No. 12-1422
ORAL ARGUMENT SCHEDULED FOR MAY 15, 2013

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

NATIONAL ASSOCIATION OF MANUFACTURERS;
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA;
BUSINESS ROUNDTABLE,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION

Respondent,

AMNESTY INTERNATIONAL USA; AMNESTY INTERNATIONAL LTD.,

Intervenors for Respondent

On Petition for Review of a Final Order of the
U.S. Securities and Exchange Commission

BRIEF OF CONGRESSMAN MCDERMOTT ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 28(a)(1) and 29(d), the undersigned counsel certifies as follows:

A. Parties and Amici.

All parties and intervenors appearing before the Commission and in this Court are listed in the briefs for Petitioners and Respondent. To counsel's knowledge, all *amici* appearing in this Court are listed in the Petitioners' and Respondent's briefs, except for Global Witness and Better Markets (who are filing separately) and the complete list of signatories to this brief: Senator Barbara Boxer, Senator Dick Durbin, former Senator Russ Feingold, former Congressman Howard Berman, Congressman Wm. Lacy Clay, Congressman Keith Ellison, Congressman Raul Grijalva, Congressman John Lewis, Congressman Ed Markey, Congressman Jim McDermott, Congresswoman Gwen Moore, Congresswoman Maxine Waters.

B. Rulings Under Review

On August 22, 2012, the Commission adopted the rule that Petitioners challenge here, Rule 13p-1, in *Conflict Minerals*, Securities Exchange Act Release No. 62764, published in the Federal Register at 77 Fed. Reg. 56,274 (Sept. 12, 2012).

C. Related Cases

The case on review has not previously been before this or any other Court. Counsel is not aware of any other related cases currently before this or any other Court.

Dated: March 8, 2013

Respectfully submitted,

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STATEMENT OF IDENTITY OF AMICI, THEIR INTEREST IN THE CASE, AND THEIR AUTHORITY TO FILE

Amici curiae are members of the United States Congress who supported the development of conflict mineral legislation, culminating in §1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, §1502, 124 Stat. 1376, 2213-18 (2010). *Amici* have direct knowledge of the development and drafting of § 1502 and the congressional intent that motivated its passage. *Amici curiae* are:

- Senator Barbara Boxer is a United States Senator from California; she is Chairwoman of the Committee on Environment and Public Works and sits on the Committee on Foreign Relations among others; she advised the authors of the Senate conflict minerals bill that, when combined with the House conflict minerals bill, formed the basis of § 1502.

- Senator Dick Durbin is a United States Senator from the State of Illinois; he serves as the Assistant Majority Leader, the second highest ranking position in the Senate, and sits on the Senate Judiciary, Appropriations, Foreign Relations, and Rules Committees; Sen. Durbin was one of the three original cosponsors and authors of the Senate conflict minerals legislation that culminated in the adoption of § 1502;

- Former Senator Russ Feingold served in the United States Senate from 1992 to 2010, representing the State of Wisconsin; he sat on the Judiciary, Foreign Relations, Budget, and Intelligence Committees; Sen. Feingold was one of the three original cosponsors and authors of the Senate conflict minerals legislation that culminated in the adoption of § 1502;

- Former Congressman Howard Berman served for 30 years in the United States House of Representatives and was Chairman of the House Committee on Foreign Affairs where he managed the drafting of amendments and markup of H.R. 4128, the House conflict minerals legislation that, combined with the Senate conflict minerals bill, was the basis for § 1502;

Congressman Berman also served on the Dodd-Frank conference committee that adopted § 1502 in its final form;

- Congressman Wm. Lacy Clay is a United States Representative from the State of Missouri; he sits on the House Financial Services Committee and the Oversight and Government Reform Committee and is the ranking member of the House Financial Services Subcommittee on Monetary Policy and Trade; Congressman Clay advised the House Foreign Affairs Committee and Ways and Means Committee members on H.R. 4128, the House conflict minerals legislation that, combined with the Senate conflict minerals bill, was the basis for § 1502;

- Congressman Keith Ellison is a United States Representative from the State of Minnesota; he sits on the House Financial Services Committee and the House Democratic Steering Committee, and he advised the House Foreign Affairs Committee and Ways and Means Committee members on H.R. 4128, the House conflict minerals legislation that, combined with the Senate conflict minerals bill, was the basis for § 1502;

- Congressman Raul Grijalva is a United States Representative from the State of Arizona; he sits on the House Committee on Education and The Workforce and the House Committee on Natural Resources; Rep. Grijalva was a cosponsor of H.R. 4128, the House conflict minerals legislation that, combined with the Senate conflict minerals bill, was the basis for § 1502;

- Congressman John Lewis is a United States Representative from the State of Georgia; he sits on the House Ways and Means Committee and cosponsored H.R. 4128, the House conflict minerals legislation that, combined with the Senate conflict minerals bill, was the basis for § 1502;

