

THE EFFECTS OF SECTION 1504 OF THE DODD-FRANK ACT: DISCLOSURE OF PAYMENTS BY RESOURCE EXTRACTION ISSUERS

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I. INTRODUCTION

THIS article focuses on the statutory requirements and delayed implementation of Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Section 1504 of Dodd-Frank, also known as the Cardin-Lugar Amendment, instructs the Securities and Exchange Commission (SEC) to promulgate rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, or by a subsidiary or another entity controlled by the issuer, to a foreign government or the U.S. Federal Government for the purpose of the commercial development of oil, natural gas, or minerals.¹ The disclosure rule mandated by Section 1504 is designed to protect those who invest in oil and mining companies, as well as address the “resource curse” that plagues many developing economies dependent on resource extraction, by creating increased regulatory transparency.²

More specifically, this article addresses the policy considerations in favor of and against Section 1504, and how the new regulatory and disclosure regime compares to the practices that existed prior to its enactment. This article further examines, through the SEC’s heavily litigated proposed rules and delayed enactment, Section 1504 to determine whether it will be effective in meeting its purpose of (1) increased protection and transparency for investors, and (2) providing information important to citizens of developing economies dependent on resource extraction seeking to hold their governments accountable for extraction revenue.³ The

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1. See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1504, 124 Stat. 1376, 2220–2222 (codified at 15 U.S.C. § 78m(q) (2010)).
2. See Daniel M. Firger, Note, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 GEO. J. INT’L L. 1043, 1048–50 (2010).
3. Letter from Benjamin L. Cardin, Senator, U.S. Senate, to Mary Shapiro, Chairwoman, SEC (Dec. 1, 2010), available at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-94.pdf>.

lack of transparency among companies and financial institutions warrants discussion because it was one of, if not the, primary causes of the Global Financial Crisis of 2008.⁴ With that in mind, Congress is charged with doing everything in its power to improve transparency in the system and prevent another similar crisis.⁵

Part II of this article discusses the background behind Section 1504 and the regulatory environment before Section 1504 was enacted. Part II devotes significant time to the issues and problems that brought about Section 1504. It also examines Dodd-Frank's overall goals and methodologies to provide a foundation for my analysis and give context to the sweeping reforms ushered in through Dodd-Frank following the Global Financial Crisis of 2008.

Part III, in turn, analyzes Section 1504 itself. It examines how and why the section was incorporated into Dodd-Frank, what the law requires, and what its implications are for consumers, governments, and international oil companies. Part III also examines conflicting policy perspectives on different portions of Section 1504 and the SEC's subsequent proposed rules.

Part IV discusses the legal challenges and major case law stemming from Section 1504. In particular, it examines (1) American Petroleum Institute's suit against the SEC that successfully challenged the SEC's rule requiring public disclosure of payments made to foreign governments in connection with the commercial development of oil, natural gas, or minerals; and (2) Oxfam America, Inc.'s recent suit against the SEC that sought to compel the SEC to issue a revised and finalized resource extraction disclosure rule—something the SEC has yet to do even though its mandated deadline under Section 1504 of Dodd-Frank expired more than three years ago. Part IV also addresses the significance of the SEC's continued delay in promulgating a finalized rule as a result of the above litigation, and the delay's implications for both extraction issuers and proponents of the law.

Part V examines multiple countries' proposed or adopted international rules modeled after Section 1504. It also discusses how those international laws and the SEC's impending final revised rule risk creating a patchwork of international regulation where no clear "world standard" exists, thus creating additional compliance costs and legal issues for larger extraction issuers.

Finally, Part VI draws together my conclusions and makes modest recommendations about how this issue should be resolved. Simply put, to achieve the expressed Congressional objective of making payments by extractives companies to governments more transparent, the SEC should

4. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, at xix (2011) [hereinafter FINANCIAL CRISIS INQUIRY REPORT], available at <http://fcic.law.stanford.edu/report>.

5. *See id.*

produce a strong Section 1504 revised final rule requiring public, project-level reporting by companies, with no categorical exemptions. This article and its accompanying research should contribute to the already-existing literature, case law, and proposals about Section 1504. In the end, this article's goal is to determine how well-suited Section 1504 is to accomplish its goals and how expeditiously, if ever, final revised disclosure rules should be put into place by the SEC.

II. BACKGROUND

This section briefly discusses the collapse of U.S. financial markets during the Global Financial Crisis of 2008, the historical events that paved the way for Dodd-Frank, Dodd-Frank's general goals and methodology, and the pre-Section 1504 regulatory environment that existed before Dodd-Frank.

A. BRIEF DISCUSSION OF THE GLOBAL FINANCIAL CRISIS OF 2008

The Global Financial Crisis of 2008 has been described as the worst financial crisis since the Great Depression.⁶ While the events leading up to the crisis started to unfold years before, "it was the collapse of the housing bubble—fueled by low interest rates, easy and available credit, scant regulation, and toxic mortgages—that was the spark that ignited a string of events, which led to a full-blown crisis in the fall of 2008."⁷ Furthermore, the overall losses were compounded by the "exponential growth in financial firms' trading activities, unregulated derivatives, and short-term 'repo' lending markets."⁸ Shortly after the financial crisis began, nearly \$11 trillion in household wealth disappeared and many retirement accounts and savings accounts were decimated.⁹

In May 2009, Congress created the Financial Crisis Inquiry Commission (FCIC) to "examine the causes, domestic and global, of the current financial and economic crisis in the United States."¹⁰ The FCIC's findings, released in January 2011, provide informative conclusions about what caused the Global Financial Crisis of 2008.¹¹ The conclusions most significant to this article's analysis of Section 1504 were the following: (1) "A combination of excessive borrowing, risky investments, and lack of transparency put the financial system on a collision course with crisis;" and (2) "There was a systemic breakdown in accountability and ethics."¹² Regarding the general lack of transparency in financial markets, the FCIC found that "[w]ithin the financial system, the dangers of this debt

6. *Id.* at xv.

7. *Id.* at xvi.

8. *Id.* at xvii.

9. *Id.* at xv.

10. Fraud Enforcement And Recovery Act of 2009 (FERA), Pub. L. No. 111-21, § 5(a), 123 Stat 1617, 1625 (2009).

11. See FINANCIAL CRISIS INQUIRY COMMISSION REPORT, *supra* note 4, at xv–xxviii.

12. *Id.* at xix, xxii.

were magnified because transparency was not required or desired.”¹³ Furthermore, when discussing the breakdown of accountability and ethics, the FCIC noted that “[t]he soundness and the sustained prosperity of the financial system and our economy rely on the notions of fair dealing, responsibility, and transparency.”¹⁴ These systemic failures—along with countless others—ultimately led Congress to pass Dodd-Frank.¹⁵

B. GENERAL GOALS & METHODOLOGY OF DODD-FRANK

In reaction to the Global Financial Crisis of 2008 and in an attempt to avoid (or at least delay) another large-scale financial crisis, Congress passed Dodd-Frank on July 21, 2010.¹⁶ Dodd-Frank’s mission, set forth in its first lines of text, is “to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.”¹⁷ As discussed later in the article, at least a portion of Section 1504 is best described as one of the “for other purposes” found in Dodd-Frank’s introduction.

