ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1422

**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

OPENING BRIEF OF PETITIONERS

Peter D. Keisler
Jonathan F. Cohn
Erika L. Myers
Sidley Austin LLP
1501 K St., NW
Washington, DC 20005
202.736.8000
pkeisler@sidley.com
Counsel for Petitioners the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and Business Roundtable

January 16, 2013

Additional Counsel on Inside Cover

Of Counsel:
Robin S. Conrad
Rachel L. Brand
National Chamber
Litigation Center, Inc.
1615 H St., NW
Washington, DC 20062
202.463.5337
Counsel for Petitioner the Chamber of Commerce of the United States of America

Of Counsel:
Quentin Riegel
National Association of
Manufacturers
733 10th St., NW
Suite 700
Washington, DC 20001
202.637.3000
Counsel for Petitioner the National Association of Manufacturers

Of Counsel:
Maria Ghazal
Business Roundtable
300 New Jersey Ave., NW
Suite 800
Washington, DC 20001
202.496.3268
Counsel for Petitioner Business Roundtable

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to D.C. Circuit Rule 28(a)(1):

(A) Parties and *Amici*

Petitioners

National Association of Manufacturers

Chamber of Commerce of the United States of America

Business Roundtable

Respondent

United States Securities and Exchange Commission

Intervenors for Respondent

Amnesty International USA

Amnesty International Ltd.

(B) Rulings Under Review

This petition challenges the Securities and Exchange Commission's final rule, *Conflict Minerals*, 77 F.R. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. Parts 240 and 249b); Exchange Act Release No. 34-67716 (Aug. 22, 2012), and the statutory provision pursuant to which it was adopted, Section 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) (codified in relevant part at 15 U.S.C. §78m(p)).

(C) Related Cases

The case under review has never previously been before this court. Counsel is aware of no related cases currently pending in any other court.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1, the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and Business Roundtable respectfully submit this Corporate Disclosure Statement and state as follows:

1. The National Association of Manufacturers (NAM) states that it is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 states. The NAM is the preeminent U.S. manufacturers' association as well as the nation's largest industrial trade association. The NAM has no parent corporation, and no publicly held company has 10% or greater ownership in the NAM.

2. The Chamber of Commerce of the United States of America (Chamber) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million businesses and organizations of all sizes, sectors, and regions. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

3. Business Roundtable (BRT) states that it is an association of chief executive officers of leading U.S. companies with more than $7.3 trillion in annual revenues and nearly 16 million employees. BRT member companies comprise nearly a third of the

total value of the U.S. stock market and invest more than $150 billion annually in research and development—equal to 61 percent of U.S. private R&D spending. BRT companies pay $182 billion in dividends to shareholders and generate nearly $500 billion in sales for small and medium-sized businesses annually. BRT companies give more than $9 billion a year in combined charitable contributions. BRT was founded on the belief that in a pluralistic society, businesses should play an active and effective role in the formation of public policy. BRT has no parent corporation, and no publicly held company has 10% or greater ownership in BRT.

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GLOSSARY

APA	Administrative Procedure Act
BRT	Business Roundtable
Chamber	Chamber of Commerce of the United States of America
DRC	Democratic Republic of the Congo
NAM	National Association of Manufacturers
OECD	Organisation for Economic Co-operation and Development
SEC	Securities and Exchange Commission

INTRODUCTION

The Securities and Exchange Commission's (SEC's) "conflict minerals" rule may have been motivated by good intentions—to reduce funding to armed groups and help end the terrible conflict in the Democratic Republic of the Congo (DRC). As the dissenting Commissioners pointed out, however, good intentions are no substitute for rigorous analysis, and the Commission's analysis here was woefully inadequate. Indeed, the Commission admitted it did not determine whether the rule will provide *any* benefits to the people of the DRC, and a number of commenters warned that the rule could unintentionally make the humanitarian situation worse. At the same time, the Commission found that the rule will impose staggering costs on American businesses: \$3 to \$4 billion for initial compliance, and an additional \$200 to \$600 million per year for ongoing compliance, making this one of the costliest rules in SEC history. Some commenters calculated that costs would be substantially higher still. By imposing extraordinary costs without showing they will achieve any benefits, the SEC violated the Administrative Procedure Act (APA) and the agency's heightened obligation under the Securities Exchange Act of 1934 to analyze the economic impact of its rules.

Of course, the Commission had to follow the congressional directive to impose a rule. But Congress did not mandate these massive costs. The pertinent statutory provisions are brief and general, imposing certain requirements and leaving the remainder to the Commission's rulemaking process. And in that process, the

Commission both misconstrued those statutory requirements and acted arbitrarily in filling the gaps that remained. By refusing to create a *de minimis* exception, requiring companies to undertake an onerous "reasonable country of origin inquiry," expanding the rule's scope to non-manufacturers, and providing for an irrational transition period, the Commission greatly multiplied the rule's unprecedented burden on U.S. companies, with no showing of benefits to the Congolese people. Furthermore, the rule's authorizing statute itself violates the First Amendment by compelling companies to indicate publicly that their products contribute to human rights abuses in the DRC—a statement, for most companies, as unfounded as it is politically charged.

JURISDICTIONAL STATEMENT

The Commission's rule was published on September 12, 2012, and Petitioners filed their petition for review on October 19, amending it on October 22. Petitioners address jurisdiction *infra* at 55-57.

STATUTES AND REGULATIONS

Section 1502 of Pub. L. No. 111-203, 124 Stat. 1376, 2213-18 (2010) (Section 1502), and 77 F.R. 56,274 (Sept. 12, 2012) are reproduced in the Addendum.

STATEMENT OF ISSUES

1. Whether the Commission violated its duty under 15 U.S.C. §78c(f) and 15 U.S.C. §78w(a)(2) to conduct an adequate economic analysis.

2. Whether the Commission erroneously concluded it lacked authority to adopt a *de minimis* exception.

3. Whether the Commission's interpretation of "did originate" in 15 U.S.C. §78m(p)(1)(A) to mean "reason to believe … may have originated" is erroneous or arbitrary and capricious.

4. Whether the rule's "reasonable country of origin inquiry" is arbitrary and capricious because it requires companies to trace their supply chains, when far less costly approaches were available.

5. Whether the Commission's interpretation of 15 U.S.C. §78m(p)(2)(B) as including non-manufacturers who contract for the manufacture of products is erroneous.

6. Whether providing a shorter transition period for larger companies is arbitrary and capricious, when larger companies will have to depend on smaller companies to comply with the rule.

7. Whether the statute and rule compel speech in violation of the First Amendment.

STATEMENT OF THE CASE

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. One provision, Section 1502, is directed at the issue of "conflict minerals"—tin, tantalum, tungsten, and gold.[1] Section 1502(a) states that "the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation." The provision does not directly restrict the use of these minerals in the manufacture of American products. Instead, it directs the SEC to issue a rule requiring companies to submit reports and make public disclosures regarding their use and sourcing of these minerals.

On August 22, 2012, by a 3-2 vote, the Commission adopted a final rule. 77 F.R. 56,274. The rule first requires companies to determine whether any quantity of the minerals—even a "trace" amount—is "necessary to the functionality or production" of a product that they manufacture or "contract to manufacture." *Id.* 56,279, 56,297. If so, the companies must conduct a "reasonable country of origin inquiry" to determine whether there is "reason to believe" that any of the minerals

[1] Section 1502 defines "conflict minerals" as four metal ores—"columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives"—and any other mineral or derivatives that the Secretary of State determines finance conflict in the DRC region. Section 1502(e)(4). The final rule defines "conflict minerals" as the four listed metal ores, the derivatives most commonly extracted from those ores—namely, tantalum, tin, gold, and tungsten—and any other minerals or derivatives added by the State Department. 77 F.R. 56,283-85. The State Department has not added any. For simplicity, this brief refers to tin, tantalum, tungsten, and gold as the "conflict minerals" covered by the rule.

"may have originated" in the DRC or one of the nine adjoining countries (comprising most of central Africa). *Id.* 56,313. A company satisfies this inquiry "if it seeks and obtains reasonably reliable representations indicating the facility at which its conflict minerals were processed and demonstrating that those conflict minerals did not originate in the Covered Countries," for instance, by showing that the processing facility had "received a 'conflict-free' designation by a recognized industry group." *Id.* 56,312.

If a company has reason to believe its minerals may have originated in the covered countries, it must conduct "due diligence" on the minerals' source and chain of custody, determine whether the minerals may have directly or indirectly financed armed groups in the DRC region, obtain a private sector audit, and file a Form SD with a "Conflict Minerals Report" as an exhibit that describes its due diligence measures and which of its products were not "found to be DRC conflict free." *Id.* 56,281, 56,313.[2]

The rule was published on September 12, 2012, and became effective on November 13, 2012. *Id.* 56,274. Petitioners bring this lawsuit under the First Amendment, the Exchange Act, 15 U.S.C. §78a *et seq.*, and the APA, 5 U.S.C. §500 *et seq.*, challenging the rule and 15 U.S.C. §78m(p).

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[2] If a company determines it has no reason to believe its minerals may have come from the covered countries, it still must file a Form SD.

STATEMENT OF FACTS

A. Factual Background

1. Uses of Tin, Tantalum, Tungsten, and Gold

Tin, tantalum, tungsten, and gold are commonly used in a multitude of different products, including "everyday goods like tin cans, light bulbs, ballpoint pens, and sewing thread." Miller 2. A few examples illustrate their pervasive presence across the wide range of manufactured products in the domestic economy:

> Tin is found in solders, coatings for food cans, and chemical applications such as catalysts and stabilizers. BSR, *Conflict Minerals and the Democratic Republic of Congo* 6 (2010) (*BSR Report*), *available at* http://www.bsr.org/reports/BSR_Conflict_ Minerals_and_the_DRC.pdf.
>
> Tantalum is present in automotive electronics, cell phones, computers, superalloys for jet and power plant turbines, and cutting tools, *id.*, as well as surgical implants and prosthetic devices, http://www.grandviewmaterials.com/tantalum/industry.html.
>
> Tungsten is used in tools, aerospace components, electric lighting, and electronics, *BSR Report* 7, as well as window heating systems, automobile horns, X-Ray machines, dental drills, golf clubs, darts, and remote control racing cars, ITIA Newsletter, *A Family's Day With Tungsten* 3-11 (Dec. 2007), *available at* http://www.itia.info/assets/files/Newsletter_2007_12.pdf.

