, the agency has looked at several dates on which to at least propose a revamped rule, the latest being April 2016.

But any timetable for action, the judge said, must consider the burdens on the agency. Oxfam had asked the court to require a new rule be issued by November, but the SEC said it should instead be allowed to report on its progress by the end of October. The judge gave the SEC 30 days to file an expedited rulemaking schedule with the court.

The case is [No. 14-cv-13648](#).

Attorneys: Jonathan Kaufman, EarthRights International, for Oxfam America, Inc. Richard M. Humes, Securities and Exchange Commission, for the SEC.

Companies: Oxfam America, Inc.

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