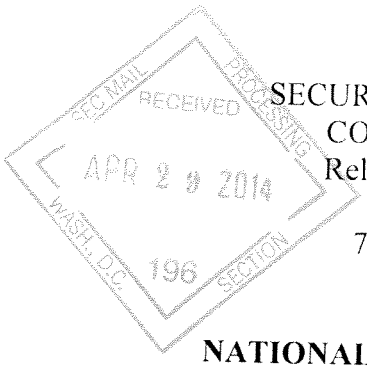

SECURITIES AND EXCHANGE COMMISSION
CONFLICT MINERALS; FINAL RULE
Release No. 34-67716; File No. S7-40-10
RIN 3235-AK84
77 Fed. Reg. 56,274 (Sept. 12, 2012)

MOTION FOR STAY BY
NATIONAL ASSOCIATION OF MANUFACTURERS,
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AND BUSINESS ROUNDTABLE

The National Association of Manufacturers, the Chamber of Commerce of the United States of America, and Business Roundtable ("Petitioners") hereby request that the Securities and Exchange Commission ("the Commission") stay its final Conflict Minerals Rule, or at the least stay the filing deadline for the Form SD and reports associated with the rule. Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012), codified at 17 C.F.R. §§ 240.13p-1, 249b.400(B). Petitioners request this stay pending amendment of the final rule's disclosure requirements, which were invalidated by the U.S. Court of Appeals for the District of Columbia Circuit on April 14, 2014. *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-5252, 2014 WL 1408274 (D.C. Cir. Apr. 14, 2014). Absent a stay, the rule compels certain issuers, including certain of petitioners' members, to file the Form SD and associated reports by June 2, 2014. A brief in support of this motion is attached.

Action on this motion is respectfully requested by Thursday, May 1, 2014, so that petitioners may promptly proceed to court to seek appropriate relief if a stay is not granted.

Dated: April 29, 2014

Respectfully submitted,

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SECURITIES AND EXCHANGE COMMISSION
CONFLICT MINERALS; FINAL RULE
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77 Fed. Reg. 56,274 (Sept. 12, 2012)

BRIEF IN SUPPORT OF MOTION FOR STAY BY NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BUSINESS ROUNDTABLE

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INTRODUCTION

The Commission's Conflict Minerals rule requires issuers to state that certain products have not been found to be "DRC conflict free," defined to mean that the products help finance groups that commit human rights abuses in the Democratic Republic of the Congo, and that other products are "DRC conflict undeterminable," defined to mean that issuers are unable to determine whether the products are "DRC conflict free." 17 C.F.R. § 249b.400(F)(1)(d)(4)-(5). On April 14, 2014, the U.S. Court of Appeals for the District of Columbia Circuit held that this compelled statement violates the First Amendment, and ordered the case remanded to the district court for further proceedings. *Nat'l Ass'n of Mfrs. v. SEC*, No. 12-5252. Nonetheless, under the rule, the Form SD and associated reports are currently due in approximately one month, on June 2, 2014.

As Commissioners Gallagher and Piwowar have stated, "the entirety of the rule should be stayed, and no further regulatory obligations should be imposed, pending the outcome of this litigation." Commissioner Daniel M. Gallagher and Michael S. Piwowar, *Joint Statement on the Conflict Minerals Decision* (Apr. 28, 2014). Indeed, a stay is essential to prevent issuers from being irreparably harmed by a rule that has been declared to be unconstitutional, and given the imminence of the reporting deadline, a stay is the only feasible course.

A stay of the entire rule—not just the requirement that companies state whether or not their products are conflict free—is essential. First, the whole point of the rule and the statute was to try to effect social change by shaming companies who cannot label their products as "DRC conflict free." That shaming mechanism—the compelled not "DRC conflict free" statement—has been struck down on First Amendment grounds. And, without its unconstitutional premise, the remainder of the rule has questionable benefits. Given these questionable benefits, the

Commission must reconsider whether to revise the rule that, according to its own estimates, will require the expenditure of billions of dollars.