Gold is used in jewelry, electronics, medical equipment, and aerospace, *BSR Report* 8, as well as anti-lock brakes, airbag-inflating sensors, http://www.gold.org/technology/(access "Gold's Role" hyperlink), and dental fillings, http://geology.com/minerals/gold/uses-of-gold.shtml.

The minerals appear in trace amounts in many additional products. The soles of shoes, for instance, may contain tiny amounts of tin, as may buttons and zippers. *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) (statement of Stephen Lamar, Exec. Vice President, Am. Apparel & Footwear Ass'n) (*AAFA Testimony*). Fluoride compounds used in toothpaste and mouthwash sometimes contain tin as well. *See* Suzan Salman, *A Clinical Study Evaluating the Effect of 0.4% Stannous Fluoride Gel in Controlling Plaque and Gingivitis*, 23 J. Baghdad College Dentistry 97 (2011). Minute "nanoparticles" of gold are used in home pregnancy testing kits, stained glass, colored pottery glazes, and technologies targeting cancerous tumors. World Gold Council, *Gold for Good: Gold and Nanotechnology in the Age of Innovation* (Jan. 2010), *available at* http://www.gold.org/download/rs_archive/gold_and_nanotechnology_in_the_age_of_innovation.pdf. And tantalum and tungsten are both used in alloys and catalysts. *See* NAM Attach.4 2 (11.19.10). Thus, the minerals at issue are used by numerous companies "spread over an array of industries, from [the] high-tech field to food and beverage producers, as well as energy and medical technology sectors." CEI 5 (8.22.11).

2. Identifying the Country of Origin of Tin, Tantalum, Tungsten, and Gold

The sources of these minerals are as varied as their uses. Only a small percentage of the world's mineral supply comes from the DRC: 6 to 8% of the global supply of tin; 15 to 20% of tantalum; 2 to 4% of tungsten; and around 0.3% of gold. *BSR Report* 6 (2008 figures); Tiffany 4 (9.29.10). The rest of the 400,000 tons[3] that are mined each year come from dozens of other countries: Tin is mined in around 20 countries on five continents, U.S. Geological Survey, *2010 Minerals Yearbook: Tin [Advance Release]* (2012); tantalum in over ten countries on four continents, U.S. Geological Survey, *Mineral Commodity Summaries: Tantalum* (2012); tungsten in at least eight countries on five continents, U.S. Geological Survey, *Mineral Commodity Summaries: Tungsten* (2012); and gold in approximately 100 countries on six continents, U.S. Geological Survey, *2010 Minerals Yearbook: Gold [Advance Release]* (2012).

Generally, the source of the minerals contained in manufactured products is unknown. This is largely due to the fact that, with very few exceptions, manufacturers do not buy directly from mines. Instead, there are often "ten, twelve, or even more layers of intermediaries between the mines" and the final manufacturer. AT&T 4.

[3] 253,000 tons of tin, 79,000 tons of tantalum, 72,000 tons of tungsten, and 2,700 tons of gold are mined per year. U.S. Geological Survey, *Mineral Commodity Summaries* (2012).

Manufacturers may not even know whether their products contain certain minerals. "Although one might expect that a purchaser of products would know what is in the products they purchase, that is often far from the truth." IPC 4 (11.22.10). Rather, "[m]any companies purchase parts, components, or subsystems based on certain performance capabilities without specifying the materials." NAM 7 (3.2.11). Moreover, the materials used "may be considered proprietary to the supplier," *id.*, and manufacturers "typically do not have the necessary leverage to force a supplier to disclose" this information, IPC 4 (11.22.10).

Even if the manufacturer knows its products contain a mineral, tracing it through the supply chain to the country of origin is often prohibitively expensive. First, the supply chain is not "a transparent, linear process," but rather "a complex, multi-layered network of trading companies and suppliers." IPC 4 (11.22.10).

Second, manufacturers, particularly of complex products, frequently purchase enormous numbers of parts from numerous suppliers. A vehicle, for instance, "typically contains thousands of parts or components, and most of these contain multiple materials"; the seating assembly alone "may contain leather, textiles, seat foam, electronic controls, wiring, steel frames and tracks, plastic and steel fasteners." Ford 3. Wireless handsets for phones "commonly contain about 1,000 parts." AT&T 4. A Boeing "747 aircraft incorporates some six million parts." *Cohen Statement*. And "Boeing's defense business—which represents only one half of the Company's total business—acquired well over 190 million piece parts" in 2010. *Id.*

Each part may have its own distinct supply chain. Indeed, a single manufacturer may obtain parts from "tens of thousands" of suppliers. NAM 25 (3.2.11). AT&T, for example, has "over 50,000 direct suppliers." AT&T 4. Boeing's defense business had "almost 8,000 direct suppliers last year," and its "commercial aircraft business had almost 2,000 direct suppliers." *Cohen Statement* (emphasis omitted). One member of the NAM has "over 22,000 direct material suppliers." NAM 2 (11.1.11). And each of a manufacturer's "direct suppliers may have thousands of direct suppliers itself, and many of those indirect suppliers will have a comparable number of suppliers." *Cohen Statement*. Kraft Foods, for instance, has approximately 100,000 direct and indirect suppliers for its 40,000 products. *Villarreal Statement*.

Typically, manufacturers "only have direct contact" with their own suppliers, and know little to nothing about this vast web of sub-suppliers. IPC 4 (11.22.10). And suppliers often consider their supply chains to be proprietary information, and "may be unwilling to identify to the public company customer all [their] sources of supply." ABA 8 (6.30.11); *see* TriQuint 2 (3.2.11). Even when sub-suppliers can be identified, they "could be small businesses and/or non-public companies located anywhere in the world … without the infrastructure, resources, and capability to meaningfully comply" with such requests. NAM 2 (7.26.11).

Moreover, even if a company succeeded in mapping its supply chain, the map "would be out of date as soon as it was released." *Cohen Statement*. Not only do "[c]ompanies change suppliers," but their "suppliers change suppliers, and their suppliers change suppliers all the time." *Merber Statement*. Boeing, for instance, estimates that up to a quarter of its direct suppliers may change every year. *Cohen Statement*. This fluidity is necessary; "supply chains must be able to shift at a moment's notice to address small-scale disruptions like a fire at a critical supplier's facility, as well as large-scale disruptions like Fukushima [the nuclear disaster]—and of course to reflect changes in price or quality of inputs." *Id.*

Finally, the process used to extract metal from the mineral ore—known as "smelting"—"breaks the chain of supply." NAM 10 n.5 (11.1.11). At this stage, which typically occurs overseas, "supplies from all over the globe are mixed together," and it becomes chemically and physically "impossible to distinguish tin or tantalum that originated in Congo from other sources." Enough Attach. 6 (9.24.10). Thus, "[i]nternal control mechanisms based on tracing minerals in a company's possession are generally unfeasible after smelting." OECD, *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2011) (*OECD Guidance*). Gold is not smelted, only refined, *see* ITRI 4 (1.27.11), but, like smelting, refining breaks the supply chain. There are no "chemical characteristics that distinguish one gold bullion bar from another" and no way "to identify which mine or mines produced [refined] gold." Tiffany 5 (9.29.10).

It is thus not surprising that most attempts to trace supply chains to the country of origin have been tremendously costly and largely unsuccessful. One company "found that tracing material composition data for just one part (an electronic control module) through only the second tier of the supply chain cost $60,000 and took three months to complete." NAM 2 (11.1.11). Another company "has been surveying its supply chain since mid-2009 for Conflict Minerals data," and despite its efforts, has identified the country of origin in "very few" instances—generally only when its supplier is a "highly vertically-integrated ... compan[y], who own[s] the mines, the smelters, the railways and cargo ships that haul these materials." TriQuint 1 (3.2.11).

3. Identifying the Mine of Origin

As difficult as it is to trace the minerals to their country of origin, it is even harder to trace them to the mine. This is particularly true for the small percentage of the minerals that comes from the DRC, a country that has long been ravaged by a brutal war, involving more than twenty different armed groups and several neighboring countries. Enough 3 (9.24.10); *AAFA Testimony* 7 (statement of Mvemba Dizolele). Fighting continues in the eastern DRC, and armed groups continue to commit grave human rights abuses. Enough 4 (9.24.10). After decades of instability and war, the central government has little control, and "[t]he national army is little more than a collection of militias [that] obeys no central command." The Economist, *Digging for Victory* (Sept. 24, 2011).

The multitude of armed groups, political instability, and lack of government control make it extremely difficult to implement programs to identify all of the mines in operation. There are literally hundreds of mines in the DRC, many of them "artisanal mines," which are mostly "very small scale operations" dug "by hand or with basic tools." Dep't of State, *Democratic Republic of the Congo Mineral Exploitation by Armed Groups & Other Entities* (2012) (*DOS Map*). As the State Department has concluded, a "[l]ack of verifiable data makes it difficult to locate precisely many mine sites, [and] to establish which mines are active and which are inactive at any given time." *Id.* In addition, "[m]any of the mining sites in eastern DRC are inaccessible to outsiders due to remoteness, a lack of passable roads, and the dangers stemming from the presence of militia, undisciplined army troops, and bandits." *Id.*

4. Determining Whether Minerals Finance Armed Groups

Equally challenging is determining whether minerals that are mined in the DRC (or adjoining countries) benefit armed groups. The State Department reports that a "[l]ack of verifiable data makes it difficult … to comprehensively verify the armed groups or other entities that are either present at mines or have access to revenue streams emanating from them." *Id.* Sending independent monitoring groups to each mine, in addition to being highly burdensome and dangerous, is unlikely to provide reliable data. Organizations that have tried have found that armed groups "were often alerted to the [monitoring] group's visits and left in advance of the validators' arrival." Enough 7 (8.9.12). And even if one could determine whether armed groups are profiting from a particular mine, the information would not remain reliable for long, because "[t]he situation on the ground is in flux," due to the number of armed groups and the constantly shifting nature of the conflict. *DOS Map*; *see* Enough 7 (8.9.12).

