ORAL ARGUMENT SCHEDULED FOR JANUARY 7, 2014

No. 13-5252

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,

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee,

AMNESTY INTERNATIONAL USA; AMNESTY INTERNATIONAL LTD.,

Intervenors for Appellee.

On Appeal from the United States District Court for the District of Columbia, Case No. 1:13-cv-00635, Judge Robert L. Wilkins

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STATUTES

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GLOSSARY

APA	Administrative Procedure Act
BRT	Business Roundtable
Br.	Brief of the Securities and Exchange Commission
Chamber	Chamber of Commerce of the United States of America
Conflict minerals or minerals	Columbite-tantalite, cassiterite, gold, wolframite, and their derivatives tantalum, tin, gold, and tungsten
Congressmen Br.	Brief of Congressman McDermott et al.
DRC	Democratic Republic of the Congo
DRC region	The DRC and the nine adjoining countries in Central Africa
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010)
Global Witness Br.	Brief of Global Witness Ltd., Fred Robarts, and Gregory Mthembu-Salter
GAO	Government Accountability Office
Intervenors Br.	Brief of Amnesty International USA and Amnesty International Ltd.
NAM	The National Association of Manufacturers
OECD	Organisation for Economic Co-operation and Development
Opening Br.	Opening brief of Appellants the NAM, the Chamber, and BRT

The release	*Conflict Minerals*, 77 FR 56,274 (Sept. 12, 2012)
SEC or Commission	The United States Securities and Exchange Commission
Section 1502	Section 1502 of Dodd-Frank

SUMMARY OF ARGUMENT

The Commission fundamentally misconstrues Appellants' argument. Appellants are not contending that "the Commission should have re-evaluated Congress's determination that the disclosures" required by Section 1502 "would ameliorate, rather than exacerbate, the crisis in the DRC." Br. 2. Nor are Appellants asking this Court to "second-guess" Congress's judgment that the statute, when properly implemented, would further humanitarian goals and strike an appropriate balance of legislative interests. *Id.* 2-3.

Rather, Appellants are challenging four regulatory decisions *the Commission* made in promulgating the rule: (1) refusing to create a *de minimis* exception; (2) requiring companies to file reports whenever their minerals "may have originated" in the DRC; (3) expanding the rule's scope to non-manufacturers; and (4) providing for an irrational transition period. Nowhere in Section 1502 did Congress require any of these decisions.

Indeed, the Commission itself recognizes as much (in its brief, not in the release adopting the rule), contending that the four regulatory decisions were exercises of agency discretion. Br. 26-27. The Commission further acknowledges that "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987), *see* Br. 15-16; that in some instances requiring more disclosure could be counter-productive and create a *de facto* embargo, *id.* 18, 51; and that the agency should "reduce the burden of compliance where possible," *id.* 57.

Nonetheless, the Commission repeatedly contends it could not choose less burdensome regulatory alternatives with respect to the four decisions at issue, because any alternative "would undermine the scheme Congress envisioned," "intended," and "mandated." Br. 2, 3, 10, 26, 28, 51-52, 53, 58. This is the mantra the Commission reiterates throughout its brief, and it is the foundation of the Commission's position.

It is also incorrect. As an initial matter, the Commission never identifies what *is* the "scheme Congress mandated." Certainly, Congress did not mandate any of the particular decisions that Appellants challenge. The Commission agrees; otherwise, it could not simultaneously claim it made those decisions itself as an exercise of agency discretion. Although Congress required *a* rule, it did not mandate the *Commission's* rule.

At bottom, the Commission appears to be arguing that the proposed regulatory alternatives would undermine the "purpose" or "goal[]" of "the disclosure scheme Congress mandated." *See* Br. 2-3, 21. This purpose, the Commission asserts, is "promot[ing] peace and security in the Congo." JA795. But the Commission's argument is unavailing for two reasons.

First, the Commission never determined in its release that the regulatory alternatives would undermine the goal of promoting peace and security in the Congo. The decisions in the release were based on other reasoning, which agency counsel has since abandoned. Indeed, the agency has conceded it did not even attempt to determine the likely impact of its decisions on the DRC. Br. 52-53.

Second, the Commission could not have made such a determination without violating both the APA and the agency's heightened obligations under the Exchange Act to analyze through reasoned decisionmaking the impact of its rules. The regulatory alternatives at issue—such as exempting companies that use in the aggregate negligible amounts of the minerals at issue—would have no discernible impact on the DRC.

Regardless, the rule and its authorizing statute violate the First Amendment. The compelled public disclosures, suggesting that companies' products contribute to terrible human rights abuses in a foreign land, are misleading, stigmatizing, and pregnant with political judgments.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in Appellants' opening brief.

ARGUMENT

I. THE COMMISSION MISINTERPRETED THE STATUTE, PROVIDED NO REASONED ANALYSIS, AND ARBITRARILY REJECTED LESS BURDENSOME REGULATORY ALTERNATIVES.

A. The Commission Erroneously And Arbitrarily Refused To Create A *De Minimis* Exception.

The agency insists it properly recognized its express and implied authority to create a *de miminis* exception, and that it reasonably declined to exercise that authority as a matter of discretion. Br. 29-30. Yet this assertion requires the agency to abandon

the primary reason it gave in its release: "[W]e are of the view that *Congress intended* not to provide for a *de minimis* exception, and including one in the final rule would therefore thwart, rather than advance, the provision's purpose." JA743 (emphasis added).