Second, the Court's opinion raises a host of questions that do not admit of easy answers and that need to be carefully considered before imposing enormous, unprecedented costs on industry. The statute will have to be reinterpreted and the scope of the Commission's discretion to craft a disclosure that comports with both the statute and the First Amendment will have to be reassessed. In this regard, it will have to be decided whether the existing disclosure requirement is compelled by the statute, and if so, whether it is severable from the remainder of the statute. If it is not compelled by the statute, the Commission will have to determine what type of disclosure should replace the unconstitutional requirement, and whether the changes to the disclosure requirement will necessitate corresponding changes to other provisions of the rule as well. Further, the Commission will have to re-analyze the costs and benefits of the rule in light of these changes. All of these issues will need to be considered through further litigation proceedings and notice-and-comment rulemaking. This process plainly cannot be carried out in the one month remaining before the current reporting deadline.

Nor is it feasible to attempt to excise the unconstitutional portions of the rule, and require some type of truncated report to be filed on June 2, 2014. The rule was intended to work as an interconnected whole, and such an approach would not serve its intended purposes. Further, especially given the imminence of the reporting deadline, any attempt to excise certain required statements without staying the deadline would exacerbate the massive uncertainty and confusion among issuers subject to the rule. By staying the rule, or at least the June 2 reporting deadline, the Commission will enable an orderly and thorough process of responding to the Court's decision, without compromising the public interests that the rule was designed to promote.

DISCUSSION

The Commission has previously acknowledged that it has authority under the Administrative Procedure Act to "postpone the effective date of action taken by it" when "justice so requires."[1] 5 U.S.C. § 705; *see also In re Motion of American Petroleum Institute et al. for Stay of Rule 13Q-1 and Related Amendments to Form SD*, Release No. 34-68197, 2012 WL 5462858, at *2 (Nov. 8, 2012). When considering an application for a stay, "the Commission generally considers four factors: (1) whether there is a strong likelihood that a party will succeed on the merits in a proceeding challenging the particular Commission action (or, if the other factors strongly favor a stay, that there is a substantial case on the merits); (2) whether, without a stay, a party will suffer irreparable injury; (3) whether there will be substantial harm to any person if the stay were granted and (4) whether the issuance of a stay would likely serve the public interest." *Order Preliminarily Considering Whether to Issue Stay Sua Sponte and Establishing Guidelines for Seeking Stay Applications,* Release No. 34-33870, 1994 WL 117920, at *1 (Apr. 7, 1994). Under these factors, the Commission should stay the rule.

A. Petitioners Have Already Succeeded On The Merits.

Petitioners have more than a "strong likelihood" of succeeding on the merits: Petitioners have already succeeded on the merits of their constitutional challenge to the disclosure requirements. The D.C. Circuit unequivocally held that "15 U.S.C. § 78m(p)(1)(A)(ii) & (E), and the Commission's final rule 56 Fed. Reg. at 56,362-65, violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on

[1] Unlike 15 U.S.C. § 78y, section 705 does not set forth any time limit within which an agency must act on a stay. It is clear that 15 U.S.C. § 78y does not govern here, in light of the Court's holding in *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013), and the D.C. Circuit's subsequent order transferring this case to the district court. Per Curiam Order, *Nat'l Ass'n of Mfrs. v. SEC*, No. 12-1422 (D.C. Cir. May 2, 2013).

their website that any of their products have 'not been found to be DRC conflict free.'" Slip Op. at 23. Accordingly, the need for a stay is at its apex in order to preserve the status quo until the Court's ruling can be implemented. *Cf. Ctr. for Food Safety v. USDA*, No. C 08-00484 JSW, 2010 WL 10079293, at *2 (N.D. Cal. Mar. 16, 2010) ("Plaintiffs have done more than shown a likelihood of success on the merits. By order dated September 21, 2009, the Court has already found, on the merits, that Defendants have violated [the statute]. Therefore, Plaintiffs have already succeeded on the merits."); *In Re 1998 Biennial Regulatory Review-Review of Comm'n's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of Telecommunications Act of 1996*, 17 F.C.C. Rcd. 6280, 6281 (2002) (granting a one year stay of an FCC order following the D.C. Circuit's remand of the order as arbitrary and capricious in *Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, *opinion modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002)).[2]

Further, this is not an instance where a rule has been held to be arbitrary and capricious for lack of reasoned explanation, but following additional analysis, the agency could properly impose the same substantive requirements. The Court held that the rule's compelled statements violate the First Amendment; they will have to be changed. It would plainly be inappropriate,