Dodd-Frank marked an extensive change to the previous regulatory structure, a shift that many declared as “the greatest legislative change to financial supervision since the 1930s.”¹⁸ It created multiple new agencies and removed others to streamline the regulatory process, increased oversight of systemically risky institutions, amended the Federal Reserve Act, and promoted greater overall transparency.¹⁹ Davis Polk & Wardwell LLP estimates that Dodd-Frank will, at a bare minimum, require regulators to create 243 rules, conduct 67 studies, and issue 22 periodic reports.²⁰ But little of that effect was felt immediately because Congress designed Dodd-Frank to become effective in stages, with a majority of the rulemaking taking place over the six to months following its enactment.²¹

C. PRE-SECTION 1504 REGULATORY ENVIRONMENT

Prior to Section 1504, few transparency rules aimed at extraction indus-

13. *Id.* at xx.

14. *Id.* at xxii.

15. *Id.* at xxii–iii.

16. 124 Stat. at 1376.

17. *Id.*

18. *Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010*, DAVIS POLK (July 21, 2010), http://www.davispolk.com/sites/default/files/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Preview/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf.

19. Dechert LLP, *Executive Summary: Dodd-Frank Wall Street Reform and Consumer Protection Act*, AM. BANKERS ASS’N, http://www.aba.com/Issues/RegReform/Pages/RR_ExecSummary.aspx (last visited Jan. 18, 2016).

20. *Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010*, *supra* note 18, at ii.

21. *Id.* at i.

tries existed.²² Additionally, most of the initiatives that were in place were voluntary and lacked depth and specificity, as well as specific penalties or sanctions for a violation.²³ Arguably the most popular and widespread pre-Section 1504 program was the Extractive Industry Transparency Initiative (EITI).²⁴ The EITI is a “coalition of governments, companies, and civil society working together” to “promote open and accountable management of natural resources” to “strengthen government and company systems, inform public debate, and enhance trust.”²⁵ Participants who implement the EITI standard agree to ensure full disclosure of taxes and other payments made by oil, gas, and mining companies to governments.²⁶

Before the adoption of Section 1504, thirty-six countries implemented or were committed to implement the EITI.²⁷ But the United States and many other influential countries had not yet committed to participate. Critics pointed to three major flaws.²⁸ First, the EITI was (and still is) voluntary in nature, which allowed the governments of those countries that could benefit the most from the initiative to avoid its requirements by simply declining to join.²⁹ Second, the EITI required countries to report payments only on an aggregate, countrywide basis rather than a disaggregate basis that could account for payments by individual companies.³⁰ As a result, the aggregated revenue data was often too general to be useful when comparing countries.³¹ Third, there were no penalties or sanctions for violating the initiative’s commitments other than public removal from the EITI.³² This less-than-ideal regulatory environment paints the backdrop upon which Section 1504 was enacted.

Against the backdrop of this pre-Section 1504 regulatory environment, the next section of this article discusses the enactment Section 1504’s enactment, text, and competing policy perspectives.

III. SECTION 1504

This portion of the article focuses on Section 1504’s drafting and enactment, and the legal requirements created by its final text. It also ad-

22. See Branden Carl Berns, note, *Will Oil and Gas Issuers Leave U.S. Equity Markets in Response to Section 1504 of the Dodd-Frank Act? Can They Afford Not To?*, 2011 COLUM. BUS. L. REV. 758, 770–772 (2011).

23. *Id.*

24. *Id.*

25. *What is the EITI?*, EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, <http://eiti.org/eiti> (last visited Jan. 18, 2016).

26. *Id.*

27. Berns, *supra* note 22, at 770.

28. *Id.* at 770–71.

29. *Id.* at 771.

30. Letter from Kyle Isakower, Vice President of Regulatory & Econ. Policy, and Patrick T. Mulva, Chairman of Corporate Fin. Comm., Am. Petroleum Inst., to the SEC 4 (Oct. 12, 2010), available at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-27.pdf>.

31. *Id.*

32. See Firger, *supra* note 2, at 1067.

dresses the competing policy perspectives both in favor of and against the SEC's promulgation of a strong revised final rule. To be clear, Section 1504 of Dodd-Frank is a statutory provision created and adopted by Congress. Through Section 1504, however, Congress mandated the SEC to promulgate and enforce regulatory rules. The controversy at issue centers on the initial final rules released by the SEC in 2012, not whether Section 1504 itself should be repealed. That said, the SEC's initial final rules tracked Section 1504's language. What's more, they were vacated by the U.S. District Court for the District of Columbia (discussed in greater detail below). So the main issue now is how Section 1504's language should be interpreted and enforced. With that in mind, the detailed analysis of Section 1504 in the following paragraphs is intended to provide context for the current controversy surrounding the rules promulgated by the SEC.

A. THE DRAFTING AND SUBSEQUENT ADOPTION OF SECTION 1504

Many commentators question the placement of Section 1504 within Dodd-Frank.³³ For that reason, it is important to understand the origins of the text and how it came to be included in Dodd-Frank. Section 1504 is based on the proposed Energy Security Through Transparency Act (Transparency Act) originally introduced in Congress in September 2009.³⁴ The bill was introduced and sponsored by Senator Lugar (for himself and Senators Cardin, Schumer, Wicker, Feingold, and Whitehouse), but was never enacted.³⁵ While Section 1504 of Dodd-Frank is more limited in scope, it is conceptually similar to the disclosure requirements proposed in the Transparency Act.³⁶

The Transparency Act discussed a broad range of policy concerns, including (1) promoting good governance in extractive industries to strengthen national security and foreign policy, and contribute to a better investment climate for businesses in the United States; (2) providing development assistance to countries suffering from the "resource curse," (i.e., the tendency of countries that derive a significant portion of revenues from natural resources to have higher poverty rates, weaker governance, higher rates of conflict, and a poorer development record); (3) improving the transparency of revenue payments to governments to enable citizens "to hold their leaders more accountable"; (4) the "growing consensus among oil, gas, and mining companies that transparency in revenue payments is good for business [because] it improves the business climate in which they work and fosters good governance and accountability"; and (5) increasing the availability of information to help sharehold-

33. See Paul Hilton, *Dodd-Frank Provisions Applicable to Resources Companies Operating Internationally: Resource Extraction Disclosure Under Section 1504 of the Dodd-Frank Act*, 59 ROCKY MTN. MIN. L. INST. 18-1, 18-4 to -5 (2013).

34. *Id.*; Energy Security Through Transparency Act of 2009, S. 1700, 111th Cong. § 1 (2009).