- Congressman Ed Markey is a United States Representative from the State of Massachusetts; he is the ranking member of the House Natural Resources Committee and served as the Chairman of the Select Committee on Energy Independence and Global Warming; at the time the conflict minerals provision was passed, Rep. Markey chaired the Energy and Environment Subcommittee of the House Energy and Commerce Committee;

- Congressman Jim McDermott has served as a United States Representative from the State of Washington for over 20 years; he is a senior member of the

House Ways and Means Committee and a member of the House Committee on the Budget; Rep. McDermott sponsored H.R. 4128, the House conflict minerals legislation that, combined with the Senate conflict minerals bill, was the basis for § 1502;

- Congresswoman Gwen Moore is a United States Representative from the State of Wisconsin; she sits on the House Committee on Financial Services and the House Budget Committee; Rep. Moore was a cosponsor of H.R. 4128 the House conflict minerals legislation that, combined with the Senate conflict minerals bill, was the basis for § 1502;

- Congresswoman Maxine Waters has served as a United States Representative from the State of California for over 20 years; she is the ranking member of the House Committee on Financial Services; Rep. Waters was a cosponsor of H.R. 4128, the House conflict minerals legislation that, combined with the Senate conflict minerals bill, was the basis for § 1502; Congresswoman Waters also served on the Dodd-Frank Conference Committee that adopted § 1502 in its final form.

Amici have an interest in this case because the final rule adopted by the SEC thoughtfully effectuates congressional intent, while judicial vacatur of the final rule would undermine *amici*'s efforts to further humanitarian and national security goals, provide stability to the minerals trade, and enable investors to be better informed.

Amici certify that no party's counsel authored this brief, in whole or in part, and no one other than *amici* listed herein or their counsel contributed money intended to fund the preparation or submission of this brief.

All parties have consented to the filing of this brief, consistent with Rule 29 of the Federal Rules of Appellate Procedure.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the conflict minerals reporting provision with bi-partisan support as part of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, H.R. 4173). The conflict minerals SEC-disclosure provision, was offered as an amendment by then-Senator Brownback (R-KS), now Governor of Kansas, and adopted in the Senate by unanimous consent. *See, e.g.*, 156 CONG. REC. S3801,17 (May 17, 2010) (Senator Dodd (D-CT): "Given the ongoing emergency in the Congo, I am glad that Senator Shelby and I have been able to work out an agreement to adopt this Congo amendment."). The measure was supported and strengthened in Conference, as a similar measure was under consideration in the House of Representatives by the Committee on Ways and Means and by the Committee on Foreign Affairs, where it was marked up. *See* Statement of Rep. Berman, Chairman of the House Committee on Foreign Affairs, July 15, 2010, *available at* http://democrats.foreignaffairs.house.gov/press_display.asp?id=747 (last visited Feb. 26, 2013) ("Our Committee worked hard for months with our House and Senate colleagues to see that this provision was included and strengthened in the Wall Street reform bill.").

In response to the ongoing humanitarian emergency in the Democratic Republic of the Congo, § 1502 requires companies to disclose annually whether they use conflict minerals that originated in the Congo or an adjoining country and,

if so, to investigate and disclose the minerals' sources within those countries. As Senator Durbin explained, "we can't begin to solve the problems of eastern Congo without addressing where the armed groups are receiving their funding, mainly from the mining of a number of key conflict minerals . . . . [I]f a company registered in the United States uses any of a small list of key minerals from the Congo—minerals known to be involved in the conflict areas—then such usage must be disclosed in that company's SEC disclosure." 156 CONG. REC. S3801,17 (May 17, 2010) (floor statement of Sen. Durbin); *see also Conflict Minerals Trade Act: Markup Before the House Comm. on For. Affs.* 111th Cong. 139-141 (April 28, 2010) (Rep. Ros-Lehtinen: "This important human rights legislation will help disrupt the illegal mineral trade that funds and fuels the bloody conflict in the Democratic Republic of the Congo.")

When Senator Brownback introduced the first conflict minerals bill in 2008, he explained "all we want to do with this is make sure that the coltan, the tantalum we are using, comes from legitimate sources. That is all we are asking . . . we want to know where it is coming from and that it is not conflict coltan that is used to pay for the suffering of so many people. We all must be good actors in this chain. With 1,500 people dying a day, there is no room for turning a blind eye on this matter." 154 CONG. REC. S1047-02 (Feb. 14, 2008).

The Rule adopted by the SEC implements the statute as Congress intended. Each of the SEC's determinations at issue in this case is consistent with the policy choices made by Congress. And, importantly, the statute and rule are working as intended. Within 14 months of the law passing, over 500 mines in Rwanda and the Congo were producing over 550 tons of conflict free minerals per month, replacing a substantial percentage—as much as 40%—of what was being mined in the black market before the law passed. Rep. McDermott, SEC Video Message: SEC Roundtable on Conflict Materials (Oct. 18, 2011).