Furthermore, even if one could determine that no armed group "physically control[led]" a particular mine at the relevant time, Section 1502(e)(5)(A), that would not exclude the possibility that such a group had access to the revenue stream "emanating from" the mine, *DOS Map*. Some groups "tax, extort, or control … trade routes" or "trading facilities." Section 1502(e)(5)(B); Global Witness 2 (10.12.10).

Tracking the minerals from the mines to the country's borders and confirming that no armed group had access to the mineral revenues along the supply route is fraught with difficulty. Among other reasons, the minerals pass through numerous hands, largely without documentation or supervision from DRC authorities. First, negociants purchase minerals from miners and take them to trading houses "on their backs, by large trucks, and/or by planes in sacks." Enough Attach. 3 (9.24.10). Because of the weakness of the central government, around 90% of negociants and trading houses operate "without proper licenses and registration." *Id.*

Trading houses then sell minerals to export companies, who sell them to foreign buyers, often smuggling minerals "across Congo's porous borders" to avoid government requirements and taxes. *Id.* 5. At each stage of the process, minerals from different locations are combined together. By the time they reach the smelters, "one shipment container of mineral concentrate … will usually contain material from hundreds of miners, passing through the hands of many traders." ITRI 3 (1.27.11).

For years, international and trade organizations, including the Organisation for Economic Cooperation and Development (OECD), the United Nations, the Electronic Industry Citizenship Coalition, and ITRI, a tin industry group, have been attempting to design systems to reduce mineral funding to armed groups in the DRC without harming the country's population and economy, including systems to track minerals and certify that particular smelters are "conflict free." These systems, however, are still "in their infancy." IPC 9 (11.22.10).

B. Statutory And Regulatory Background

1. Congress Passes Section 1502

Section 1502 of Dodd-Frank directs the SEC to issue a rule requiring public companies "to disclose annually" whether "conflict minerals [that] are necessary to the functionality or production of a product manufactured" by the company "did originate in the Democratic Republic of the Congo or an adjoining country." 15 U.S.C. §78m(p)(1)(A), (2)(B). Companies whose minerals "did originate" in the region must submit a public report that describes "the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit." The report must also describe "the facilities used to process the conflict minerals, the country of origin of the conflict minerals, … the efforts to determine the mine or location of origin with the greatest possible specificity," and the products that "are not DRC conflict free." *Id.*

2. The Rulemaking Process

a. The Proposed Rule

The Commission issued a Notice of Proposed Rulemaking in December 2010 to implement Section 1502. The proposed rule was breathtakingly broad, far exceeding what the statute required: The rule contained no *de minimis* exception (that is, no exception for the use of minute or trace amounts of the minerals), covered companies that manufactured no products, and required companies to submit reports unless they could prove the negative that their products contained no conflict minerals from the DRC region. Despite the proposed rule's reach, the Commission offered only a sparse, 10-page economic analysis, which estimated that the costs of compliance would be only $71.2 million. Release No. 34-63547, 2010 WL 5121983, at *34 (Dec. 15, 2010).

The Commission received over 13,000 comments. 77 F.R. 56,277-78. A number of these comments explained that the Commission's economic analysis was incorrect by several orders of magnitude. The NAM, for instance, explained that a more realistic assessment of initial compliance costs is between $9 and $16 billion, with approximately $750 million in additional annual compliance costs. NAM 2 (3.2.11); 77 F.R. 56,336-38. Tulane University's Payson Center for International Development independently estimated the cost of initial compliance to be $7.93 billion, with approximately $207 million in ongoing annual costs. Tulane 3, 22.

Commenters also questioned whether the rule would have any benefits for the DRC. Some commenters asserted the rule would help by reducing funding to armed groups. 77 F.R. 56,335. Others, including non-profit groups and affected governments, explained that the new disclosure regime would actually harm the DRC and the entire region of Central Africa by damaging legitimate mining and the communities that rely on it. *See, e.g.*, Tanzania 3 ("[U]nless amendments are made to the regulations, Tanzania will irreparably suffer economically.").

These concerns have already been realized. Because of the difficulty in determining whether minerals fund an armed group, the statute led to a *de facto* embargo on the region, harming the millions of Congolese dependent on the country's mining sector.[4] *See, e.g.*, Verizon 3 (nearly all of the "certified smelters" have found it necessary to "explicitly avoid[] sourcing any materials from the DRC Zone"); Pact Attach. 2 (3.2.11) ("The loss of income from mining has caused profound economic hardship"); Serge ("No more circulation of money, no more mining activities, no more social commitment."); OGP/BEST 2 ("Thousands of miners experienced a sudden loss of livelihood. Many have been unable to afford school

[4] In 2008, the World Bank estimated that 10 million Congolese (16% of the population) depended on mining. The World Bank, *Growth with Governance in the Mining Sector* (2008). Mining is important to the economies of neighboring countries as well. In Tanzania, around 20% of the population—1.5 million people—depend on artisanal mining. CASM, *Beyond Conflict* 61 (2009), *available at* http://www.resourceglobal.co.uk/documents/Beyond%20Conflict_RCS_CASM.pdf.

enrollment fees or pay for their families' health needs."). The embargo has impacted the nine neighboring countries as well, causing harm to their mining industries. Tanzania 3; Burundi. Compounding the problem, many artisanal miners were demobilized soldiers, who, having lost their mining income, "may return to fighting for the militias." CEI 4 (8.22.11).

Commenters also suggested that, despite the embargo, armed groups continue to profit. Due to the DRC's porous borders, armed groups smuggle minerals, especially gold, which is "very easy to smuggle." Enough Attach. 3 (9.24.10); *see id.* (noting gold is worth more than $15,000 per pound); Enough 6 (8.9.12) ("Nearly 100 percent of eastern Congo's gold is smuggled."). Gold is also very easy to refine; refining can be "carried out in small vessels and containers on benches, without industrial infrastructure, by people with very limited knowledge of chemistry and metallurgy," Metalor 2, so that even a complete embargo by major refineries would not stop DRC gold from reaching the world market, *see* Jewelers 4 (11.1.11). Unsurprisingly, armed groups' revenues from gold appear to be skyrocketing. Enough 6 (8.9.12). Indeed, by some commenters' accounts, armed groups' mineral revenue streams have *increased* since Dodd-Frank's passage, as warlords shift their focus to smuggling gold. *Compare* Enough Attach. 4 (9.24.10) (estimating that in 2009 armed groups obtained $180 million from all four minerals combined), *with* Enough 6 (8.9.12) (estimating that the gold trade alone from the eastern DRC is now worth $300 million a year, most of which goes to an armed group).

Addressing the content of the proposed rules, a number of commenters requested a *de minimis* exception and proposed a variety of possible *de minimis* standards. NAM 20-21 (3.2.11). Commenters also explained that it would be overly burdensome to trace minerals back to the smelter or refiner. Rather than requiring such tracing, they proposed that the rule should allow companies to comply by contractually obligating their suppliers to use certified "conflict free" smelters that do not source minerals from the DRC region, and to "flow down" that contractual requirement through the supply chain. *See* NAM 5 (11.19.10); *Merber Statement*.

In addition, several commenters explained that the proposed rule's inclusion of non-manufacturers was contrary to the statute. *See, e.g.*, Chamber 3 (2.28.11); Cable 2. And many commenters explained that it was critical for the final rule to include a phase-in period, because "the infrastructure necessary for compliance does not exist." House Fin. Servs. 1 (7.28.11); NAM 15 (3.2.11). Finally, commenters explained that the proposed rule compelled speech in violation of the First Amendment, by forcing companies to indicate publicly that "their products support human rights violations, even when there is no reason to believe that is true," simply because they could not determine the source of the minerals in their products. Tiffany 2 (2.22.11); *see also* Taiwan Semiconductor 7.

b. The Final Rule

On August 22, 2012, in a 3-2 decision, the Commission promulgated the final rule. The Commission drastically increased its cost estimates: $3-4 billion for initial compliance and $207-609 million per year for ongoing compliance. 77 F.R. 56,334. The Commission, however, provided no estimate of any benefits of the rule. Instead, it stated that "[t]he statute … aims to achieve compelling social benefits, which we are unable to readily quantify with any precision, both because we do not have the data to quantify the benefits and because we are not able to assess how effective Section 1502 will be in achieving those benefits." *Id.* 56,335. Indeed, not only did the Commission fail to quantify the benefits "with any precision"—it failed to determine there were any benefits at all. The Commission also failed to measure the marginal costs or benefits of the choices it made among available regulatory alternatives, stating "[w]e are unable to quantify the impact of ... the decisions ... with any precision because reliable, empirical evidence regarding the effects is not readily available." *Id.* 56,342.

The SEC made a number of changes from the proposed rule but, despite the absence of measurable benefits to the DRC, the Commission nonetheless refused to create a *de minimis* exception, on the basis that "[t]he statute itself does not contain a *de minimis* exception." *Id.* 56,298. The Commission recognized that "by not including a *de minimis* exception, even minute or trace amounts of a conflict mineral could trigger disclosure obligations," and the rule would therefore "be more costly." *Id.*

The final rule modified the "reasonable country of origin inquiry," eliminating the requirement to prove a negative. But it still requires a Form SD, a conflict minerals report and due diligence from companies that have no knowledge that their minerals did originate in the DRC. A report and due diligence are required unless, "based on its reasonable country of origin inquiry, the issuer has no reason to believe that its conflict minerals *may* have originated" in the region. *Id.* 56,313 (emphasis added). In addition, despite comments explaining that tracing minerals back to the smelter or refiner would be prohibitively costly, the final rule apparently requires such tracing. *Id.* 56,312.