35. S. 1700.

36. *Id.*; Hilton, *supra* note 33, at 18-4.

ers of public companies “assess financial risk, compare payments from country to country, and assess whether such payments help to create a more stable investment climate.”³⁷ These same policy considerations underpin Section 1504 and were considered by the SEC in its rulemaking process in implementing Section 1504.³⁸

According to the Congressional Record, Senators Lugar and Cardin inserted Section 1504, also known as the Cardin-Lugar Amendment, into Dodd-Frank during the late stages of conference negotiations.³⁹ Senator Dodd remarked on its late insertion, noting that

[b]ecause we have not yet been able to hold hearings on this measure this year—something which I had hoped to do in the Banking Committee once we had completed this historic financial reform measure—I am not sure we have all the precise details and the language exactly right, but the thrust is exactly right and, therefore, in my view, the amendment by Senators Cardin and Lugar ought to be adopted.⁴⁰

Senator Dodd additionally explained that “[w]e can work on the details, if we have to, later on, but we should not miss this opportunity provided by this legislation to make this historic contribution to something that not only benefits investors here at home but might make a huge difference in the wealth and opportunity in these countries.”⁴¹ On the recommendation of Senator Dodd and others, Section 1504 was quickly adopted with little debate.⁴² The above quotes demonstrate the relative ease in which the Lugar-Cardin Amendment was examined, considered, and adopted.⁴³

B. CONDUCT & ACTIONS REQUIRED BY SECTION 1504

Section 1504 of Dodd-Frank Act was signed into law on July 21, 2010.⁴⁴ Dodd-Frank amended “Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m).”⁴⁵ Section 1504, titled “Disclosure of Payments by Resource Extraction Issuers,” requires the SEC to:

[n]ot later than 270 days after July 21, 2010 . . . 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 ex-

37. S. 1700.

38. See 156 Cong. Rec. S3794, 3815 (daily ed. May 17, 2010) (statement of Sen. Richard Lugar).

39. 156 Cong. Rec. S3794, 3815 (daily ed. May 17, 2010) (statement of Sen. Ben Cardin).

40. 156 Cong. Rec. S3794, 3818 (daily ed. May 17, 2010) (statement of Sen. Chris Dodd).

41. *Id.*

42. 156 Cong. Rec. S3794, 3819 (daily ed. May 17, 2010) (statement of Presiding Officer Sen. Mark Warner and Sen. Chris Dodd).

43. *Id.*

44. 124 Stat. at 1376.

45. *Id.* at 2220.

traction 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.⁴⁶

The “Definitions” subsection of 15 U.S.C. 78m(q) is specific in its description of key terms.⁴⁷ For instance, a “resource extraction issuer” is an issuer that: “(1) is required to file an annual report with the [SEC]; and (2) engages in the commercial development of oil, natural gas, or minerals.”⁴⁸ In addition, “‘commercial development of oil, natural gas, or minerals’ includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity, as determined by the [SEC].”⁴⁹ And “‘foreign government’ means a foreign government, a department, agency, or instrumentality of a foreign government, or a company owned by a foreign government, as determined by the [SEC].”⁵⁰ But perhaps most specific of all is “‘payment,’” which means “a payment that is (1) made to further the commercial development of oil, natural gas, or minerals, and; (2) not de minimis.”⁵¹ “‘Payment’” expressly includes “taxes, royalties, fees (including license fees), production entitlements, bonuses, and other material benefits, that the [SEC], consistent with the guidelines of the Extractive Industries Transparency Initiative (to the extent practicable), determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals.”⁵²

The section further dictates that

[t]he interactive data standard shall include electronic tags that identify, for any payments made by a resource extraction issuer to a foreign government or the Federal Government – (i) the total amounts of the payments, by category, (ii) the currency used to make the payments, (iii) the financial period in which the payments were made, (iv) the business segment of the resource extraction issuer that made the payments, (v) the government that received the payments and the country in which the government is located, (vi) the project of the resource extraction issuer to which the payments relate, and (vii) such other information as the [SEC] may determine is necessary or appropriate in the public interest or for the protection of investors.⁵³

Additionally, the Act requires that “[t]o the extent practicable, the [SEC] shall make available online, to the public, a compilation of the informa-

46. 15 U.S.C. § 78m(q)(2)(A) (2010).

47. *See id.* § 78m(q)(1).

48. *Id.* § 78m(q)(1)(D).

49. *Id.* § 78m(q)(1)(A).

50. *Id.* § 78m(q)(1)(B).

51. *Id.* § 78m(q)(1)(C)(i).

52. *Id.* § 78m(q)(1)(C)(ii).

53. *Id.* § 78m(q)(2)(D)(ii).

tion required to be submitted under the rules issued under [Section 78m(q)(2)(A)].”⁵⁴

Moreover, in affirmation of one of its overall objectives, Section 78m(q)(2)(E), titled “International transparency efforts” states that, “[t]o the extent practicable, the rules issued under [Section 78m(q)(2)(A)] shall support the commitment of the Federal Government to international transparency promotion efforts relating to the commercial development of oil, natural gas, or minerals.”⁵⁵ Finally, Section 78m(q)(2)(F) provides that the final rules “shall take effect on the date on which the resource extraction issuer is required to submit an annual report relating to the fiscal year . . . that ends not earlier than [one] year after the date on which the [SEC] issues final rules under [Section 78m(q)(2)(A)].”⁵⁶

On September 12, 2012, the SEC promulgated final rules that generally tracked the language of Section 1504.⁵⁷

Consistent with the [congressional record] and in light of the structure, language, and purpose of the statute, the final rules do not provide any exemptions from the disclosure requirements. As such, the final rules do not include an exemption for certain categories of issuers or for resource extraction issuers subject to similar reporting requirements under home country laws, listing rules, or an EITI program. The final rules also do not provide an exemption for situations in which foreign law may prohibit the required disclosure. In addition, the final rules do not provide an exemption for instances in which an issuer has a confidentiality provision in an existing or future contract or for commercially sensitive information.⁵⁸

Given the nature of Section 1504 and the SEC’s initial final rules, the next section of this article discusses the policy perspectives both in favor of and against Section 1504.

C. POLICY PERSPECTIVES IN FAVOR OF SECTION 1504

The majority of policy perspectives that seem in favor of a strong SEC final rule based on Section 1504 focus on the benefits of greater transparency for investors and improved accountability for impoverished citizens in resource rich countries.⁵⁹ Commentators also tout the ancillary benefit that a strong Section 1504 would have on the Extractive Industry

54. *Id.* § 78m(q)(3)(A).

55. *Id.* § 78m(q)(2)(E).

56. *Id.* § 78m(q)(2)(F).

57. *See* Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249).

58. *Id.* at 56,368.

59. *See* EITI, IMPLEMENTING EITI FOR IMPACT: HANDBOOK FOR POLICY MAKERS AND STAKEHOLDERS 3–4, 144–45 (Anwar Ravat & Sridar P. Kannan eds., 2012) available at https://eiti.org/files/Implementing%20EITI%20for%20Impact_Handbook%20for%20Policy%20Makers%20and%20Stakeholders.pdf.