Petitioners in this action ("NAM") seek exemptions that would eviscerate the statute. Petitioners argued for these same exemptions during the statute's consideration by Congress but having failed to get these exemptions from Congress, and having failed to obtain those same desired exemptions during the rulemaking process, NAM comes before this Court seeking a third bite at the apple. This Court should not accept NAM's invitation to rewrite § 1502, undercut Congress's clear intent and roll back the progress that is being made to end the mineral-fueled bloodshed in the Congo.

BACKGROUND

The mineral-fueled conflict in the Congo threatens regional stability as well as American economic, humanitarian, and national security interests:

- 1,500 people die in the Congolese conflict each day, making it the world's "single deadliest conflict since the Second World War";

- The conflict contributes to regional instability, having drawn in six neighboring countries already;

- The resulting regional instability is a threat to American economic and national security interests, as other nations expand their sphere of economic influence in the region and militant Islamists expand their sphere of political influence. President George W. Bush and President Barack Obama have deemed the Congolese conflict to be "an unusual and extraordinary threat to the foreign policy of the United States";

- Rape and other forms of sexual violence have become standard tools of war in the Congo;

- The conflict in the Congo inflicts unique horrors on the many children who are conscripted as soldiers, forced to labor in dangerous mines, subject to unspeakable sexual violence, uprooted from their homes and denied access to food, clean water, and basic medical care; and

- The companies that use conflict minerals from Central Africa to manufacture their products are relying on an inherently unstable and volatile black market, and this sourcing represents a risk to investors, companies, consumers, and the national interests of the United States, including U.S. foreign policy goals.[1]

[1] *See, e.g.*, 149 CONG. REC. S27536-03, 2003 WL 21313580 (June 9, 2003); 152 CONG. REC. H8860-02, 2006 WL 3524926 (Dec. 6, 2006); 152 CONG. REC. S00000-36, 2006 WL 3592068 (Dec. 8, 2006); 153 CONG. REC. S13360-03, 2007 WL 3101517 (Presidential Rep. on the Nat'l Emergency Declared in Exec. Order 13413) (Oct. 24, 2007); 153 CONG. REC. S13396-01, 2007 WL 3119155 (Oct. 25, 2007); 154 CONG. REC. S1047-02, 2008 WL 398110 (Feb. 14, 2008); 154 CONG. REC. H8632, 2008 WL 4329693 (Sept. 23, 2008); 155 CONG. REC. S4671-01, 2009 WL 1098211 (Apr. 23, 2009); 155 CONG. REC. S4745-01, 2009 WL 1118569 (Apr. 27, 2009); 155 CONG. REC. H11482-03, 2009 WL 3364626 (Presidential Message on the Continuation of the Nat'l Emergency with Respect to the Dem. Rep. Congo) (Oct. 20, 2009); 155 CONG. REC. S10787-03, 2009 WL 3445255 (Oct. 27, 2009); 155 CONG. REC. S13030-01, 2009 WL 4729775 (Dec. 11, 2009) (statement of Sen. Feingold, observing that the crisis in the Congo "the single deadliest conflict since the Second World War"); Transcript of House Foreign Affairs Subcommittee, 2011 WL 794381 (Mar. 8, 2011) (witness quoting Justine Masika, a Congolese

Congress has long understood that an effective response to the Congolese conflict must include scrutiny of the mineral trade. In 2008, Senator Feingold observed that the "lack of mechanisms to regulate or at least scrutinize trade in these resources handicaps our diplomatic and humanitarian efforts to bring peace to" the Congo and address the impact of the black market. *Resource Curse or Blessing? Africa's Management of its Extractive Industries: Hearing Before the Sen. Comm. On Foreign Relations*, 110th Cong. (Sept. 2008) (statement of Sen. Feingold). Year after year, Senator Brownback placed extensive documentation of the link between conflict mining and human rights violations into the Congressional Record, including a statement from the U.N. Ambassador to the Democratic Republic of the Congo explaining that "the minerals have truly been the driving force behind this war," and Senator Brownback concluded that "by making this supply-chain more translucent, we ultimately can help save millions of innocent Congolese lives." 155 CONG. REC. S4671-01, 2009 WL 1098211 (Apr. 23, 2009).

In its final form, § 1502 is the result of conscious and careful decisions. Although the complexity of modern business practices can make transparency and supply chain verification challenging, Congress still chose to pass a law that compels reasonable and proactive transparency throughout the supply chain. 155

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women's rights advocate: In the Congo the "link between conflict minerals and mass rape" is "crystal clear").