[2] Even if the D.C. Circuit were to adopt an expansive reading of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) in its pending *en banc* hearing in *Amer. Meat Inst. v. U.S. Dep't of Agriculture*, No. 13-5281, Petitioners would nonetheless have a strong likelihood of success on the merits. At issue in *American Meat Institute* is whether rational basis review of compelled disclosures as described in *Zauderer* applies only when those disclosures are intended to prevent deception of consumers. There is no dispute in *American Meat Institute* that a compelled disclosure must be purely factual and uncontroversial for *Zauderer* review to apply. The Court made clear in this case that Petitioners have a substantial likelihood of successfully demonstrating that the statements required by the conflict minerals rule are not factual or uncontroversial, and so, at a minimum, intermediate scrutiny would continue to apply. *See* Slip Op. at 20 ("[I]t is far from clear that the description at issue—whether a product is "conflict free"— is factual and non-ideological."); *id.* at 4-5 (Srinivasan, J., conc. in part) ("[T]here are, at the least, substantial questions . . . that the disclosure requirement may fail to qualify for *Zauderer* review regardless.").

and not in the interests of justice, for the Commission to require issuers to comply with a rule that the Court of Appeals has held violates their constitutional rights.

B. Issuers Will Suffer Irreparable Injury In The Absence Of A Stay, And The Balance Of Equities And Public Interest Favor A Stay.

It is well settled that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (same); *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 301 (D.C. Cir. 2006) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed."). That is especially true here where, as the DC Circuit held, companies are effectively being forced to "tell consumers that [their] products are ethically tainted," and that they have "blood on their hands," a message with which many issuers, including those "who condemn[] the atrocities of the Congo war in the strongest terms," strongly disagree. Slip Op. 20.

In a closely analogous circumstance, the Second Circuit held that dairy manufacturers required by a Vermont law and accompanying regulations to indicate on their products whether milk came from cows treated with certain hormones were entitled to an injunction of that requirement to prevent irreparable harm to their First Amendment rights. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71-72 (2d Cir. 1996). The Court held that "[t]he wrong done" to the "constitutional right not to speak is a serious one." *Id.* "The right not to speak inheres in political and commercial speech alike, and extends to statements of fact as well as statements of opinion." *Id.* Therefore, "[b]ecause compelled speech contravenes core First Amendment values," it satisfies the irreparable harm requirement for securing injunctive relief. *Id.* (internal

citations and quotation marks omitted). This case presents even more severe First Amendment injuries.

Additionally, the absence of a stay will irreparably injure issuers by requiring them to expend further funds conducting due diligence and preparing and filing the reports. *See Odebrecht Const., Inc. v. Sec'y, Florida Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) (same). The Commission estimated that the rule would cost issuers $3 to $4 billion for initial compliance, plus $200 to $600 million annually thereafter. 77 Fed. Reg. 56,334. While issuers have already expended large sums attempting to comply with the rule, many issuers would have to spend substantial additional funds conducting due diligence and drafting, finalizing, and filing their reports. *See* Melissa J. Anderson, *Conflict Minerals Ruling Puts Boards in Limbo*, Agenda (Apr. 28, 2014) (citing a survey estimating that 90% of affected issuers "still have significant work to do" on their due diligence and conflict minerals reports).

Furthermore, the balance of equities and the public interest both favor a stay. In the absence of a stay, the current deadline for filing the Form SD and associated reports—June 2, 2014—will remain in effect. This deadline is only one month away. Because the reporting deadline is so imminent, and the D.C. Circuit ordered a remand to the district court for "further proceedings consistent with this opinion," Slip Op. at 23, any proceedings before either the district court or the Commission to determine the impact of the decision on the statute and rule probably will not have even commenced before the reporting deadline. It is therefore highly unlikely that either the court or the agency could develop and issue any reasoned guidance for

issuers that would implement the D.C. Circuit's decision prior to the reporting deadline. It would clearly not be equitable, and not in the public interest, to force issuers to comply with a rule that has been held to be unconstitutional. A stay is warranted.