Transparency Initiative and other similar programs.⁶⁰

1. Greater Transparency Benefits Investors

A large number of institutional investors—and the investing community as a whole—have voiced support for a strong Section 1504-based final rule that establishes disclosure requirements consistent with other jurisdictions, such as the European Union (EU).⁶¹ For the better part of a decade, investors representing more than \$6 trillion in assets under management have sent letters to the SEC recommending it reissue a strong Section 1504 final rule.⁶² The group of leading investors also encouraged the SEC to “continue its vigorous defense of the Section 1504 rules as it responds to the U.S. District Court’s decision [in *American Petroleum Institute et al. v. Securities and Exchange Commission*].”⁶³

Within their comment, these large institutional investors argued that [p]ayment disclosure regulations, such as Section 1504 and the European Union Transparency Directive, play a critical role in encouraging greater stability in resource-rich countries, which benefits both the citizens of those countries and investors.⁶⁴ Furthermore, the investors noted that “[i]t is in the interest of investors and companies subject to both the U.S. and EU requirements that the reporting obligations in these jurisdictions are as uniform as possible. Consistent and predictable regulations may lower compliance costs and enhance the salience of disclosures.⁶⁵

In addition to possibly lowering compliance costs, uniform disclosure requirements under Section 1504 will provide investors all over the world with the information they need to better assess the potential risks and rewards of an investment.⁶⁶ Most international exploration and development projects for oil and natural gas are multi-billion dollar operations and lease bonuses and royalty payments often costs millions of dollars.⁶⁷ With that in mind, everyday investors want to know where their money is going and how it is being used.⁶⁸ Pre-Section 1504, most of this information was subject to confidentiality agreements negotiated by the parties.⁶⁹

60. See Letter from Patrick Mulva, Vice President & Controller, ExxonMobil Corp., to Comm’rs, SEC, 2 (Oct. 25, 2011), available at <http://www.sec.gov/comments/s7-42-10/s74210-112.pdf>.

61. See Daniel Kaufmann, *Transparency in Natural Resources: Why is the U.S. Playing Catch Up?*, BROOKINGS (June 9, 2014, 12:14 PM), <http://www.brookings.edu/blogs/up-front/posts/2014/06/09-transparency-natural-resources-kaufmann>.

62. See Letter from Columbia Ctr. on Sust. Inv. to Mary Jo White, Chairwoman, SEC, 2 (Oct. 30, 2015), available at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-93.pdf>.

63. See Letter from Investors to Mary Jo White, Chairwoman, SEC, at para. 2 (Oct. 30, 2015), available at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-93.pdf>.

64. *Id.* para. 4.

65. *Id.* para. 3.

66. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. at 56,399.

67. *Id.* at 56,400.

68. *Id.* at 56,398.

69. *Id.* at 56,399.

With a strong Section 1504-based disclosure rule in place, investors will have more power to hold the companies they invest in accountable, which in turn will force them to manage their financial resources more diligently.⁷⁰

2. *Increased Accountability for Impoverished Citizens in Resource-Rich Countries*

Similar to the benefits investors receive from increased transparency and disclosure in extraction-related industries, impoverished citizens in resource-rich countries tremendously benefit from strong Section 1504-based regulations by having access to information that allows them to better keep their countries' leaders accountable for large payments from extraction-related activities.⁷¹ On April 14, 2014, a group of 544 civil society organization, from 40 countries around the world, united by Publish What You Pay Coalition's International Director, Marinke Van Riet, wrote a letter to the SEC to "urge [the SEC] to re-issue an implementing rule for the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 1504) that aligns with the EU Accounting and Transparency Directives, with no country exemptions and full public disclosure of payments, without delay."⁷² The groups represented included "human rights, faith-based, anti-corruption and environmental" organizations from countries "rich in natural resources, but blighted by corruption, conflict and poverty."⁷³ In their comment, these civil society organizations argued that "[g]reater transparency of extractive industry revenues will reduce natural resource related corruption and conflict, and help ensure these resources are transformed into lasting public benefits."⁷⁴

The comment further argues that including project-level reporting will bring the greatest benefit to citizens in resource-dependent countries—noting that transparency requirements are even more important in areas where local revenue-sharing agreements are in place.⁷⁵ For example, in the Democratic Republic of Congo, there are national laws that require twenty-five percent of tax revenues from mining projects to go back to the province, and fifteen percent to go back to the local territory where the development took place.⁷⁶ "Similarly in the Philippines, indigenous communities have a legal right to a minimum of [one percent] of royalties from mining in their ancestral domains."⁷⁷ But in each of these countries and regions, the local citizens likely never collect the full amount they are

70. EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, *supra* note 59, at 69.

71. See Letter from Marinke Van Riet, Int'l Dir., Publish What You Pay Coal., to Mary Jo White, Comm'n, SEC, at para. 2 (Apr. 14, 2014), available at <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-32.pdf>.

72. *Id.* para. 1.

73. *Id.* para. 2.

74. *Id.*; see also Letter from Patrick Mulva to Comm'rs, *supra* note 60, at 2.

75. See Letter from Marinke Van Riet to Mary Jo White, *supra* note 71, para. 2.

76. *Id.* para. 8.

77. *Id.* para. 9.

owed because there is no way for them to know how much taxes or royalties are being generated given the lack of transparency.⁷⁸

An additional example of the “resource curse” negatively affecting, or at least failing to benefit, impoverished citizens in resource-rich countries can be found in Nigeria.⁷⁹ The citizens of Nigeria, sub-Saharan Africa’s largest oil producer, are painfully aware of the consequences of the lack of transparency in the extractives industry.⁸⁰ According to Faith Nwadiishi, Nigerian National Coordinator for Publish What You Pay, “[i]n resource-rich countries with weak institutions, like Nigeria, corruption is already a significant risk,” and “[w]hen oil, gas and mining projects generate billions of dollars in revenue in secrecy, they end up fueling corruption.”⁸¹ As an example of this corruption, Ms. Nwadiishi states that, “Nigeria was missing \$20 billion of oil revenues [last year] while its citizens suffered from poverty.”⁸² And for reasons like these, Publish What You Pay argues that project-level transparency is necessary in Section 1504.⁸³ Next, I will discuss the beneficial impact a strong Section 1504 final rule could have on the Extractive Industry Transparency Initiative.

3. *Beneficial Impact on the Extractive Industry Transparency Initiative*

In addition to the benefits of greater transparency for investors and increased accountability for impoverished citizens in resource-rich countries, an ancillary benefit of a strong Section 1504 rule would be the beneficial impact it would have on the EITI. When Section 1504 was adopted, it was not intended to replace the EITI.⁸⁴ Instead, it was intended to complement the EITI and magnify its positive effects.⁸⁵ More countries will be encouraged to join the EITI because disclosed payment information will be made available for countries not yet signed up to the EITI.⁸⁶

The availability of this payment information may allow transparency advocates to demonstrate that part of the process is already underway and that the government must match those efforts with the remaining components of national EITI implementation.⁸⁷ Many commentators also argue that, in these cases, Section 1504 will “create a precedent and

78. *Id.*

79. See Jana Morgan, *SEC announces plan to implement landmark oil, gas and mining transparency law Sen., investors and transparency advocates urge the SEC to take action before end of 2014*, PUBLISH WHAT YOU PAY, para. 10 (May 27, 2014), http://pwwpusa.org/sites/default/files/Press_Release_Rulemaking_Scheduled_May_27_2014.pdf.

80. *See id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. 156 CONG. REC. S3817 (daily ed. May 17, 2010) (statement of Sen. Cardin).

86. *The Cardin-Lugar Amendment (Dodd-Frank 1504)*, PUBLISH WHAT YOU PAY, available at <http://www.publishwhatyoupay.org/about/stock-listings/cardin-lugar-amendment-dodd-frank-1504>.