The final rule also continues to cover non-manufacturers who "contract to manufacture" products, in spite of comments explaining that this extension is contrary to the statutory text. Indeed, the Commission asserted that the statute is "clear" and compels this result. *Id.* 56,291. Again, the Commission recognized that this requirement would increase costs. *Id.* 56,345.

Acknowledging "legitimate concerns about the feasibility of preparing the required disclosure in the near term because of the stage of development of the supply chain tracing mechanisms," the final rule includes a phase-in period. *Id.* 56,309. For four years, small companies (those with a public float of less than $75 million, *id.* 56,281 n.57) may describe their minerals as having "undeterminable origin" if they are unable to trace their supply chains. Although such companies must submit conflict minerals reports, they need not have such reports audited. *Id.* 56,310. Oddly, however, the phase-in period will last only two years for larger companies, even though the Commission recognized that "many smaller companies are part of larger companies' supply chains and would need to provide conflict minerals information so that the larger companies could meet their obligations under the rule." *Id.* 56,361.

Finally, the Commission acknowledged concerns that the rule "could lead to incorrect and misleading disclosures and could unfairly punish companies that lack complete visibility into their supply chains." *Id.* 56,321. It responded, however, only by changing the wording of the compelled disclosure, from stating that a product is "not DRC conflict free" to stating that it has "not been found to be DRC conflict free," *id.* 56,323, and the Commission indicated that it "presume[d] that Congress acted constitutionally." *Id.*

Commissioners Paredes and Gallagher dissented. Commissioner Paredes stated that, while the rule was well-intentioned, "[t]he best of intentions cannot substitute for a rigorous analysis by this agency of whether the social benefits that Section 1502 strives for are likely to be realized by the final rule." *Paredes Dissent.* "Although the Commission finds itself in a difficult position by having to undertake a rulemaking that falls far outside its zone of expertise," he explained, "the agency still must base its final rule on a reasoned assessment that considers the potential consequences of its judgments." *Id.* The Commission, he concluded, had not met this obligation. The "rulemaking suffers from an analytical gap that I cannot overlook—namely, there is a failure to assess whether and, if so, the extent to which the final rule will in fact advance its humanitarian goal as opposed to unintentionally making matters worse." *Id.*

Commissioner Gallagher similarly concluded that the SEC had failed to meet this obligation. *Gallagher Dissent.* He feared the rule could unintentionally harm the

DRC, by "contribut[ing] to a reduction in, or abandonment of, commercial activity in the DRC—a *de facto* economic embargo—as U.S. issuers scramble to avoid a 'scarlet letter.'" *Id.* Moreover, he concluded, the Commission's discretionary decisions, including its refusal to adopt a *de minimis* exception, had significantly increased the costs of the rule, with no showing of any corresponding benefits. *Id.*

SUMMARY OF ARGUMENT

This rule is one of the costliest in the SEC's history. By the agency's own estimation, initial compliance will cost $3 to $4 billion, and ongoing compliance will cost an additional $200 to $600 million per year, and even these staggering figures underestimate the expense. Remarkably, the Commission imposed these enormous costs without determining whether the rule would yield *any* benefits for the Congolese people, or would instead make a tragic situation even worse. Instead, the Commission simply asserted it was "not able to assess how effective Section 1502 will be in achieving those benefits." 77 F.R. 56,335, 56,350. The Commission also failed to measure the marginal costs and benefits of its own discretionary decisions in fashioning the rule. Thus, the Commission violated its statutory obligations to apprise itself of the costs and benefits of the rule and the available regulatory alternatives before saddling U.S. public companies with billions of dollars in regulatory burdens.

This failure of analysis infects the entire rule. While the Commission had a congressional directive to implement, the statute provided room for the exercise of agency judgment in several important respects, and the Commission's regulatory choices significantly increased the burdens of the final rule. In multiple respects, the Commission imposed requirements that will exacerbate the competitive harms to U.S. companies and rejected alternatives that would have lessened the burdens.

The Commission also misread the statute and incorrectly concluded that Congress compelled it to impose certain burdens. First, the Commission mistakenly concluded it could not create a *de minimis* exception, thus significantly increasing the costs to companies whose purchases cannot possibly assist armed groups. Second, the Commission incorrectly interpreted the term "did originate" to mean "reason to believe … *may* have originated," and required an unreasonably stringent "reasonable country of origin inquiry," rejecting a less burdensome approach. Third, the Commission mistakenly read the statute to cover non-manufacturers who contract to manufacture products, thus extending the rule's reach to many retailers. Fourth, the Commission arbitrarily created a shorter phase-in period for larger companies, even though it recognized that larger companies would need to depend on information from smaller companies to comply.

The Commission thus misconstrued the statute and acted arbitrarily and capriciously in violation of the APA and the Securities Exchange Act, necessitating vacatur. In addition, Section 1502 and the rule violate the First Amendment by compelling companies to make misleading and stigmatizing public statements linking their products to terrible human rights abuses.

STANDING

Petitioners are business associations. Their members include large numbers of public companies that must comply with the rule. For example, one member company manufactures coatings, sealants, and specialty chemicals which contain trace amounts of tin. ADD-113-14. Another manufactures automotive components containing gold, tin, tantalum or tungsten. ADD-118. A third manufactures electronic products containing miniscule amounts of gold, tin, and tantalum. ADD-107-09. The rule will cause such companies to incur costs determining which of their products contain minerals subject to the disclosure requirements, attempting to determine the origin of those minerals, and preparing Conflict Minerals Reports. Other member companies contract to manufacture products containing tin, tantalum, tungsten, and gold, or have already incurred expenses attempting to determine whether they are subject to the rule. ADD-100-105, 121-22. Also, several of Petitioners' members submitted comments regarding costs the rule will impose on them. *See Cohen Statement*; AT&T 4-5; Ford 3; NAM 2 (11.1.11); NAM, *Board of Directors*, http://www.nam.org/About-Us/Board-of-Directors/Landing-Page.aspx; BRT, *Members*, http://businessroundtable.org/about-us/members/; Chamber, *Board of Directors*, http://www.uschamber.com/about/board. Because Petitioners' members are "object[s] of the action" under review, there is "little question" about standing. *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

STANDARD OF REVIEW

Under the APA, this Court "shall hold unlawful and set aside agency action ... found to be arbitrary, capricious, an abuse of discretion, … otherwise not in accordance with law[,] ... contrary to constitutional right, [or] in excess of statutory jurisdiction." 5 U.S.C. §706(2)(A)-(C). An agency's failure to "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made," or to "consider an important aspect of the problem," makes its action arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. THE COMMISSION FAILED TO MEET ITS STATUTORY OBLIGATIONS TO CONSIDER THE EFFECTS OF ITS RULE.

"[O]nce again," the Commission failed to meet its statutory obligations "adequately to assess the economic effects of a new rule." *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011). "[T]he Commission has a unique obligation" under 15 U.S.C. §78c(f) "to consider the effect of a new rule upon 'efficiency, competition, and capital formation,'" *id.*, as well as a unique obligation under 15 U.S.C. §78w(a)(2) not to adopt any "rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter." Thus, the Commission's "failure to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation makes promulgation of the rule arbitrary and capricious and not in accordance with law." *Bus. Roundtable*, 647 F.3d at 1148.

The Commission determined that its final rule will impose billions of dollars in costs, and yet did not determine whether the rule would have any benefits. The Commission did so in the face of significant evidence that the rule would not only fail to meet its objectives, but could be counter-productive. Although Congress directed the Commission to promulgate a rule, it also required the Commission to exercise reasoned judgment in crafting it. Because the Commission failed to analyze properly the costs and benefits of its choices, the Court should vacate.

A. The Commission Failed To Determine Whether The Rule Would Benefit The DRC.

The Commission recognized that Congress intended the rule to have "compelling social benefits": Congress sought "to decrease the conflict and violence in the DRC" and "to reduce the amount of money provided to armed groups."[5] 77 F.R. 56,335; *see* Section 1502(a), (c)(1). Yet the Commission did not determine whether the final rule, or the various alternatives suggested, would achieve these benefits, stating "we are unable to readily quantify [the benefits] with any precision, both because we do not have the data to quantify the benefits and because we are not

[5] The Commission recognized the rule was not intended to—and would not—benefit investors or public companies. 77 F.R. 56,335.

able to assess how effective Section 1502 will be in achieving those benefits." 77 F.R. 56,335, 56,350.

As Commissioner Paredes aptly said, "[t]he best of intentions cannot substitute for a rigorous analysis by this agency of whether the social benefits that Section 1502 strives for are likely to be realized by the final rule." *Paredes Dissent*. Estimating the benefits of this rule is not an easy task, especially as "the Commission has no expertise when it comes to the humanitarian goal of ending the atrocities that besiege the DRC." *Id.* This difficulty, however, "does not excuse the Commission from its statutory obligation to determine as best it can the economic implications of the rule it has proposed." *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005); *see also Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1221 (D.C. Cir. 2004). In assigning this rulemaking to the SEC, Congress chose an agency that bears a unique statutory responsibility to analyze the economic impact of its rules and to avoid unnecessary burdens on competition and capital formation. 15 U.S.C. §78c(f); *id.* §78w(a)(2). Of course, the Commission had to follow the congressional directive to promulgate *a* rule, but Congress provided for agency judgment in the crafting of the rule's content. *See infra* at 32-34. The Commission had to conduct an adequate analysis of the overall costs and benefits of the rule, including the alternatives it adopted, in order to satisfy its statutory obligations and exercise its authority in a reasoned manner. *Cf. Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177 (D.C. Cir. 2010). The Commission therefore erred by promulgating its final rule "with no empirically founded sense of what the particular benefits are as compared to the significant, identifiable costs." *Gallagher Dissent*.