C. The Commission Should Stay The Rule, Not Merely The Requirement To Use Particular Language.

Moreover, the Commission should stay the rule in its entirety, or at least the June 2 deadline by which issuers are required to file reports. It is simply not feasible to stay only the rule's requirement that issuers describe products as not "DRC conflict free." Even assuming that such a stay would "fully address the First Amendment violation," *but see* Gallagher and Piwowar, *Joint Statement on the Conflict Minerals Decision*, such a stay is not practical and would make little sense in light of the interrelatedness of the rule's provisions. Both the reasonable country of origin inquiry and due diligence process and the manner in which that diligence is reported to the Commission are intertwined with the ultimate manner in which the conclusions of that diligence are to be reported to the Commission and disseminated to the public. As Commissioners Gallagher and Piwowar have explained, "it is the listing of products—the apotheosis of the diligence process—that is central to the rule." Commissioners Daniel M. Gallagher and Michael S. Piwowar, *Joint Statement on the Conflict Minerals Decision* (Apr. 28, 2014).

The compelled statement that certain products are not "DRC conflict free" was intended to serve as the description of the results of issuers' reasonable country of origin inquiry and due diligence processes. Without this statement, or an alternative disclosure adopted by the Commission after notice-and-comment rulemaking, the reports will describe the inquiry and due diligence without a meaningful description of its outcome. *See* Melissa J. Anderson, *Conflict Minerals Ruling Puts Boards in Limbo*, Agenda (Apr. 28, 2014) (statement of Paul Atkins that

"[t]he whole rule points companies to state a conclusion" as to whether minerals are DRC conflict free, and "[w]hat is left [absent that conclusion] makes little sense."). Such reports "are not themselves sufficient to achieve the benefits that Congress sought to advance," *id.*: "to provide greater transparency in the use of key minerals" in order to promote peace and security in the DRC. Letter of Sen. Richard Durbin et al. to Chair Mary Jo White, U.S. Securities and Exchange Commission, Apr. 21, 2014, at 1.[3]

Indeed, the entire purpose of the rule and statute was to try to effect social change by publicly shaming companies through forcing them to label certain products as not "DRC conflict free." Now that the shaming mechanism has been struck down on First Amendment grounds, the remainder of the rule has questionable benefits. The Commission must therefore re-assess whether the rule complies with the requirements of 15 U.S.C. § 78w(a)(2), which bars "any rule . . . which would impose a burden on competition not necessary or appropriate," and 15 U.S.C. §78c(f), which requires the Commission to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." At a minimum, the Commission should preserve the status quo while it reconsiders whether to require billions of dollars in expenditures for a purported benefit that no longer exists.

Further, a stay of only the not "DRC conflict free" descriptor would cause massive confusion for issuers subject to the rule. Because the deadline is so imminent, the Commission could not develop reasoned guidance (much less complete the required notice-and-comment rulemaking process, *see* p.10 n.4) instructing issuers as to what their reports should include in

[3] If the Commission required such truncated reports to be filed by the June 2 deadline, it would not have any statutory authority to later require additional reports to be filed in 2014. Requiring reports to be filed at a later point—once the pending litigation has concluded, and the Commission has determined what disclosures should be required—would better further the public interest than requiring truncated reports by the original deadline.

time for the issuers to draft and file the reports. The rule applies to almost six thousand issuers, and they would not know what their legal obligations were. If issuers file reports that the Commission or private parties later deem inadequate, they could be subject to liability, including the possibility of private lawsuits. The Commission should stay the rule, or at least the reporting deadline, until it has time to undertake a notice and comment rulemaking and adopt a standard for issuers to follow that does not compromise their First Amendment rights.

The entirety of the rule should be stayed for the additional reason that further proceedings may "determine that the entire rule is invalid." Gallagher and Piwowar, *Joint Statement on the Conflict Minerals Decision.* In its opinion, the Court noted that in the first instance the question of what the statute requires, and whether "the requirement that an issuer use the particular descriptor 'not been found to be DRC conflict free' . . . arise[s] as a result of the Commission's discretionary choices" or "of the statute itself," must be re-considered. Slip Op. at 23 n.14. There is a substantial likelihood that the statute itself mandates the unconstitutional disclosure, and that provision is not severable from the remainder of the statute. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S. Ct. 1476, 1480, 94 L. Ed. 2d 661 (1987) ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently."); *see* Gallagher and Piwowar, *Joint Statement on the Conflict Minerals Decision* ("[D]isclosures about the due diligence process should not be seen as severable from the unconstitutional scarlet letter of not DRC conflict free."). As discussed above, the shaming mechanism of forcing companies to state that their products are not "DRC conflict free" is key to the statutory scheme, and the balance of the legislation is not capable of functioning as intended without that provision.