87. *Id.*

provide the necessary first step toward transparency.”⁸⁸ A strong Section 1504-based SEC final rule would “create a flow of high-quality financial data for inclusion in EITI reports” and would ensure that payment information data is available from each extractive company that operates in a region.⁸⁹ According to transparency advocates, one of the biggest weaknesses of the EITI thus far has been the difficulty of obtaining payment information from large companies operating in EITI implementing countries.⁹⁰ A strong Section 1504 final rule would make it harder, if not impossible, for companies to dodge the disclosure requirements.⁹¹ In the next portion of this article, I will discuss the policy perspectives against a strong Section 1504-based SEC final rule.

D. POLICY PERSPECTIVES AGAINST SECTION 1504

Policy perspectives against a strong SEC final rule based on Section 1504 center on the massive amount of additional compliance issues that are created with the new Section 1504 requirements and the possible competitive advantage countries and companies that are not required to report to the SEC could gain by not being required to disclose this currently classified information.⁹² Additionally, many commentators are concerned that the law wrongly infringes on foreign countries’ laws and contracts that contain confidentiality provisions and prohibit the disclosure of the type of information Section 1504 mandates.⁹³

1. Compliance Costs

One of the biggest issues commentators have with a strong, no categorical exceptions, project-by-project structured Section 1504 rule is that it will likely create a substantial amount of initial and ongoing compliance costs.⁹⁴ While the pundits debate the time, personnel, and monetary burdens created by the requirements of the rule, the SEC itself, based on its estimates, believed that the original rule would cost U.S. issuers about one billion dollars in initial compliance cost, with ongoing compliance costs between \$200 million and \$400 million annually.⁹⁵ If correct, “[t]hese estimates would make Section 1504 one of the most costly rules in history and it only applies to one industrial sector.”⁹⁶ Therefore, the question for many people becomes, do the socio-political and trans-

88. *Id.*

89. *Id.*

90. *Id.*

91. See 156 CONG. REC. S3817, *supra* note 85.

92. *Am. Petroleum Inst. V. SEC*, 953 F. Supp. 2d. 5, 21 (D.D.C. 2013).

93. *Id.* at 12.

94. *Id.* at 21.

95. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,398 (Sept. 12, 2012)(to be codified at 17 C.F.R. pts. 240 & 249).

96. Brigham A. McCown, *Oil and Gas Payment Disclosure May Harm Investors*, FORBES ENERGY, para. 9 (March 22, 2013, 10:27 AM), available at <http://www.forbes.com/sites/brighamccown/2013/03/22/oil-and-gas-payment-disclosure-may-harm-investors/>.

parency benefits of Section 1504 outweigh the costs imposed by the rule?⁹⁷

Furthermore, the burdens of increased disclosure are likely to be the highest on larger, more diversified companies because they conduct operations in many countries simultaneously and have multiple projects in operation within any given year.⁹⁸ For example, ExxonMobil's Vice President and Controller, Patrick T. Mulva, submitted a comment letter to the SEC estimating that the cost to ExxonMobil of implementing Section 1504 would exceed \$50 million and that "[t]he cost and extent of this should not be underestimated, as some observers who are not familiar with the reality of financial reporting systems appear to have done."⁹⁹ Additionally, Royal Dutch Shell's (Shell) comment letter to the SEC stated that, given Shell's expansive operations in over ninety countries, it believed that "integrating such detailed project reporting requirements into our current financial reporting and control systems could cost hundreds of millions of dollars."¹⁰⁰ Thus, the cost of compliance is likely to be substantial for almost every extraction issuer affected by the rule.¹⁰¹ The next portion of this article will discuss the possible competitive advantage companies who are not required to satisfy Section 1504 requirements might achieve when competitors are forced to disclose proprietary payment information and they are not.

2. Possible Competitive Advantage for Non-Section 1504 Companies

An additional policy perspective against Section 1504 is that the public disclosures required by companies subject to Section 1504 may create a substantial disadvantage because competitors will have access to proprietary information such as costs, investments, and lease payments without having to disclose this information themselves.¹⁰² According to the SEC, over 1,100 companies will be covered by the information disclosure requirements under Section 1504, including a majority of the most profitable international oil companies (e.g., Chevron, Exxon, BP, Shell and Total), the largest global mining companies (e.g., Rio Tinto, Vale and BHP Billiton) and certain state-owned entities (e.g., Petrobras, Sinopec and Petrochina).¹⁰³

But most of the state-owned oil companies and some of the largest oil companies in the world, in countries such as Russia, China, Iran, and Venezuela do not operate under SEC regulation, thus, they are not sub-

97. *Id.* para 13–14.

98. *See* Letter from Patrick Mulva to Comm'rs, *supra* note 60, para. 2.

99. *Id.* para. 3.

100. Letter from Martin Brink, Royal Dutch Shell to Meredith Cross, Sec. & Exch. Comm'n, Dir. para. 24 (Oct. 25, 2010) (on file with author), available at <http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures-33.pdf>.

101. *Id.* para. 24.

102. Q&A: *Company Disclosures Under Dodd-Frank Sec. 1504*, NATURAL RESOURCE GOVERNANCE INSTITUTE: para. 24 (Aug. 27, 2012), <http://www.resourcegovernance.org/news/qa-company-disclosures-under-dodd-frank-section-1504>.

103. *Id.* para. 24.

ject to the Section 1504 disclosure requirements.¹⁰⁴

Therefore, many people in the oil and gas industry, including the American Petroleum Institute (a lobbying group comprised of many major U.S. oil and gas companies) are concerned that non-U.S. companies, such as Russia's Gazprom, who are not required to disclose information under the proposed rules of Section 1504, could use the data to outmaneuver U.S. companies in contract negotiations.¹⁰⁵ According to those pundits, "[t]he rule would have put U.S.-listed firms at an insurmountable disadvantage to state-owned firms, which are information black holes and most likely to do backroom deals with tyrants."¹⁰⁶ While the potential competitive disadvantages of Section 1504 are likely not insurmountable, they do provide important perspectives that need to be carefully considered as the SEC promulgates a revised final Section 1504 rule.

2. Host Country Legal and Contractual Issues

In addition to the potentially large compliance costs and the possible competitive advantages for non-Section 1504 companies, Section 1504 creates host-country legal and contractual issues that will likely require renegotiating and redrafting a large number of contracts.¹⁰⁷ Additionally, many industry executives note that confidentiality agreements may prevent oil and gas companies from disclosing information to third parties concerning their arrangements to purchase oil or gas from host countries.¹⁰⁸ Thus, disclosures to the SEC under Section 1504 could create a potential breach of contract if these matters are not addressed in advance.¹⁰⁹

Additionally, multiple countries, such as Angola, Cameroon, China, and Qatar, have laws that forbid disclosures.¹¹⁰ And to this point, the SEC has resisted requests to include an exemption for companies that are contractually prevented from disclosing payments made to host governments.¹¹¹ Therefore, many companies, including Shell, are concerned that their existing contracts currently prohibit disclosure of Section 1504 payment information and renegotiation to amend all of the currently valid contracts would be costly.¹¹² This area likely requires additional examination by Congress and the SEC to determine what the appropriate revised final rule should include.¹¹³ The next portion of this article will

104. *Id.* para. 16–17.