Nor can the Commission claim that data as to the rule's likely benefits was unavailable. There are significant disputes in the record as to "whether and, if so, the extent to which the final rule will in fact advance its humanitarian goal as opposed to unintentionally making matters worse." *Paredes Dissent*. Some commenters argued that the rule will help the DRC, 77 F.R. 56,335, but others, including government agencies in adjoining countries and non-profit organizations in the DRC, argued the contrary. *Id.* 56,335 n.719. These comments were far from conclusory or speculative; they provided concrete and specific data as to the impact that anticipation of the rule following the statute's enactment *was already having* upon the DRC.

Commenters explained that anticipation of the rule was leading to a *de facto* embargo, harming the millions of Congolese who depend on the country's mining sector, and millions more in the nine neighboring countries. *See supra* at 17-18. For instance, one non-profit group found it to have "been devastating to the mining communities and the broader economy of Eastern DRC." BEST/OGP 2. A mining cooperative in the DRC explained that, with "[e]ach passing day children die from lack of food and medicines." Serge. And a DRC industry group wrote that "we can confirm today that as expected" there is "more smuggling," a "very big decrease in revenue" for the government, and a "huge impact" on the livelihoods of innocent Congolese. Kanyoni 1 (10.28.11).

The Commission mentioned this dispute as to the rule's benefits only in a footnote. And, in that footnote, the Commission did not even attempt to resolve the serious questions as to the rule's likely impact on the people it was intended to help. Nor did it address whether its final rule would have any impact on armed groups, who continue to profit by smuggling minerals, most notably gold. *See supra* at 18. The Commission simply provided no answer to the questions Commissioner Paredes asked in dissent: "[W]hat if the demand for DRC-sourced conflict minerals coming from countries other than the U.S. increases to offset any reduction in the demand from U.S. companies? What if conflict minerals are smuggled into other countries … ? What if armed groups find other ways to finance their violence? What if the result is a persistent de facto embargo against conflict minerals sourced from the DRC?" *Paredes Dissent.* And as the Commission weighed how to address the various alternatives that had been offered in response to its proposed rule, answers to those questions were highly material.

It could well be that the SEC's rule will fail to disrupt funding to armed groups, while causing serious harms to artisanal miners and the DRC economy. Indeed, as commenters discussed, the rule could have a destabilizing influence on the region. *See supra* at 18. "[I]f there is anything that seems to be a reliable predictor of chaos and violence anywhere in the world, it is economic hopelessness." *Gallagher Dissent.* Whether the final rule that the Commission designed is likely to achieve its intended purpose or make things worse is surely "an important aspect of the problem," yet the Commission "entirely failed to consider" it. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

"More is expected, and should be expected" from an SEC analysis. *Gallagher Dissent*. The agency has a statutory obligation to "base its final rule on a reasoned assessment that considers the potential consequences of its judgments." *Paredes Dissent*. "Without such a cost-benefit analysis, accounting for benefits as well as costs," the agency's analysis, "all of which focuses solely on the costs of the rule," cannot "pass muster in this court." *Pub. Citizen*, 374 F.3d at 1222.

B. The Commission Underestimated the Rule's Costs.

Compounding its error, the Commission underestimated the costs of the rule. As the NAM explained, a more accurate estimate of the initial cost is between $9 and $16 billion. NAM 2 (3.2.11). Tulane University estimated it to be $7.93 billion, and that number expressly did not include all of the upstream costs. Tulane 3.

The agency arrived at its low estimate because it "inconsistently and opportunistically framed the costs" and "failed adequately to quantify the certain costs." *Bus. Roundtable*, 647 F.3d at 1148-49. For instance, in its discussion of IT costs, the SEC selected Tulane University's estimate of $205,000 for a small company over the NAM's estimate of $1,000,000, simply because a third commenter, without providing "a factual basis for the assertion," had estimated such costs to be lower still. 77 F.R. 56,351. The SEC erred again by concluding that large issuers would incur only twice the IT costs of small companies, even though Tulane itself estimated the costs to be "four times those for a smaller issuer." *Id.* 56,352. Next, the SEC rejected Tulane's estimate of the number of affected suppliers, for allegedly failing to reflect overlap in the supply chain—even though, as the SEC noted, Tulane expressly "adjust[ed] for potential overlap." *Id.*; *see* Tulane 18. Finally, the SEC arbitrarily rejected the NAM's estimate of the number of first-tier suppliers per issuer, simply because other commenters had lower estimates. 77 F.R. 56,352.

But whether the proper estimate is $3 to $4 billion, or $9 to $16 billion, it is plain that this rule will be extraordinarily costly, and will harm competition and efficiency. Indeed, the SEC found that the rule "will result in significant economic effects," disadvantage public companies, and give a "significant advantage to foreign companies." *Id.* 56,350 The SEC found that the rule will likely also harm efficiency, because "the cost of compliance … will be borne by the shareholders," potentially "divert[ing] capital away from other productive opportunities." *Id.*

C. The Commission's Own Decisions Increased The Rule's Costs Without Corresponding Benefits.

The Commission apparently believed that Section 1502 excuses it from conducting an adequate cost-benefit analysis, reasoning that "[i]n requiring the Commission to promulgate this rule … Congress determined that its costs were necessary and appropriate in furthering the goals of helping end the conflict in the DRC." *Id.* To the contrary, Congress assigned this rulemaking to an agency with statutory obligations to conduct an economic analysis of its rules. 15 U.S.C. §78c(f);

id. §78w(a)(2). If Congress had intended to relieve the Commission of those obligations with regard to this rule, Congress would have said so. It did not.

Moreover, Congress did no more than "set[] the general contours and direction of the rulemaking." *Paredes Dissent*. It left the particulars of the rule to the Commission. The final rule "is replete with policy choices—elective exercises of Commission discretion—that Congress did *not* mandate." *Gallagher Dissent*. "One straightforward indicator" of the extent of this discretion is that the "Commission ... markedly change[d] the final rule as compared to the proposal," *Paredes Dissent*, including changing the structure of the "reasonable country of origin inquiry" and designing a phase-in period. The release itself describes no fewer than 14 different choices that the Commission made, "covering the central features of the regulatory regime," and affecting both the rule's costs and its likely impact on the DRC. *Id.*; *see* 77 F.R. 56,342-50. Surely, the Commission cannot contend that an obligation to promulgate *a* rule relieves it of responsibility to analyze the likely effects of the *particular* rule it chose.

Yet the Commission admitted it did not measure the benefits or costs of its own choices, stating "we are unable to quantify the impact of each of the decisions we discuss below with any precision because reliable, empirical evidence regarding the effects is not readily available to the Commission, and commentators did not provide sufficient information to allow us to do so." *Id.* 56,342. And when the Commission euphemistically says it could not quantify the impact "with any precision," what it really means is that it did not determine the impact at all. The Commission made no effort to attach any numbers to the costs or benefits of its choices, and failed even to conclude that the choices will improve conditions in the DRC at all.

This is plainly inadequate. Without an estimation of the likely benefits of its choices, how can the Commission reliably determine whether "a better outcome for the DRC [would] have resulted if the Commission had made different choices among the regulatory alternatives available to it?" *Paredes Dissent*. And without an estimate of either the marginal benefits or the marginal costs of its choices, how can the Commission determine whether those marginal costs are "necessary or appropriate"? 15 U.S.C. §78w(a)(2). "[U]ncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself … of the economic consequences of a proposed regulation." *Chamber of Commerce*, 412 F.3d at 144; *see Pub. Citizen*, 374 F.3d at 1221.

II. THE COMMISSION MISINTERPRETED THE STATUTE AND ARBITRARILY REJECTED ALTERNATIVES THAT WOULD HAVE SIGNIFICANTLY REDUCED COSTS.

The Commission fundamentally misconstrued the statute and failed to adequately explain numerous decisions that raised the rule's costs without any showing of marginal benefits. First, the Commission arbitrarily refused to adopt a *de minimis* exception, on the faulty premise that it would be inconsistent with the statutory scheme. Second, the Commission's "reasonable country of origin inquiry" is inconsistent with the statutory text, and appears to unnecessarily impose an extraordinarily burdensome requirement that companies trace their supply chains. Third, the Commission misinterpreted the statute to cover non-manufacturers who only "contract to manufacture" products. Fourth, the Commission arbitrarily created a shorter phase-in period for larger companies, even though it recognized that larger companies would have to rely on information from smaller companies to comply. These serious flaws require vacatur.

A. The Commission Misinterpreted The Statute As Precluding A *De Minimis* Exception.

One "fundamental flaw in the rule" is that the Commission refused to create a *de minimis* exception. *Gallagher Dissent*. Thus, "even minute or trace amounts of a conflict mineral could trigger disclosure obligations." 77 F.R. 56,298. The case for a *de minimis* exception is particularly compelling where, as here, a rule will impose massive costs that cannot be linked to any identifiable benefits. The SEC's determination that it was *precluded* from considering such an exception is inexplicable.

The Commission gave two reasons for refusing to create the exception, both wholly unconvincing. First, the Commission concluded that it lacked authority, reasoning that "[t]he statute itself does not contain a *de minimis* exception, and … we believe it would be contrary to the Conflict Minerals Statutory Provision and Congressional purpose to include one." *Id.* The Commission inferred that Congress intended to preclude a *de minimis* exception because "a conflict mineral used in even a very small amount could be 'necessary' to the product's functionality or production," and so fall within the literal terms of the statute. *Id.* If Congress "had intended that the provision be limited further, so as not to apply to a *de minimis* use of conflict minerals," the Commission explained, "Congress would have done so explicitly." *Id.* The Commission noted that Section 1504 of Dodd-Frank "explicitly include[s] a *de minimis* threshold" and reasoned that this indicates that Congress did not wish the SEC even to consider an exception under Section 1502. *Id.*

This reasoning misstates the law. As several commenters informed the Commission, "as long as legislation does not forbid establishing a *de minimis* threshold, an agency's regulations may allow for one." *Id.* 56,295. The Commission has statutory authority to "exempt ... any class or classes of persons, securities, or transactions, from any provision or provisions of this chapter or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest." 15 U.S.C. §78mm(a)(1). Dodd-Frank did not repeal this statute.