CONG. REC. S4696 (Apr. 23, 2009) (Sen. Brownback: "we call for transparency and accountability throughout the supply-chain of these minerals"). As Senator Feingold explained, "[T]his requirement will compel companies to take responsibility for their suppliers and thus bring greater transparency to the trade in these minerals, which may enable more targeted actions down the road. . . . I appreciate that these minerals often pass through extensive supply chains and processing stages before the relevant metals are used . . . but it is something we can and should expect of industry when certain commodities are known to be fueling human rights violations." 155 CONG. REC. S4697.

In drafting conflict mineral legislation, Congress carefully considered the views of the business community. Indeed, Congress worked with Petitioners, as well as other manufacturing associations, a large number of individual manufacturing companies, retailers that act as manufacturers, associations for each of the conflict minerals, and companies throughout the mineral supply and refining chain. Congress took industry concerns into account and adjusted many aspects of the legislation, including a) requiring due diligence and disclosure rather than an outright import ban, b) requiring reports from U.S. and non-U.S. businesses alike, c) requiring the Department of State to work with Central African governments and private industry to support greater minerals governance, d) involving the Commerce Department to regularly quality check company reports, and e)

instituting reporting by the GAO on the effectiveness of the law and suggested improvements, to name only a few aspects of the law that were created with input from the business community. *See, e.g.*, 156 CONG. REC. S3965 (May 19, 2010) (Sen. Feingold: The proposed legislation "includes modifications based on discussions with representatives from industry, U.S. Government agencies, and the Banking committee").

The business community, however, did not get everything it asked for from Congress. And now NAM attempts to achieve a number of policy goals that Congress considered and rejected. Congress considered carefully that many products use only small amounts of conflict minerals, that due-diligence does cost money, that supply chains are complex and ever-changing, and that many manufacturers contract with other businesses to fabricate their products. Yet, Congress decided that these factors did not outweigh the benefits of requiring proactive steps from the business community to monitor their supply chains. *See, e.g.*, Remarks of Rep. Berman, Chairman of the House Committee on Foreign Affairs, for *The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo available at* http://democrats.foreignaffairs.house.gov/press_display.asp?id=954 ("[Some] companies have said that implementing this law would simply be too difficult and too expensive. They are telling us that, sophisticated as they are, they have no idea where their materials come from. They

are saying that if we ask them to be responsible, they cannot make a profit. I take issue with all of those statements.").

A great many businesses have not only supported the goal of greater supply-chain transparency, they have already implemented transparency measures, thereby demonstrating the economic feasibility of such measures. For example, Ford Motor Company took action to begin due diligence well before the final regulations were promulgated. *See* Ford Motor Co. Sustainability Report 2010/2011; *see also* RF Micro Devices Statement on Conflict Minerals, Feb. 27, 2012 (RF Micro Devices, an integrated circuit manufacturer, is "actively working with its supply chain to certify that metals found in RFMD products are DRC conflict free."); H.C. Stark Raw Material Procurement Statement (H.C. Starck, a global supplier of refractory metal powders, has already "implemented a certified Responsible Supply Chain Management System (RSCM) as a core control system to guarantee we purchase only conflict-free raw materials.").[2] *See also* Rep.

[2] The statements cited from Ford, RF Micro Devices, and H.C. Starck are available in the Appendix to *The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo: Hearing on Pub. L. 111-203 §1502 Before the H.R. Subcomm. On Int'l Monetary Policy & Trade* (May 10, 2012). In the same appendix, see also Honeywell Electronic Materials Conflict Minerals Statement, Feb. 10, 2011(Honeywell "actively works with its suppliers to identify the source of the minerals defined in [§ 1502]"); SiTimes Declaration of Conflict Metals/Supplies from Conflict Free Mines ("SiTimes is familiar with and fully supports the conflict free metal/mineral regulation"); AMD Supplier Responsibility Statement; and TriQuint Semiconductor Policy on Conflict Minerals, May 19, 2011.

McDermott, SEC Video Message: SEC Roundtable on Conflict Materials p. 2 (Oct. 18, 2011) ("Many companies we're talking to . . . think the business know-how they get from their transparency work is hugely valuable. . . . [T]hey can operate more efficiently, they can make better sourcing decisions.").

Section 1502 has received support and praise from a broad range of constituencies. *See, e.g.*, *The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo: Hearing on Pub. L. 111-203 §1502 Before the H.R. Subcomm. On Int'l Monetary Policy & Trade*, May 10, 2012 ("May 2012 Hearing") (Statement of Bishop Nicolas Djomo Lola, President of the Catholic Bishops' Conf. of the Congo) (expressing his church's support for § 1502); *id.* (statements of business support) (contains hundreds of public statements from companies committing themselves to going conflict free, including from Samsung Electronics, Motorola, Ford, Texas Instruments, and Philips); *id.* (statement from Claigan Environmental, regulatory compliance expert) ("I have never seen so many companies becoming compliant before the final rules have come out. I think in many ways we are far past the issue of can it be done and is it costly—it can be done and at lower-than-publicized cost"). Moreover, § 1502 is working as intended. Between April and October 2011, the Congo and Rwanda went from having no verifiably clean mines to over 500 clean mines, with over 14,000 miners producing 550 tons of clean tin and coltan each month. Rep.