105. *The SEC's Pro-Putin Rule*, THE WALL ST. J. para. 2–3 (May 11, 2014, 7:03 PM), <http://www.wsj.com/articles/SB10001424052702304518704579523982321856704>.

106. *Id.* para. 4.

107. See Letter from Martin Brink to Meredith Cross, *supra* note 100, para. 14.

108. See *id.* para. 8.

109. See *id.*

110. Disclosure of Payments by Resource Extraction Issuers, 77 Fed. Reg. 56,365, 56,370 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249).

111. *Id.* at 56,472.

112. See Letter from Martin Brink to Meredith Cross, *supra* note 100, para. 14.

113. See *id.* *supra* note 100, para. 20.

discuss the legal challenges and major case law that has arisen as a result of Section 1504.

IV. IMPORTANT CASE LAW & ADMINISTRATIVE DELAY

This portion of the article will focus on the significant legal cases that have transpired as a result of the inclusion of Section 1504 in the Dodd-Frank Act.¹¹⁴ Given that the Act was created and adopted by Congress but requires the rulemaking to be done separately by the SEC, lawsuits have been filed successfully challenging the validity of the SEC's final rule, as well as a relatively new lawsuit that seeks to end the SEC's long delay in promulgating a revised final rule.¹¹⁵ Additionally, this section of the article will discuss the implications regarding the SEC's major delay in issuing revised final rules and examine similar international rules that have been adopted since Section 1504 was signed into law.¹¹⁶

A. AMERICAN PETROLEUM INSTITUTE V. SEC

In *American Petroleum Institute v. Securities and Exchange Commission*, industry associations brought an action to challenge the SEC's rule requiring public disclosure of payments made to foreign governments in connection with the commercial development of oil, natural gas, or minerals.¹¹⁷ The Court of Appeals had dismissed the associations' simultaneously filed petition challenging the rule for lack of subject matter jurisdiction.¹¹⁸ After both parties cross-moved for summary judgment, the U.S. District Court for the District of Columbia granted the plaintiff's motion and denied the defendant's motion.¹¹⁹ In an opinion dated July 2, 2013, the court held the following: (1) The SEC's interpretation of Dodd-Frank Act in promulgating rule was not entitled to deference; (2) The SEC misread Dodd-Frank Act to mandate public disclosure of the reports, and thus, the agency's action was invalid; (3) The SEC's denial of an exemption for countries prohibiting payment disclosure was arbitrary and capricious; and (4) Vacatur of the rule was an appropriate remedy.¹²⁰

The court provided multiple explanations and rationales to justify its holding. The court noted that the SEC's interpretation of Section 1504 "was not entitled to deference, where [the] SEC did not exercise its own judgment, but instead considered itself bound by statute to require public filing of the reports."¹²¹ Additionally, the court provided that because the SEC's rule was based "on its misreading of the statute to mandate public disclosure . . . [the] agency's action was invalid."¹²² The court con-

114. See *Am. Petroleum Inst.*, 953 F. Supp. 2d at 5.

115. See *id.*

116. See Letter from Martin Brink to Meredith Cross, *supra* note 100, para. 25.

117. See *Am. Petroleum Inst.*, 953 F. Supp. 2d at 5.

118. See *id.*

119. See *id.*

120. *Id.*

121. *Id.* at 13.

122. *Id.* at 13-14.

cluded that “the statute said nothing about the ‘public’ filing of reports, the statute’s public availability requirement was limited to a compilation of information, and the Exchange Act as a whole used the word ‘report’ to refer to disclosures made to SEC alone.”¹²³ Furthermore, the court noted that, “if disclosing some of the information publicly would compromise commercially sensitive information and impose high costs on shareholders and investors, then the [SEC] may selectively omit that information from the public compilation.”¹²⁴ These conclusions centered on the wording of the statute including “to the extent practicable,”¹²⁵ meaning it should only be done if realistic under the circumstances.

Finally, after finding the SEC’s rule invalid for the reasons listed above, the court concluded that vacatur of the rule “was the appropriate remedy” because the “issuers had not yet been required to make disclosures under the rule, so no disruption would result from vacatur, the rule’s deficiencies were grave enough to warrant vacatur, and the SEC offered virtually no argument against vacatur.”¹²⁶ In conclusion, while the American Petroleum Institutes’ lawsuit was only successful in getting the SEC’s rule vacated based on a few minor technicalities, the ruling has been instrumental in delaying the implementation of another version of a Section 1504-based rule to this date.

B. OXFAM AMERICA, INC. v. SEC

In response to the ruling in the *American Petroleum Institute* case analyzed above, and the SEC’s lack of promulgating a revised final rule, Oxfam America, Inc. (Oxfam) brought a lawsuit against the SEC on September 18, 2014, seeking to compel them to issue a revised final rule implementing Section 1504 of the Dodd-Frank Act.¹²⁷ This civil action was brought under the Administrative Procedure Act, 5 U.S.C. § 706(1), which provides a remedy to “compel agency action unlawfully withheld or unreasonably delayed.”¹²⁸

According to its complaint, Oxfam “is a nonprofit international development and relief organization dedicated to finding lasting solutions to poverty and related injustice.”¹²⁹ Additionally, “[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

123. *Id.*

124. *Id.* at 14.

125. *Id.* at 22.

126. *Id.* at 24–25.

127. *Oxfam Am., Inc. v. SEC*, No. 14-13648-DJC, 2015 WL 5156554 (D. Mass. Sept. 2, 2015).

128. 5 U.S.C. § 706(1) (2006).

129. *Oxfam America Complaint* at 13, *Oxfam Am., Inc. v. SEC*, No. 1:14-CV-13648 (D. Mass. Sept. 2, 2015).

revenues from extractive resources.”¹³⁰ In its lawsuit, Oxfam alleges that, “[b]y vacating and remanding the 2012 final rule to the SEC, the District Court [in *American Petroleum Institute*] restored the status quo before the 2012 final rule took effect.”¹³¹

Oxfam challenges the SEC’s lack of final rule promulgation based on its organization’s interest in combating the resource curse facing many citizens of countries with minerals, as well as its interest as an owner of the securities of several resource extraction issuers that would be subject to a revised final rule implementing Section 1504.¹³² Additionally, Oxfam notes that “[a]ccess to the disclosures mandated by Section 1504 would allow Oxfam America to better assess investment risks associated with extractive industry payments to governments.”¹³³

In its complaint, Oxfam claims it “is directly injured by the SEC’s failure to issue a final rule by the statutory deadline” and that “[t]he information that would be disclosed pursuant to Section 1504 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 around the world.”¹³⁴ In addition, Oxfam claims that its “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” and that Oxfam’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.”¹³⁵ While this lawsuit has yet to be fully adjudicated, it represents a growing number of challenges to the SEC’s failure to issue a revised final rule. And, as will be further discussed in the next section, there are an increasing number of negative implications resulting from the SEC’s continued delay in issuing a final revised rule.