In addition, under background principles of administrative law, "[u]nless Congress has been extraordinarily rigid," the Commission has implied "*de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value." *Ala. Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979). Indeed, while the Commission relied on the absence of an "explicit[]" exception in the statute, this Court has "repeatedly recognized that a de minimis exception is generally *not* express; rather, it is 'inherent in most statutory schemes,' by implication." *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) (emphasis added).

Accordingly, it cannot be "infer[red] that the Congress did not intend that there be a de minimis exception" simply because it was silent in Section 1502. *Id.* at 961. This is true regardless of what exceptions Congress provided in Section 1504. The authority to create a *de minimis* exception is not defeated by the enumeration of other exceptions. *Id.* at 961-62. Where, as here, Congress did not "expressly foreclose[]" a *de minimis* exception, and the statutory language is not "extraordinarily rigid," *id.* at 962, "it is unreasonable for the Commission *not* to consider … the use of [its] exemptive authority," *Gallagher Dissent*, to avoid "mandat[ing] pointless expenditures of effort," *Ala. Power Co.*, 636 F.2d at 360.

The agency's second reason for refusing to create a *de minimis* exception is equally unconvincing. According to the Commission, the minerals "are often used in products 'in very limited quantities,' so that a *de minimis* threshold 'could have a significant impact on' the final rule." 77 F.R. 56,298 (quoting State Dep't Comment 11 (3.24.11)). But the Commission provided no analysis showing that a *de minimis* exception would have such an effect. It made no attempt, for instance, to determine how frequently minerals are used in small quantities, or how small those quantities typically are. Nor did it assess the effect, if any, the lack of a *de minimis* exception would have on armed groups' revenues. Thus, the agency failed to "examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Furthermore, the Commission did not analyze the many alternative *de minimis* thresholds that commenters proposed, and explain why none of them could be adopted without undermining the rule. The NAM alone proposed three alternatives: first, that "issuers who use less than 0.01 percent of the global usage of a certain conflict mineral be considered *de minimis*"; second, that "conflict minerals must trigger a threshold value of 0.1 percent or greater of the part or component"; or, third, that the SEC "identify the top industry users that account for 80+ percent of the usage and consider the remaining 20 percent *de minimis*." NAM 21 (3.2.11). Other commenters proposed that the exception apply when "the cost of the conflict minerals in an issuer's products make up less than 1% of the issuer's consolidated total production costs," 77 F.R. 56,295, or when "the fair market value of the conflict minerals … is less than a specified *de minimis* amount, on an annual basis," ABA 5 (6.30.11). One commenter even proposed an exception for companies that use less than "1 g[ram] per year." Semiconductor Equip. 15 (2.15.11).

The Commission provided no reason to believe that every one of these alternatives would undermine the rule. The purported concern that a *de minimis* exception would sweep too broadly could be solved by "setting a very low *de minimis* threshold." Tulane 8. For instance, the Commission did not point to any evidence that an exception set at 0.1% of the value of a component would apply to a problematically large proportion of total mineral usage.

It is difficult to see how a properly designed *de minimis* standard, applying only to "those whose use of conflict minerals from the Congo is incidental or negligible" would materially affect conditions in the region. *Gallagher Dissent*. And the SEC can hardly claim that imposing the rule on *de minimis* uses is necessary to achieve benefits, as the agency failed to determine that the rule would have any benefits, even without an exception.

At the same time, as the SEC itself recognized, the lack of a *de minimis* exception will increase costs. 77 F.R. 56,298. The inclusion of *de minimis* uses needlessly sweeps into the rule many companies whose products have no impact on mining in the DRC. For instance, the plastic used in the soles of shoes sometimes contains minute amounts of tin. *AAFA Testimony*. Because there is no *de minimis* exception, many shoe manufacturers will have to "expend[] extraordinary resources to trace the origin of a mineral that sometimes is encountered at *de minimis* levels in a few ... products," even though the companies "simply don't have the purchasing power or the business relationships to affect change" in supply chains. *Id.*

"The use of metal compounds in catalysts" also "exemplifies why a *de minimis* standard is needed." NAM 21 (3.2.11). Metal catalysts are "broadly used to chemically react with and manufacture a range of materials, from solvents to fuels to polymers." *Id.* "The catalysts are typically not consumed in the reaction, and can be reclaimed, reprocessed and reused. Trace levels of the catalyst, however, will be found in the … manufactured product." *Id.* The metals "may be present in parts per million or less." *Id.* 8. An adhesive made from a polymer and containing "parts per million" of tin may, in turn, be used as one very small part of a component that is itself only one out of the thousands or millions of components in a final product. *Id.* 21.

It strains credulity to believe that requiring a manufacturer to "undertake[] a complex and costly analysis" to attempt to determine the origin of a trace amount of tin would be anything other than a waste of resources. Davis Polk 6. Yet, far from excepting catalysts, the SEC specifically included them: "a conflict mineral used as a catalyst or in another manner in the production process of a product [is] 'necessary to the production' of the product if that conflict mineral … is contained in any amount, including trace amounts, in the product." 77 F.R. 56,297. Expanding the scope of the rule to such products—without any articulation of benefits, and based on the misconception that the agency lacked statutory authority to consider doing otherwise—was arbitrary and capricious.

B. The Rule's "Reasonable Country Of Origin Inquiry" Is Contrary To The Statute And Rests On A Faulty Cost-Benefit Analysis.

The SEC made two errors in designing the "reasonable country of origin inquiry." First, even though the statute requires a public report and an audit only from companies whose minerals "did originate" in the DRC region, the rule requires a report and an audit from companies who, after inquiry, merely have a "reason to believe" that their minerals "*may* have originated" in the region. 77 F.R. 56,313 (emphasis added). Second, the "reasonable country of origin inquiry" appears to require companies to undertake the burdensome task of tracing their supply chains back to the smelter, even though there were far more reasonable alternatives. Additionally, the SEC's analysis of these choices is deeply deficient as it fails adequately to consider their impact on reporting companies and the DRC, and fails to show that the enormous additional costs arising from these choices are warranted.

1. The Statute Says "*Did* Originate," Not "Reason To Believe ... *May* Have Originated."

Section 1502 provides for reporting obligations only for companies whose minerals "did originate" in the DRC region. The provision unambiguously states that the Commission shall require companies to disclose whether their minerals "*did originate* in the Democratic Republic of the Congo or an adjoining country, and, in cases in which such conflict minerals *did originate* in any such country, submit to the Commission a report," including a description of "due diligence on the source" of the minerals. 15 U.S.C. §78m(p)(1)(A) (emphasis added). Yet, contrary to the statutory text, the rule requires a company to file a report unless, "based on its reasonable country of origin inquiry, the issuer has *no reason to believe* that its conflict minerals *may have originated* in the Covered Countries." 77 F.R. 56,313 (emphasis added).

The SEC concluded the statute compels this standard. According to the SEC, "requiring further steps by issuers that have reason to believe that they have necessary conflict minerals that may have originated in the Covered Countries is necessary to carry out the requirements contemplated by the statute." *Id.* 56,314. This conclusion is incorrect. By its terms, the statute requires a report only from those companies whose minerals "did originate" in the DRC region, while the SEC's far broader standard will require a report from large numbers of companies whose minerals in fact *did not* originate in the region, simply because those companies are unable to determine the minerals' source.

The Commission's erroneous interpretation is entitled to no deference. First, the statute is clear: It says "did originate," not "reason to believe … may have originated." Second, even if the statute were ambiguous, the Commission wrongly believed its "interpretation is compelled by Congress," and "deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face." *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006).

Moreover, the Commission's decision would be indefensible even if the statute left room for discretion and the agency purported to exercise such discretion. The SEC acknowledged that its standard "will be more costly than only requiring a report if the issuer has affirmatively determined that its minerals did come from the Covered Countries." 77 F.R. 56,344. And the SEC was unable to justify these costs by pointing to any benefit. *Id.* Imposing enormous costs without any benefits is arbitrary and capricious. *Pub. Citizen*, 374 F.3d at 1218.

The SEC's other attempts to defend its rule are meritless. The SEC asserts that a stricter standard is necessary because "if we allowed an issuer to stop its inquiry after learning that its necessary conflict minerals came from a smelter that includes minerals from the Covered Countries and other sources without knowing if its particular minerals came from the Covered Countries, there would be an incentive for issuers to avoid learning the ultimate source of the minerals." 77 F.R. 56,314. But this reasoning erroneously assumes that companies will trace their minerals to a smelter, then fail to make further inquiries. In fact, in most cases, companies *will not be able to trace their minerals to the smelters*. *Supra* at 8-12. Moreover, the suggestion that a stricter standard is needed to prevent willful blindness is a *non sequitur*. The rule separately requires companies to design a good faith inquiry, and to perform it in good faith. 77 F.R. 56,312; *see also Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011) (willful blindness is equivalent to knowledge). Petitioners agree that companies should conduct a good faith inquiry, but the question is what must a company do *after* it conducts such an inquiry and cannot determine the country of origin. In light of the statutory text, the high costs of preparing an audited public report, and the absence of marginal benefits, the Commission erred in requiring such companies to file a report and conduct an audit.

Finally, the SEC points out that the proposed rule contained an even more burdensome standard, which would have required companies to submit a report unless they could "prove a negative," and determine with certainty that the minerals did not originate in the DRC region. 77 F.R. 56,343. The SEC cannot, however, justify its approach simply on the ground that it could have been worse.