McDermott, SEC Video Message: SEC Roundtable on Conflict Materials (Oct. 18, 2011) (based on an oral report to Rep. McDermott's office from the chief program manager of iTSCi, a joint industry program for tracing the origin of conflict minerals). Meanwhile, progress on clean mining is spreading to neighboring countries like Burundi and Uganda. *Id.* The U.S. Department of State recently opined that "Issuance of the SEC regulations was a vital step in establishing a clear and harmonized global framework," adding that "[e]ach country's ability to develop a responsible mineral trade depends in part on the credibility of equivalent measures" in other countries. Dept. of State's Feb. 28, 2013, STATEMENT CONCERNING IMPLEMENTATION OF CONFLICT MINERALS DUE DILIGENCE PURSUANT TO SECTION 1502 OF THE DODD-FRANK ACT, *available at* http://www.state.gov/e/eb/rls/othr/2013/205465.htm?goMobile=0. The State Department concluded that "as implementation of traceability and transparency measures continues, more companies should and will responsibly source from the region." *Id.*

ARGUMENT

I. The SEC Correctly Determined that a *de minimis* Exception Was Not Appropriate.

A. Because Congress Considered and Rejected a *de minimis* Exception, the SEC Properly Decided Not to Adopt One in Contravention of Congressional Intent.

Congress considered and rejected the adoption of a *de minimis* exception when drafting § 1502, and the SEC properly decided not to include a *de minimis*

exception in contravention of congressional intent. "The ability to create a *de minimis* exemption 'is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design.'" *Envtl. Def. Fund, Inc. v. E.P.A.*, 82 F.3d 451, 466 amended sub nom. *Envtl. Def. Fund v. E.P.A.*, 92 F.3d 1209 (D.C. Cir. 1996)).

A draft *de minimis* standard was circulated among staff, discussed extensively with industry associations, individual companies, policy experts, administration officials, and the NGO community and was rejected by Congress because creating a *de minimis* exception for these minerals would have subverted the goals of the law. Indeed, no Member of Congress even offered a *de minimis* amendment.

The legislation's sponsors explained to the SEC that Congress intentionally did not include a *de minimis* exception:

> [W]e intended [the reporting requirements] to cover practically all uses of conflict minerals—except for those that are naturally occurring or unintentionally included in a product. . . . In the example of the car whose only conflict minerals are contained in the radio, we would argue that the car manufacturer would, in fact, be covered by Section 1502.

Letter from Rep. Jim McDermott and Sen. Richard Durbin to Mary L. Schapiro, SEC Chairwoman, Feb. 28, 2011 ("McDermott & Durbin 2011 Letter").

Congress rejected the idea of a *de minimis* exception because it would have created a loophole that would swallow the rule. *See* Letter from Rep. Jim

McDermott and Sen. Richard Durbin to Mary L. Schapiro, SEC Chairwoman, Oct. 4, 2010 ("McDermott & Durbin 2010 Letter") ("Congress carefully considered including a de minimis rule in Section 1502 . . . but a de minimis rule would have created an overly generous loop-hole in the law."). Because conflict minerals are used in small quantities—whether measured by weight or dollar value—a *de minimis* exception would have exempted an unacceptably large number of companies from the statute's requirements. *Id.* ("the weight of the conflict minerals so essential to many products is very small, and the percentage by weight or dollar value of the conflict minerals as a proportion of unit cost is often also very small"). Accordingly, Congress "intentionally did not use a de minimis rule." *Id.*

Moreover, Congress expressly vested in the President the authority to suspend or temporarily revise § 1502's reporting requirement. *See* § 1502, codified at 15 U.S.C. § 78m(p)(3). Congress did not vest the power to make exceptions in the SEC.

Because a *de minimis* exception would be contrary to the legislative design, the SEC lacked authority to create one.

B. Because Any So-called "*de minimis*" Exception Would Significantly Affect the Rule, The SEC Lacked Authority to Include a *de minimis* Exception.

Agencies have limited authority to promulgate a *de minimis* exception where, as here, Congress does not provide for one. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 113-14 (D.C. Cir. 2005). The inherent authority to impose a *de minimis* exception covers only situations where the burdens of regulation yield a gain of trivial value and where the absence of such an exception would create "absurd or futile results." *Id.* "[O]therwise the exemption reflects impermissible second-guessing of Congress's calculations." *Id.* (citations and some internal punctuation omitted).