C. IMPLICATIONS OF THE CONTINUED DELAY

The SEC’s continued delay in promulgating a revised final rule creates negative consequences for both extraction industry issuers and proponents of Section 1504 who are waiting for the beneficial effects of the mandatory disclosures to be realized. Moreover, the continued delay also increases the risk of creating an international patchwork of regulation, with many additional disclosure and compliance issues, because multiple countries are currently adopting rules that model the SEC original rule, while the SEC is considering changes that could affect the original disclosure requirements for companies in the United States. Furthermore, larger companies whose subsidiaries and affiliates operate in multiple se-

130. *Id.* at 4.

131. *Id.* at 3.

132. *Id.* at 5.

133. *Id.*

134. *Id.* at 17.

135. *Id.* at 19–20.

curities markets face the potential challenge of having to manage and tailor disclosures to multiple different regions of operations, which will create more compliance and legal related expenses.

Extraction industry issuers are also negatively affected because they are currently stuck in limbo—not knowing what the final disclosure requirements will be—and the SEC only continues to tell issuers to standby and monitor the developments closely, without providing any clarity about when a new rule will be implemented or what the final revised rule will look like.¹³⁶ Thus, issuers are unsure whether they should begin implementing portions of the law to get a head start on compliance efforts, or if they should stick their head in the sand and wait until a revised rule is promulgated.

Similarly, proponents of Section 1504 are stuck waiting for the beneficial effects of the mandatory disclosures to be realized and still do not have any payment information to help investors and citizens almost five years after Congress enacted Section 1504 in 2010. Meanwhile, the United States is also falling behind as a world leader in transparency initiatives. In 2010, Congress created what is becoming the world standard today. And while other countries have followed our perceived lead, the current lengthy delays by the SEC in promulgating a final revised rule negatively affects our early initiatives. Countries that drafted and adopted laws based on the United States' Section 1504 standards are now wondering how their laws will match up against the SEC's revised final rule. The next section of this article will further discuss the multiple Section 1504-type international rules that have been recently enacted.

V. SIMILAR INTERNATIONAL RULES

This portion of the article will examine similar international rules that have been proposed or adopted since Section 1504 was signed into law. "In enacting Section 1504, Congress sought to have the United States set the "global standard" in the field of extractive industries payment disclosure.¹³⁷ Congress intended for the standard set by Section 1504 to be the model for other jurisdictions' extractive payments disclosure regulations."¹³⁸ This intended objective can be inferred from the congressional record discussing Section 1504 and the short statutory deadline for promulgating a final rule provided for in Section 1504. To that end, the SEC's 2012 final rule, even though it was later vacated and remanded, has already made a substantial contribution to the development of a global transparency standard. Many other countries and jurisdictions, for example, have made significant progress in passing transparency laws modeled after Section 1504 and the SEC's 2012 original final rule.

136. Letter from Royal Dutch Shell to S.E.C. (Oct. 25, 2010), <https://www.sec.gov/com-ments/df-title-xv/specialized-disclosures/specializeddisclosures-33.pdf>.

137. Oxfam America Complaint, *supra* note 129, at 11; *see also* 156 CONG. REC. S3316 (daily ed. May 6, 2010) (statement of Sen. Cardin).

138. Oxfam America Complaint, *supra* note 129, at 11.

“On June 12, 2013, the European Union adopted new transparency requirements for extractive companies that were expressly based on the SEC’s 2012 final rule.”¹³⁹ The provision requires full disclosure of all payments above \$100,000 on a project-by-project basis.¹⁴⁰ The Parliament was successful in removing “the ‘tyrant’s veto’ from the draft legislation—a clause exempting companies from the reporting requirements where the host country’s criminal law bans such disclosure.”¹⁴¹ The European Union’s requirements also go beyond Section 1504 by expanding the disclosure requirements to also cover large, privately owned firms and companies operating in the logging sector.¹⁴² The legislation instructs the European Commission to consider extending the rules to more industries. “The European Union’s member-states are now obliged to transpose these requirements into national law within 24 months.”¹⁴³

In response to the new transparency requirements adopted by the European Union, the United Kingdom, on December 1, 2014, passed an oil, gas, and mining transparency law that made “the European Union’s Accounting Directives the law of the land in the United Kingdom with the European Union’s Transparency Directives to follow soon.”¹⁴⁴ “The Accounting Directives require large public companies incorporated in the EU to report their payments—which includes Shell, BP, Total, Anglo American, and others.”¹⁴⁵ Whereas, “the Transparency Directives require companies listed on EU-regulated stock exchanges to report their payments, including Gazprom and Sinopec.”¹⁴⁶

Furthermore, Canada is making great strides in its transparency initiatives and disclosure requirements as well.¹⁴⁷ On December 16, 2014, the Extractive Sector Transparency Measures Act became law after receiving royal assent by Canada’s governor general.¹⁴⁸ The Act requires all entities involved in the commercial development of oil, gas or minerals, in Canada or elsewhere, to report payments greater than C\$100,000 made to domestic or foreign governments annually and to make the information

139. *Id.*

140. *Oil, gas, mineral and logging firms obliged to disclose payments to governments*, EUR. PARI. NEWS (Dec. 6, 2013), available at <http://www.europarl.europa.eu/news/en/news-room/content/20130607IPR11387/html/Oil-gas-mineral-and-logging-firms-obliged-to-disclose-payments-to-governments>.

141. *Id.*

142. *Id.*

143. Oxfam America Complaint, *supra* note 129, at 11.

144. *Id.*

145. *UK Passes Historic Transparency Law For Oil, Gas And Mining Companies*, OXFAM AMERICA (Dec. 1, 2014), <http://www.oxfamamerica.org/press/uk-passes-historic-transparency-law-for-oil-gas-and-mining-companies/>; see also *The Reports on Payments to Governments Regulations 2014*, 2014 No. 3209 (UK), <http://www.legislation.gov.uk/uksi/2014/3209/contents/made>.

146. OXFAM AMERICA, *supra* note 145.

147. *Id.*

148. Alan Ross et al., *2014 in Review: Top 10 legislative and regulatory changes for the Canadian Oil and Gas Industry*, BLG (Feb. 2, 2015), http://www.blg.com/en/news-andpublications/publication_3971.

contained in those reports public.¹⁴⁹ The new law applies to companies listed on a Canadian stock exchange, as well as entities that have a place of business in Canada, do business in Canada, or have assets in Canada, if they meet two of the three thresholds for at least one of their two most recent financial years: (i) at least C\$20 million in assets, (ii) at least C\$40 million in revenue, and (iii) an average of at least 250 employees.¹⁵⁰ After deliberating whether exemptions from the reporting standards should be allowed, “such as in circumstances where the standards conflict with laws that prohibit disclosure of the required information or conflict with contractual provisions regarding confidentiality, the Consultation Paper proposed that no exemptions from the reporting standards be granted.”¹⁵¹ Furthermore, failure to comply with the Extractive Sector Transparency Measures Act can trigger substantial penalties—up to C\$250,000 per day.¹⁵²

Thus, while the United States, with the SEC’s 2012 final rule, was successful in spurring many other countries into action, many commenters now believe that the United States risks falling behind and weakening the extraction issuer transparency movement if the SEC continues to delay issuing a revised final rule.¹⁵³ As many other countries adopt their own rules for resource extraction issuers, a revised final rule by the SEC that is materially different than the 2012 rule presents a large risk of creating a global patchwork of regulation—where rules and requirements differ from country to country—which would require expensive micromanagement compliance procedures. Additionally, if the SEC does not issue a revised final rule within the next few months, many believe that Congress’ intent that the United States be one of the world-leaders in transparency and disclosure initiatives will be frustrated. Next, in the final section of this article, I will draw together my conclusions and make modest recommendations.