2. The Commission Made The "Reasonable Country of Origin" Inquiry Manifestly Unreasonable.

The Commission's second error in designing the "reasonable country of origin inquiry" is that it apparently requires companies to undertake the extraordinarily burdensome task of attempting to trace their supply chains back to the smelters or refiners, even though commenters suggested the far less burdensome approach of using "flow-down" clauses in supplier contracts. The SEC's rejection of this approach, with no showing that it would be less effective at reducing funding to armed groups, is arbitrary and capricious.

The rule provides that a company will satisfy the "reasonable country of origin inquiry" "if it seeks and obtains reasonably reliable representations *indicating the facility* at which its conflict minerals were processed [the smelter or refiner] *and* demonstrating that those conflict minerals did not originate in the Covered Countries," for instance, by showing that the smelter had "received a 'conflict-free' designation by a recognized industry group." *Id.* 56,312 (emphasis added). Although the standard does not require companies to obtain perfect certainty as to the origin of 100% of the minerals used in their products, it does appear to require companies to attempt to trace their supply chains back to the smelter or refiner and to determine the origin of substantially all of the minerals.

Given the length, complexity, and fluidity of supply chains, this standard will be extremely burdensome. Although a few companies with relatively simple supply chains have reportedly managed to trace their chains back to the smelters, for most companies "exact tracking of every stage of [a] component['s] manufacture, back through various other companies and metal traders, and further back to the original smelter.… would be hugely burdensome and impractical." ITRI 6 (1.27.11). For companies with very complex supply chains, involving millions of component parts and tens of thousands of suppliers, tracing those chains to the smelters is simply not feasible, at least without committing astronomical resources to the task.

Moreover, once again, the SEC failed to conduct an adequate cost-benefit analysis. The agency did not even discuss possible alternatives to supply chain tracing, much less explain its basis for rejecting those alternatives.

Commenters proposed a far less burdensome alternative for achieving the rule's purposes: Instead of attempting to trace its entire supply chain, a manufacturer could use "flow-down clauses in supplier contracts," NAM 3 (8.1.12), to establish that none of its minerals "did originate" in the region. 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, and so impose the same obligation down the entire supply chain. In the context of minerals, the required policy could be, for instance, that minerals may not be sourced from the region, such as through a requirement only to use minerals from certified smelters that do not source from the region. ITRI 6 (1.27.11). The manufacturer would "use[] company control processes to verify that suppliers are providing credible information and pushing contractual obligations upstream." NAM 5 (11.19.10); *see Merber Statement*. The manufacturer would then not need to determine which particular smelters all of its suppliers and their sub-suppliers were using, or even which particular component parts contained the minerals.

Allowing for compliance with the "reasonable country of origin inquiry" through the use of flow-down clauses would avoid "the incredible expense, delay and complexity of attempting to trace the conflict minerals that might be present in each of the hundreds of millions of piece parts that [some companies] acquire[] every year." *Cohen Statement*. While flow-down clauses will not allow a company to guarantee the origin of every grain of metal, they are a reliable way to control sourcing. Indeed, flow-down clauses "are routinely used to achieve ... vital government and social objectives, including protection of customer safety and health, quality assurance, environmental protection, and protection of national security in classified technology." *Id.*; *see, e.g.,* 48 C.F.R. §52.222-50; *id.* §52.225-13; *id.* §252.204-7008. This form of compliance is also consistent with a guidance document published by the OECD on determining the origin of conflict minerals, which recognizes that "downstream companies should establish internal controls *over their immediate suppliers* and may coordinate efforts through industry-wide initiatives," for instance to establish "conflict-free" smelters. *OECD Guidance* at 33 (emphasis added).

C. The Rule's Inclusion Of Non-Manufacturers Is Contrary To The Statute.

By its terms, Section 1502 applies to a company only if "conflict minerals are necessary to the functionality or production of a product *manufactured by*" that company. 15 U.S.C. §78m(p)(2)(B) (emphasis added). Thus, the statute applies only to manufacturers. The statute also provides that manufacturers must describe in their reports both "the products manufactured" and the products "contracted to be manufactured" that "are not DRC conflict free." *Id.* §78m(p)(1)(A)(ii).

The SEC seriously misread these provisions, erroneously concluding that the statute applies to companies that do not manufacture *any* products, if they contract for the manufacture of products. 77 F.R. 56,290. The Commission reasoned that "the statutory intent to include issuers that contract to manufacture their products is clear based on the statutory obligation for issuers to describe in their Conflict Minerals Reports products that are manufactured and contracted to be manufactured." *Id.* 56,291.

In fact, just the opposite is true: Congress's use of the term "contract to manufacture" in §78m(p)(1)(A)(ii) shows that Congress *did not* intend to cover those who contract to manufacture products when it used the term "manufactured" in §78m(p)(2)(B). It is a basic principle of statutory construction that Congress's use of "different terms … generally implies that different meanings were intended." *United States v. Bean*, 537 U.S. 71, 76 n.4 (2002). Furthermore, the legislative history confirms this intent. An earlier version of the bill would have covered any person if conflict minerals were included in "a product of such person." 156 Cong. Rec. S3103 (daily ed. May 4, 2010) (amendment by Sen. Brownback). Congress amended the language to read "a product *manufactured by* such person," showing its intent to limit the statute to manufacturers. 156 Cong. Rec. S3866 (daily ed. May 18, 2010) (amendment by Sen. Brownback) (emphasis added).

The SEC rejected this plain meaning, claiming it would make the statute "internally inconsistent." 77 F.R. 56,291. It does not. Section 78m(p)(2)(B) sets forth *who* is required to submit reports: companies that manufacture products. Section 78m(p)(1)(A)(ii), by contrast, sets forth *what products* the reports must describe: the products the company manufactures, and the products it contracts to have manufactured. The SEC erred in concluding that Congress must have meant something different from what it said. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

Nor will applying the plain meaning lead to absurd results. To the contrary, given the enormous costs of developing an infrastructure to conduct the required due diligence, it was perfectly sensible for Congress to choose a narrower trigger in determining the companies to which the rule would apply, but then to expand the products to be included in those companies' reports.

The SEC claimed that covering companies that contract to manufacture products would "prevent manufacturers from skirting the disclosure requirements by contracting to manufacture certain products." 77 F.R. 56,292. But, if a company manufactures any products containing the necessary minerals, it must describe products that it contracted to have manufactured, as well as products that it manufactured. 15 U.S.C. §78m(p)(1)(A)(ii). Only if a company manufactures *no* products containing the necessary materials would it be able to avoid the rule. And it seems unlikely, to say the least, that a company that had built its business around manufacturing would jettison that business and cease manufacturing altogether simply to avoid the rule. At any rate, the SEC offered no reason to believe this would present a real problem, and it provides no basis to ignore the plain meaning of the statute.

Because the statute is clear and the SEC erroneously felt itself bound to adopt the contrary conclusion, the SEC's interpretation is entitled to no deference. *See Peter Pan Bus Lines*, 471 F.3d at 1354. In addition, even if the SEC had discretion and claimed to be exercising that discretion, its conclusion would still need to be set aside because of its failure to perform a proper cost-benefit analysis. Indeed, compliance with the rule is likely to be especially burdensome to non-manufacturers, because "supply-chain monitoring processes and mechanisms … may well be wholly foreign to a non-manufacturer's business," Cable 2-3, and the rule in those cases will require them to create such processes from scratch.

D. The Phase-In Period Is Arbitrary And Capricious.

The Commission recognized the need for a phase-in period, given that "the infrastructure necessary for compliance does not exist." House Fin. Servs. 1 (7.28.11). During the phase-in period, companies that are unable to trace their supply chains may describe their minerals as "DRC conflict undeterminable," and, while they still must conduct due diligence and submit a report, they need not have the report audited. 77 F.R. 56,309.

The SEC determined that the phase-in period for small companies should last four years, noting that this period "is appropriate because these issuers may lack the leverage to obtain detailed information regarding the source of a particular conflict mineral." *Id.* 56,323. However, the SEC then arbitrarily provided only a two-year period for larger companies, even though it elsewhere recognized that "many smaller companies are part of larger companies' supply chains and would need to provide conflict minerals information so that the larger companies could meet their obligations under the rule." *Id.* 56,361. Indeed, the SEC's justification for refusing to exempt small businesses from the rule was that they "could still be required to track and provide their conflict minerals information for larger issuers," and any such exemption "could increase the burden on larger companies that rely on smaller reporting company suppliers to provide conflict minerals information." *Id.* 56,349.

There is a fundamental flaw in this reasoning. If small companies cannot comply with the rule for four years, and large companies will have to rely on small companies to comply, how will large companies be able to comply in two years? The SEC's decision to structure the phase-in period in this way "is internally inconsistent and therefore arbitrary." *Bus. Roundtable*, 647 F.3d at 1153.

E. The Commission's Errors Require Vacatur.

These numerous errors in statutory interpretation, economic analysis, and reasoned decisionmaking require vacatur. An "unsupported agency action normally warrants vacatur," and there is no reason to depart from that ordinary practice here. *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005). Vacatur is plainly necessary given "the seriousness of the rule's deficiencies (and thus the extent of doubt whether the agency chose correctly)." *Comcast Corp. v. FCC,* 579 F.3d 1, 8 (D.C. Cir. 2009) (alteration omitted). The agency's deficient cost-benefit analysis, under which it imposed crushing costs without showing any benefits, casts doubt on all of the agency's regulatory choices—not least, its extraordinarily burdensome "reasonable country of origin inquiry." Moreover, the Commission's erroneous decisions not to create a *de minimis* exception and to extend the rule to non-manufacturers will impose costs upon companies that, under a properly structured rule, would have no compliance burdens.