A *de minimis* exception would thwart the purposes § 1502. Conflict minerals are often used in products in very limited quantities, so a *de minimis* exception could exempt significant amounts of conflict-sustaining commerce from the statute's disclosure requirements, as both the SEC and the Department of State recognized. *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. pts. 240 & 249b); Letter from Dep't of State (March 24, 2011), cited in 77 Fed. Reg. 56,280 n.53. Because a *de minimis* exception would do more than simply avoid an "absurd or futile" result, the SEC was precluded from second-guessing Congress's calculations by including a *de minimis*

exception. The SEC's evaluation of whether to adopt a *de minimis* exception is consistent with congressional intent. Fed. Reg. 56,298.

II. The SEC's "Reason to Believe" Standard is Consistent with Congressional Intent, and NAM Has Misread § 1502.

A. NAM has Misread § 1502.

Section 1502 requires companies to perform due diligence and submit a Conflict Minerals Report if their products involve conflict minerals that "did originate" in the Congo or an adjoining country. Whether a conflict mineral "did originate" in the Congo is a question of objective fact—that is, a fact that exists independent of a company's knowledge or ignorance of the mineral's origin. NAM, however, argues that § 1502 exempts a company from its due diligence and reporting requirements if the company is "unable to determine" the origin of its minerals. NAM Brief at 41-42. NAM's reading of the statute would thus exempt a company from due diligence and reporting requirements simply because the company remains ignorant of its minerals' origins—whether intentionally ignorant or not—even when its minerals in fact "did originate" in the Congo. Because the NAM proposal would fail to cover all companies whose conflict minerals "did originate" in the Congo or an adjoining country, the NAM proposal is incompatible with the clear text of the statute.

B. The SEC's "Reason to Believe" Standard is Consistent with the Statute.

The SEC's "reason to believe" standard is consistent with § 1502. Section 1502 requires due diligence and a Conflict Minerals Report from companies that use conflict minerals that "did originate" in the DRC or an adjoining country. As mentioned above, this standard does not depend solely on each company's individual determination of its minerals' origins. Consistent with the statutory standard, the SEC's final rule requires that a company perform due diligence and submit a Conflict Minerals Report if (i) the company "knows that it has necessary conflict minerals that originated in the Covered Countries" or (ii) the company "has reason to believe that its necessary conflict minerals may have originated in the Covered Countries." *Conflict Minerals*, 77 Fed. Reg. 56,313 (Sept. 12, 2012). Like § 1502, the SEC's final rule does not depend on a company's subjective determination of whether minerals did or did not originate in the Congo or an adjoining country. Rather, the due diligence and reporting requirements are triggered if the company has "reason to believe" that its minerals came from one such country. The "reason to believe" standard is satisfied when the company encounters "red flags," "warning signs" or "other circumstances indicating that [the company's] minerals have originated in a Covered Country." Fed. Reg. 56,313. It is not necessary, however, that the company weigh these warning signs and make its own determination of their minerals' origins. Because

the SEC's final rule does not depend on the issuer's subjective determination of a mineral's origin, the rule is compatible with § 1502.

C. The SEC's "Reason to Believe" Standard is Consistent with Congressional Intent.

The SEC's "reason to believe" standard promotes the goals of transparency and accountability, as Congress clearly intended. *See* Letter from Senators and Congress Members to Mary L. Schapiro, SEC Chairwoman, Feb. 16, 2012; *see also* McDermott & Durbin 2011 Letter. The SEC's "reason to believe" standard is consistent with congressional intent because the standard compels companies to learn the origin of their conflict minerals and "does not allow [a company] to ignore or be willfully blind to warning signs or other circumstances indicating that its conflict minerals may have originated in the Covered Countries." 77 Fed. Reg. 56,313.

Opponents of the statute complained that § 1502 would sometimes require extensive due diligence even when a company could not initially determine that its conflict minerals originated somewhere other than the Congo or an adjoining country. *See The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo* (Statement of Gary Miller (R-CA) (complaining that Kraft Food would have to conduct due diligence on all products that contain the minerals even if "not necessarily from the region"). Thus, § 1502's supporters and opponents alike understood it sometimes requires companies to proactively

investigate the origin of the conflict minerals in their products, even when those minerals may not have come from the Congo or an adjoining country. The SEC's proposed rule is entirely consistent with this understanding. 77 Fed. Reg. 56,310-314.

III. The SEC's "Reasonable Country of Origin Inquiry" is Reasonable and Consistent with § 1502, while NAM's Alternative Proposal is Inadequate to Achieve the Goals of Congress.

NAM seeks a standard for conducting the "country of origin inquiry" that undermines § 1502's goals of transparency and accountability. By contrast, the SEC's reasonable country of origin inquiry furthers those goals and is consistent with § 1502. *See* 155 Cong. Rec. S4696 (Apr. 23, 2009) (Sen. Brownback: "we call for transparency and accountability throughout the supply chain of these minerals"); *id.* at S4697 (Sen. Feingold: "This legislation . . . commits the United States government and those companies under our jurisdiction to shed light on the dynamics of eastern Congo's mineral economy.").