VI. CONCLUSION & RECOMMENDATIONS

This section will explore the SEC’s proposed timeline for initiating Section 1504 revised rulemaking, as well as discuss conclusions and modest recommendations based on the original congressional intent outlined in Section 1504. According to the Office of Information and Regulatory Affairs, the SEC plans to initiate revised rulemaking for Section 1504—the second attempt at writing new rules for oil, gas and mining companies to disclose what they pay governments for their natural resources—by

149. Alan Ross, *supra* note 148; see also Extractive Sector Transparency Measures Act, S.C. 2014, c 39, s 376, s 1–30.

150. Extractive Sector Transparency Measures Act, *supra* note 149, at s 8.

151. Podowski & Poirier, *Increasing Transparency in the Extractive Industry: The Canadian Approach*, WHO’S WHO LEGAL (Jan. 2015), <http://whoswholegal.com/news/features/article/31977/increasing-transparency-extractive-industry-canadian-approach>.

152. Extractive Sector Transparency Measures Act, *supra* note 149, at s 24.

153. Oxfam America Complaint, *supra* note 129, at 10–11.

October 2015.¹⁵⁴ But this agenda is not binding and provides no guarantee that final rules will be adopted in 2015. And given the substantial delays to this point, it is possible that the non-binding deadline could be further delayed. But depending on the outcome of Oxfam America's 2014 lawsuit, a revised rule is likely to be created within the next year. The last section of this article will discuss modest recommendations and the reasoning behind them.

Recommendations: In order to achieve the expressed Congressional objective of making payments by extractives companies to governments more transparent, the SEC should produce a strong Section 1504 revised final rule requiring public, project-level reporting by company, with no categorical exemptions. This revised rule would include most of the same requirements as the original rule, with an expressed public disclosure requirement. But given the holding in *American Petroleum Institute v. SEC*, the SEC may have to include justifications and fact-findings in its revised rule to support its position and to show that the revised final rules were based on the SEC's own judgment—instead of relying solely on what the SEC thought the statute mandated.¹⁵⁵ Moreover, Congress should amend Section 1504 to clearly define “to the extent practicable” and address whether the resource extraction payment reports must be made public and what exemptions, if any, should be given. These actions will make the rules more clear and mitigate potential lawsuits that challenge the new rule and its effects.

In order to demonstrate the Congressional intent of Section 1504, a group of “13 senior Senators, including the original co-sponsors of the legislation and the Chair of the Senate Banking Committee, sent a letter to the SEC on May 1, 2014, reminding the agency of the statutory deadline and calling for a release of strong final rules this year.”¹⁵⁶ Within the letter, the senators noted that “[p]rompt enactment of a robust rule will help protect U.S. investors, promote U.S. national and energy security, and create more stable operating environments for American businesses.”¹⁵⁷ In fact, industry participants are beginning to request strong mandatory disclosure requirements to benefit their business.¹⁵⁸ “Large public companies, such as Newmont Mining, Rio Tinto, Statoil, and Tullow Oil, have publicly emphasized the benefits their companies receive from increased transparency.”¹⁵⁹

154. Oxfam America's Motion for Summary Judgment at 6, *Oxfam Am., Inc. v. SEC*, No. 1:14-CV-13648 at 6 (D. Mass. Sept. 2, 2015).

155. *Am. Petroleum Inst.*, 953 F. Supp. 2d at 5 (D.D.C. 2013).

156. Timeline For Oil, Mining Sunshine Rule Puts The US Behind On Global Transparency, Oxfam (May 28, 2014), <http://www.oxfamamerica.org/press/timeline-for-oil-mining-sunshine-rule-puts-the-us-behind-on-global-transparency/>; see also Letter from 13 Senators to the SEC (May 1, 2014), <http://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-41.pdf>.

157. Letter from 13 Senators to the SEC, *supra* note 156.

158. *Id.*

159. *Congress calls on SEC to release extractives transparency rule is year*, OXFAM (June 12, 2014), <http://www.oxfamamerica.org/press/congress-calls-on-sec-to-release-extractives-transparency-rule-this-year/>.

To better assess and address the concerns of industry participants affected by Section 1504, “Revenue Watch Institute and Columbia Law School conducted a joint study of over 100 oil and mining contracts between local governments and extractive companies.” “The study found that ‘many companies maintain confidentiality rules around contract terms chiefly as a matter of habit’ and ‘most deals include few matters of genuine commercial sensitivity.’”¹⁶⁰ The results of the study also confirmed that most “confidential” or “proprietary” information would likely already be public information or “would be of such minimal competitive value that, with the exception of references to future transactions and trade secrets (for which Section 1504 does not require disclosure), they would not cause substantial harm to an issuer’s competitive position.”¹⁶¹ “This is likely because the most sensitive information for extraction issuers, specifically geological data, costs, and profits, is not covered by Section 1504.”¹⁶²

Furthermore, the threat of a competitive disadvantage is less significant if the final disclosure rules are adopted with universal or near-universal coverage of international oil companies and publically listed national oil companies.¹⁶³ “Under this scenario, national oil companies would be limited to a handful of partners if they wished to avoid public disclosure” of Section 1504-type payment information.¹⁶⁴ And, as discussed above, many international countries have already adopted laws and initiatives similar or more rigorous than Section 1504 and the SEC’s original rule.¹⁶⁵ Therefore, it is likely that any potential advantage gained by non-Section 1504 companies will be mitigated by wide-scale adoption that naturally eliminates most of the opportunities non-Section 1504 companies would have had to gain a competitive advantage.¹⁶⁶

In conclusion, while the costs should be considered carefully, a Section 1504-based revised final rule requiring public, project-level reporting by each company, with no categorical exemptions, is likely the best way to achieve the expressed Congressional objective of making payments by extractives companies to governments more transparent. Moreover, at this point, the United States needs to maintain the universal standard that is being adopted all over the world and avoid creating a global patchwork regulatory environment. No market participants want the additional confusion of being listed on two securities exchanges and having to keep track of two different reporting requirements. Furthermore, a relatively weak revised final SEC rule, which included categorical exemptions and

160. Branden Carl Berns, *Will Oil and Gas Issuers Leave U.S. Equity Markets in Response to Section 1504 of the Dodd-Frank Act? Can They Afford Not to?*, 2011 COLUM. BUS. L. REV. 758, 789 (2011), citing Peter Rosenblum & Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Industries* 17 (2009).

161. *Id.* at 789–790.

162. *Id.* at 790.

163. *Id.*

164. *Id.*

165. *Id.* at 794.

166. *Id.* at 809.

did not require public disclosures, would result in much of the same compliance costs and would significantly reduce the positive impacts of the rule that Congress intended for investors and impoverished citizens in resource-rich countries.