Furthermore, vacatur will not have "disruptive consequences." *Id.* This factor "is weighty only insofar as the agency may be able to rehabilitate its rationale for the regulation," and the regulation here will clearly require significant changes. *Id.* at 9. Also, vacatur will not cause disruption because companies have not yet filed disclosures, so there is still time to restructure compliance programs to accord with a more sensible rule. Indeed, vacatur is especially critical because the initial compliance costs are so enormous—$3 to $4 billion, in the agency's estimation—and because there is a significant possibility that the rule, as currently structured, could harm the people it was intended to help.

III. SECTION 1502 COMPELS SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The First Amendment protects the right "to speak and … to refrain from speaking." *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977). Section 1502 violates this right by compelling companies to publicly state on their own websites, as well as in SEC filings, that certain of their products are "not DRC conflict free." 15 U.S.C. §78m(p)(1)(A)(ii); *see also* 77 F.R. 56,364 (defining "DRC conflict free" to mean "that a product does not contain conflict minerals … that directly or indirectly finance or benefit armed groups" in the region). This compelled disclosure is intended to serve as a "scarlet letter," *Gallagher Dissent*, "[f]orcing a company to associate itself publicly with groups engaged in human rights violations" to "stigmatize the company and harm its business," Tiffany 5 (2.22.11). Even worse, this compelled disclosure will frequently be false. Many of the companies forced to make it will not be manufacturing products containing minerals that funded armed groups. Rather, the companies will simply be unable to trace their supply chains to determine the minerals' origins. *See supra* at 8-15.

Strict scrutiny applies here. The compelled disclosures are not commercial in nature, nor are they "purely factual and uncontroversial," *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).[6] Rather, they "require commercial firms to make statements pregnant with political judgments and connotations" regarding events in foreign countries. Taiwan Semiconductor 7. Nor are the disclosures needed to prevent a "danger that an advertisement will mislead consumers." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1214 (D.C. Cir. 2012). To the contrary, the disclosures themselves are likely to mislead consumers. In addition, the disclosures are "unduly burdensome," *Zauderer*, 471 U.S. at 651, requiring the expenditure of billions of dollars. Therefore, strict scrutiny applies and the statute is unconstitutional, as it is not narrowly drawn to serve a compelling government interest. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

Furthermore, even if the disclosure were commercial, the statute likewise fails intermediate scrutiny, because it does not "directly and materially advance[]" a substantial government interest. *R.J. Reynolds*, 696 F.3d at 1212. Petitioners do not contest that the government's interest in promoting peace and security in the DRC is substantial, even compelling. However, the statute and rule fail to "directly and

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[6] Section 1502 and the rule also do not regulate "[s]peech relating to the purchase and sale of securities," *SEC v. Wall Street Publ'g Inst.*, 851 F.2d 365, 373 (D.C. Cir. 1988), and therefore are not subject to any relaxed standard that might be thought to apply ordinarily to government regulation of securities.

materially advance[]" that interest. As this Court recently explained, "[a] restriction that provides only ineffective or remote support for the government's purposes, is not sufficient, and the government cannot satisfy its burden by mere speculation or conjecture." *Id.* at 1218-19 (internal citation omitted). The requirement that a restriction directly advance the government's interest "is critical, because without it, the government could interfere with commercial speech in the service of other objectives that could not themselves justify [the] burden." *Id.* at 1219 (internal alteration omitted).

It is difficult to think of a *less* direct way to benefit the DRC than imposing this disclosure requirement on U.S. public companies. The SEC even admitted that it did not determine whether the rule will benefit the DRC. Indeed, there is reason to fear that the statute and rule may harm the DRC by perpetuating an embargo. *See supra* at 17-18.

In addition, there are many far less speech-restrictive (and more direct) ways the government could pursue its goal of benefitting the DRC. Most obviously, the government could pursue political or diplomatic means. As dissenting Commissioner Gallagher remarked, "I am not a foreign or humanitarian policy expert, but it seems to me that taking the fight directly to the warlords would be a much more efficient process than waiting and hoping for some positive trickle-down effect attributable to new SEC reporting requirements under section 1502." *Gallagher Dissent.*

The SEC's attempts to mitigate these fatal First Amendment problems by subtly changing the wording of the statutorily compelled disclosure to "not been found to be DRC conflict free," and by allowing companies to add further explanatory language, are clearly insufficient. 77 F.R. 56,322. Stating that a product has "not been found to be DRC conflict free" will still leave consumers with the misleading and harmful impression that the product funds human rights abuses. Nor does the ability to add qualifying language do much to remove this unfair stigma. "In other words, the company would first be required to confess but then be allowed to accompany the confession with a (sort of) retraction." Tiffany 5 (2.22.11). Compelling this burdensome and stigmatizing speech violates companies' First Amendment rights.

IV. THIS COURT HAS JURISDICTION.

Because this Court directed the parties in *American Petroleum Institute v. SEC*, No. 12-1398 (D.C. Cir. Nov. 1, 2012) (per curiam) (order) (Doc. 1402612), to address jurisdiction, and this case presents a similar issue, Petitioners briefly address it. As both Petitioners and Respondent in *American Petroleum Institute* explained, jurisdiction lies in this Court. "Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts," courts "will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 745 (1985). That is because "[p]lacing initial review in the district court ... requir[es] duplication of the identical task in the district court and in the court of appeals." *Id.* at 744. Following this principle, courts have repeatedly construed provisions like 15 U.S.C. §78y(a), which provide for appellate court review of "orders," as encompassing agency rules.[7] *See, e.g., Inv. Co. Inst. v. Bd. of Governors of Fed. Reserve Sys.*, 551 F.2d 1270, 1276-78 (D.C. Cir. 1977); *see also United States v. Storer Broad. Co.*, 351 U.S. 192, 194-98 (1956).

To be sure, 15 U.S.C. §78y(a) exists alongside 15 U.S.C. §78y(b), which provides for review in the court of appeals of "rules" issued under certain specified subsections of the Securities Exchange Act. When 15 U.S.C. §78y(b) was enacted in 1975, however, this Court's decisions drew a sharp distinction between judicial review of provisions aimed at "rules" and those aimed at "orders." *See United Gas Pipe Line Co. v. FPC*, 181 F.2d 796, 798-99 (D.C. Cir. 1950). In enacting 15 U.S.C. §78y(b), Congress sought to ensure that rules issued under the new statutory authorities it was adding could be reviewed directly in the courts of appeals. Subsequently, this Court abandoned this distinction in *Investment Company Institute*, which held that the term "orders" should apply to "any agency action capable of review on the basis of the administrative record." 551 F.2d at 1278.

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[7] This Court also has jurisdiction over Petitioners' First Amendment challenge, because a party seeking judicial review of agency action ordinarily may "draw in[to] question the constitutionality of" the underlying statute. *Flemming v. Nestor*, 363 U.S. 603, 607 (1960).

This Court has repeatedly followed the teaching of *Investment Company Institute* when reviewing the Commission's rules. In *Business Roundtable v. SEC*, 647 F.3d at 1146, this Court exercised jurisdiction over a challenge to an agency rule adopted under the Securities Exchange Act, even though it was not issued pursuant to a subsection enumerated in §78y(b). Likewise, in both *Chamber of Commerce v. SEC*, 412 F.3d at 137-38, and *Chamber of Commerce v. SEC*, 443 F.3d 890, 896-98 (D.C. Cir. 2006), this Court exercised jurisdiction over a challenge to a rule pursuant to Section 43(a) of the Investment Company Act, 15 U.S.C. §80a-42(a), which refers only to "orders." There is no reason to depart from that approach here.

Indeed, §78y(b) provides no basis for construing §78y(a) as excluding rules. Section 78y(a) was enacted in 1934, before this Court's decision in *United Gas Pipe Line*. There is no reason to believe that Congress intended a narrow construction at the time. *See Black's Law Dictionary* 1298 (3d ed. 1933) (defining "order" to include "a rule or regulation"). And it makes no sense to conclude that, 41 years later, in seeking to *expand* appellate jurisdiction with §78y(b), Congress in fact did the opposite.

CONCLUSION

For the foregoing reasons, Petitioners request that their petition for review be granted, that the conflict minerals rule be vacated, and that 15 U.S.C. §78m(p) be struck down as a violation of the First Amendment.

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Respectfully submitted,

/s/ Peter D. Keisler
Peter D. Keisler
Counsel of Record
Jonathan F. Cohn
Erika L. Myers
Sidley Austin LLP
1501 K St., NW
Washington, DC 20005
202.736.8027
Counsel for Petitioners the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and Business Roundtable

Of Counsel:
Robin S. Conrad
Rachel L. Brand
National Chamber Litigation Center, Inc.
1615 H St., NW
Washington, DC 20062
202.463.5337
Counsel for Petitioner the Chamber of Commerce of the United States of America

Of Counsel:
Quentin Riegel
National Association of Manufacturers
733 10th St., NW
Suite 700
Washington, DC 20001
202.637.3000
Counsel for Petitioner the National Association of Manufacturers

Of Counsel:
Maria Ghazal
Business Roundtable
300 New Jersey Ave., NW
Suite 800
Washington, DC 20001
202.496.3268
Counsel for Petitioner Business Roundtable

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Garamond Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 13,996 words exclusive of the certificate required by Circuit Rule 28(a)(1), statutory and evidentiary addendum, table of contents, table of authorities, signature lines, and certificates of service and compliance. The words of Petitioners' Opening Brief do not exceed 14,000 words, as mandated by Fed. R. App. Pro. 32(a)(7)(B)(i). The undersigned used Microsoft Word 2007 to compute the count.

/s/ Peter D. Keisler
Peter D. Keisler

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2013, I electronically filed the foregoing Opening Brief of Petitioners with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Pursuant to D.C. Circuit Rules 25 and 31, and the Court's Order of November 27, 2012, five (5) paper copies of the foregoing brief and accompanying addenda will be hand-delivered to the Clerk of the Court.

/s/ Peter D. Keisler
Peter D. Keisler