Moreover, the SEC's approach is reasonably sensitive to any burden it places on business. The SEC's reasonable country of origin inquiry relies on industry standards, such as those promulgated by the OECD, while remaining flexible to the variety of circumstances faced across various industries that must determine the origin of their conflict minerals. *See* 77 Fed. Reg. 56,310-314; OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of*

Minerals from Conflict-Affected and High-Risk Areas (2011), *available at http://www.oecd.org/daf/internationalinvestment/Guidelinesformultinationalenterprises/46740847.pdf*; OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Supplement on Gold* (2012), *available at http://www.oecd.org/corporate/guidelinesformultinationalenterprises/FINAL%20Supplement%20on%20Gold.pdf.*

Indeed, the sponsors of the bill expected (but did not require) a less flexible, more demanding standard of transparency and accountability. As the sponsors opined during notice-and-comment rulemaking, the due diligence standard was expected to apply even at the initial inquiry into the minerals' country of origin:

> [T]he proposed rule differentiates between the country of origin inquiry and the due diligence involved in determining the source and chain of custody of conflict minerals, indicating that the former could be "less exhaustive." This is a misreading of our intent—we see no difference in the effort that should be exercised in each case.

McDermott & Durbin 2011 Letter. Instead, the SEC's final rule adopts a less exhaustive country of origin inquiry. Although the sponsors intended a more demanding standard, a more demanding standard was not required by the statute. The SEC's rule is consistent with the statute, and adopting such a rule was within the SEC's discretion.

NAM criticizes the SEC for not evaluating alternative standards more thoroughly. However, the specific alternative that NAM proposes—the use of "flow down clauses"—is inadequate by itself to achieve the goals of § 1502. A flow-down clause is "an obligation, included in a manufacturer's contract with its direct suppliers, that requires the direct suppliers to comply with the manufacturer's policies, and to require *their* suppliers to comply with the policies." NAM Brief at 45 (emphasis in original). Flow-down clauses would allow manufacturers to impose contractual obligations up the length of a supply chain without the manufacturers ever actually having to identify the smelters from which its minerals originated. *Id.* Indeed, a manufacturer could remain ignorant of "even which particular component parts [of its product] contained the minerals" and still be in compliance with such a regime. *Id.*

Reliance on flow-down clauses alone is inconsistent with Congress's paramount goal of shedding light on the conflict-minerals supply chain. Section 1502 was passed "to shed light on the dynamics of eastern Congo's mineral economy." 155 CONG. REC. S4697 (Apr. 23, 2009) (statement of Sen. Feingold). Congress was aware of the burdens of creating supply chain transparency but felt strongly that bringing transparency to those supply chains "is something we can and should expect of industry when certain commodities are known to be fueling human rights violations." *Id.*

To bring transparency to conflict mineral supply chains, Congress intended issuers to take strong measures to verify the origin of their conflict minerals. McDermott & Durbin 2010 Letter ("[C]ompanies must be able to track whether their conflict minerals come from the DRC and adjoining countries and, if so, where. This needs to be verifiable."). Congress did not intend issuers to rely solely on the representations of suppliers, especially since black-market brokers routinely obscure the origin of their ore. *See* Jonathan Broder, *Foreign Policy: In the Business of Change*, CQ Weekly, Sept. 14, 2009. ("One common step [in the supply-chain] . . . involves black-market brokers who routinely obscure the origin of their ore, certifying that it comes from legal mines in Congo or neighboring Uganda, Rwanda, Burundi or Tanzania in their documentation."). Furthermore, conflict mineral supply chains follow an ever-changing and international path, which will likely make the enforcement of flow-down clauses largely ineffective. McDermott & Durbin 2010 Letter ("Some processing facilities are beyond the reach of United States law and may not be compelled to provide reliable information.").

NAM ignores the intent of § 1502—an intent that was understood and embraced by legislators and industry alike, as evidenced by the letters of support that Representative McDermott received from companies like Motorola, Hewlett-Packard, and a tantalum processing company.

> [Motorola is actively involved in] a "project to improve visibility in the minerals supply chain, with particular focus on identifying sources of specific minerals and ***understanding how the minerals move through their lifecycle—from mine to electronics***. . . . We believe your bill can be an important tool to help companies source responsibly . . . . In order to holistically address this problem, we believe it is essential to engage other industries who also use minerals associated with conflict mining.

Letter from Michael Loch, Director, EHS Strategic Initiatives, Motorola Inc., to Rep. McDermott (Nov. 18, 2009) (emphasis added).[3]

> In addition to general support of the Conflict Minerals Trade Act, [Hewlett-Packard] will continue ***our long history of driving supply chain transparency and accountability*** . . . . We look forward to continued collaboration with Congressman McDermott.