Even if it is determined that the First Amendment violation derives solely from the rule, the Commission will have to reconsider the range of discretion afforded it by the statutory requirement of "a description of the products manufactured or contracted to be manufactured that are not DRC conflict free," 15 U.S.C. § 78m(p)(1)(A)(ii), and which of the available alternatives would best further the statutory purposes consistent with the Constitution.[4] Indeed, the Court expressly faulted the Commission for failing to consider adequately alternatives that might have lessened the burden on Petitioners' First Amendment rights. The Court emphasized that the Commission had "present[ed] no evidence that less restrictive means would fail," mentioning as potential alternatives that "issuers could use their own language to describe their products, or the government could compile its own list of products that it believes are affiliated with the Congo war." Slip. Op. at 22. Additional alternatives may also exist. Any response to the Court's invalidation of the present disclosure rule will necessarily entail not only the Commission's own analysis of those alternatives, but also a dialogue with issuers and other interested parties through notice and comment.

Moreover, any amended disclosure requirement may also require concomitant changes in other aspects of the rule. Both the statute and the Commission's rule make clear that the rule's due diligence and reporting process was intended to facilitate the labeling that the Court deemed

[4] This process must be done through notice-and-comment rulemaking. "It is a maxim of administrative law that . . . an amendment to a legislative rule must itself be legislative." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992). Because the Court has declared the rule invalid, any new disclosure requirement can only take effect after "a new round of notice and comment." *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991); *see also Marshall v. Western Union Tel. Co.*, 621 F.2d 1246, 1250 (3d Cir.1980) ("[T]he [new] standard is in reality . . . a substantive amendment of the regulations. As such, we believe the Secretary must engage in a rulemaking procedure conforming with . . . notice and comment."). The currently existing conflict minerals rule therefore should not be "afforded the force and effect of law" until the agency has undertaken the requisite notice-and-comment rulemaking, and issued a revised rule. *Fertilizer Inst.*, 935 F.2d at 1312 (*quoting Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979)).

unconstitutional. The unconstitutional not "DRC conflict free" certification is the primary substantive statement that the rule requires issuers to make. The rule also uses an issuer's statement that a product has "not been found to be 'DRC conflict free'" as a trigger for additional obligations to disclose information about facilities and supply chain sources. 77 Fed. Reg. 56,364. These and other aspects of the rule will need to be reconsidered. For example, if the Commission pursues the alternative of "compil[ing] its own list of products that it believes are affiliated with the Congo war," Slip. Op. at 22, it would need to consider, among other things, identifying for issuers what standards it would use to classify products as "DRC Conflict Free" or the reverse, standardizing the reporting of certain factors in order to facilitate comparison and compilation of such lists, and providing fair notice of what products were to be included on the lists before their publication.

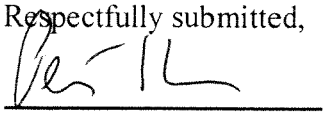
The rule in its current form has been held to be unconstitutional. It will irreparably injure issuers by violating their First Amendment rights. Responding to the Court's decision is a necessarily complicated multi-step process, requiring reinterpretation of the statute, crafting a new rule through notice-and-comment rulemaking, and undertaking a new cost-benefit analysis. The current reporting deadline—June 2, 2014—is imminent, and leaves no time for these steps to occur. "Marching ahead with some portion of the rule that might ultimately be invalidated is a waste of the Commission's time and resources . . . and a waste of vast sums of shareholder money." Gallagher and Piwowar, *Joint Statement on the Conflict Minerals Decision.* The Commission should therefore stay the rule, or at least the reporting deadline, until the process of implementing the Court's decision can be completed.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Conflict Minerals Rule, or at the least the Rule's June 2, 2014 reporting deadline, be stayed until the Commission has reconsidered the Rule's disclosure requirements, and that a new compliance date be established through no-action relief at the time the review is concluded.

Dated: April 29, 2014

Respectfully submitted,



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