Press Release from Hewlett-Packard (Nov. 19, 2009) (emphasis added).

> Niotan recognizes ***the need for the industry as a whole to be able to trace minerals in the supply chain to their origins*** in order to prove that the minerals do not support conflict or human rights abuses.

Letter from John Crawley, CEO of Niotan, "a U.S. company that processes tantalum salts into tantalum metal," to Rep. McDermott (Feb. 1, 2010) (emphasis added).

The SEC's "reasonable country of origin" inquiry is reasonable, consistent with industry standards, flexible enough to accommodate special circumstances, and consistent with the goals of the statute and with congressional intent. NAM's

[3] Letters received by Congressman McDermott are available at the Court's request.

efforts to pull from the Court what it failed to achieve in Congress should be denied, and the SEC's final rule should be upheld.

IV. Congress Intended § 1502 to Apply to Companies that Contract to Manufacture Products Involving Conflict Minerals.

Congress intended § 1502 to apply to issuers that exercise control over the manufacture of their products, including companies that contract to manufacture their products through other entities. This scope of coverage is critical to the effectiveness of § 1502, as Senator Durbin and Congressman McDermott explained prior to the promulgation of the SEC's final rule:

> [One] area of concern has been over which companies are manufacturers and which are not. . . . [P]roducts that the retailer contracts to be manufactured or for which the retailer issues unique product requirements must be included [within the scope of the rule]. . . . Many companies use component parts from any one of several suppliers when assembling their products. This business model . . . creates complexity, which has served as a rationale for not requiring responsibility to date – and which has enabled the black market for conflict minerals to grow. ***It is of paramount importance that this business model choice not be used as a rationale to avoid reporting and transparency.***

McDermott & Durbin 2010 Letter (emphasis added). In its brief, NAM invoked generic canons of statutory construction to support its position. Whatever merit those assumptions may have generally in discerning legislative intent, here the legislature's intent is known: § 1502 was meant to include companies that contract to manufacture their products. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 675 (1990) (opining that canons of

construction are "notoriously numerous and manipulable"); *see also* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). The SEC correctly recognized that intent, and the final rule is wholly consistent with that intent. 77 Fed. Reg. 56,290-91.

NAM's reading of the statute, by contrast, is clearly contrary to congressional intent. *Public Citizen v. U.S. Dept. of Justice,* 491 U.S. 440, 454 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees . . . seems inconsistent with Congress's intention"). Modern business practice regularly involves companies contracting with one another to supply materials, fabricate component parts, and assemble component parts into a whole product. NAM's reading of the statute would exempt from the disclosure requirements key companies—companies that exercise ultimate control over products entering the market and that investors are most concerned with monitoring. Congress did not intend to exempt such key actors in the conflict minerals supply chain. *See also* SEC Brief at 51-52 (SEC appropriately relied on views of legislators that, if issuers that contract to manufacture goods are exempt from reporting requirements, "then a large, non-transparent use of the black market for DRC conflict minerals would remain, directly subverting the policy intention of

the law") (quoting Sen. Durbin). As Senator Durbin stated, limiting the scope of the rule as NAM urges would directly subvert congressional intent. *Id.*

Congress intended § 1502 to apply to companies that manufacture and contract to manufacture products, as is necessary to establish transparency and accountability in the conflict mineral supply chain. NAM's attempt to roll back legislative and administrative efforts to establish much needed accountability and transparency should be denied.

V. Conclusion

For the foregoing reasons, we members of Congress urge the Court to deny NAM's petition and preserve the final rule that has been promulgated by the SEC. The final rule is consistent with the statute, consistent with our congressional intent, and critical to de-funding the ongoing crisis in the Congo.

Dated: March 8, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,837 words and therefore satisfies the type-volume limitation of Fed. R. App. P. 29(d).

This *amicus* brief has been joined by current and former Senators and Members of Congress. I have been informed that there are separate *amicus* briefs being submitted in support of Respondent by Global Witness and Better Markets. The issues addressed in the other *amicus* briefs are materially distinct from those addressed herein and accordingly consolidation of the briefs is not feasible.

Dated: March 8, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2013, I electronically filed the foregoing Brief for current and former Senators and Members of Congress Barbara Boxer, Dick Durbin, Russ Feingold, Howard Berman, Wm. Lacy Clay, Keith Ellison, Raul Grijalva, John Lewis, Ed Markey, Jim McDermott, Gwen Moore, and Maxine Waters as *amici curiae* supporting Respondent with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the use of the Appellate CM/ECF system, with paper copies to follow via hand-delivery. Service was automatically accomplished on all registered participants by the CM/ECF system, as stated on the relevant Notice of Docket Activity.

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