The agency's attorneys attempt to characterize this statement as a stray comment, entitled to no weight. Br. 32. But an examination of the release reveals that, far from a slip of the pen, the conclusion that Congress did not intend a *de minimis* exception was the cornerstone of the Commission's analysis. The Commission repeated that conclusion multiple times, stating: "We believe that *Congress understood*, in selecting the standard it did, that a conflict mineral used in even a very small amount could be 'necessary' .... If it had *intended* that the provision be limited further, so as not to apply to a *de minimis* use of conflict minerals, we think Congress would have done so explicitly." JA743 (emphasis added); *see id.* ("[W]e believe *Congress intended* the disclosure provisions to apply to the use of even small amounts of conflict minerals.") (emphasis added); *id.* ("The 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 in the final rule.").

This statutory interpretation is plainly incorrect. Nothing in Section 1502 evinces a congressional intent to foreclose the SEC from using its implied and express exemptive authority to create a *de minimis* exception. 15 U.S.C. §78*l*(h); *id.*

§78mm(a)(1); *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) ("[A] de minimis exception is generally not express; rather, it is inherent in most statutory schemes, by implication."); Opening Br. 27-28. Indeed, the Commission itself now disavows any conclusion that Section 1502 "precluded [it] from adopting a *de minimis* exception," Br. 31,[1] and even contends that it may grant *de minimis* exceptions going forward on an individualized basis, *see* Br. 34 n.6; *but see* Chair Mary Jo White, *The Importance of Independence* (Oct. 3, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539864016#.Uk66oySsiSo (asserting that Section 1502 "essentially le[ft] no room for the SEC to exercise its

[1] Although the SEC insists that it properly recognized its discretion to create a *de minimis* exception, Intervenors and amici Members of Congress contend that the SEC had no such discretion. These contentions are incorrect. Congress's grant of authority to the President to revise or temporarily waive the rule for national security reasons did not *sub silentio* strip the Commission of its exemptive authority. Intervenors Br. 13-16; Congressmen Br. 23. Section 78m(p)(3) makes no mention of section 78mm(a)(1) or section 78*l*(h), and therefore cannot abrogate them. *Hui v. Castaneda*, 130 S. Ct. 1845, 1853 (2010); 15 U.S.C. §78mm(b) (explicitly setting forth sections of the Exchange Act to which the Commission's exemptive authority does not apply). And a *de minimis* exception is neither a "revis[ion]" nor a "temporar[y] waive[r]" of the statutory requirements, but simply a limitation upon those requirements. Further, no citation to the legislative history—much less to the statutory text—supports the assertion of amici Members of Congress that "Congress considered and rejected a *de minimis* exception when drafting §1502." Congressmen Br. 23. Their post-enactment views have "almost no value," *Gen. Instrument Corp. v. FCC*, 213 F.3d 724, 733 (D.C. Cir. 2000); *see Pub. Citizen, Inc. v. Rubber Mfrs. Ass'n*, 533 F.3d 810, 819 (D.C. Cir. 2008) ("We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text."), especially where, as here, other Members of Congress who also voted for the bill contended that the Commission *should* create a *de minimis* exception, *see* JA644.

independent expertise and judgment in deciding whether or not to make the specified mandated disclosures"). Because "[t]he Commission's primary reason for rejecting an exemption does not hold water," the Commission's decision cannot stand. *Am. Petroleum Inst. v. SEC*, No. 12-1668, 2013 WL 3307114, at *13 (D.D.C. July 2, 2013); *see Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006) (where a court "conclude[s] that at least one of the [agency's] rationales is deficient, [the court] will ordinarily vacate the [action]").

The SEC argues, citing the district court's decision, that the agency's statements about congressional intent do not defeat *Chevron* deference because they do not show "that the agency treated [the] statute as unambiguous." Br. 32 (quoting JA886-87). But, even if the SEC believed the statute to be ambiguous (and there is no indication in the release that it did), the agency's conclusion that Congress intended for there to be no *de minimis* exception is clearly incorrect, and fails whether analyzed under *Chevron* Step 1 or Step 2. *See ABA v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005); *Am. Petroleum Inst.*, 2013 WL 3307114 at *12-13 (holding that agency refusal to exercise exemptive authority was arbitrary and capricious where agency incorrectly concluded that "adopting such an exemption would be inconsistent with the structure and language" of the statute and "would undermine Congress' intent"). This alone is reason to reverse.

Moreover, other than its erroneous statutory interpretation, the SEC posited only one ground for refusing to create a *de minimis* exception: because conflict

minerals "are often used in products in very limited quantities," "including a *de minimis* threshold could have a significant impact on the final rule." JA743. But a properly designed *de minimis* exception would have no such effect. For instance, one commenter proposed an exception for companies that use a total of less than "1 g[ram] per year" of the minerals. JA236. Even if this proposed exception applied to half of the 5,994 issuers subject to the rule, it would exempt, in total, *less than 7 pounds* of the minerals, an amount that is clearly too small to have any effect on armed groups in the Congo, let alone "undermine the disclosure scheme Congress mandated." Br. 53. Far more could be smuggled out in a backpack.

The SEC insists that its decision was reasonable because it "was supported by numerous comments." Br. 33. But this is simply not true. Some comments criticized proposed exceptions for *products* that individually contain small amounts of minerals, for instance as a percentage of the product's total weight or value. Commenters argued that such an exception could be problematic because the weight of conflict minerals in "many products" is "very small" as is "the percentage by weight or dollar value of the conflict minerals as a proportion of unit cost." JA103. A computer chip, for instance, contains "perhaps a few milligrams of tantalum" but the semiconductor industry "as a whole consumes over 100 tons of tantalum metal annually." JA602. The State Department comment upon which the SEC relies expresses solely this same concern: that such an exception "could have a significant impact" because the minerals are "often [used] in very limited quantities." JA445.

None of these comments addressed other possible types of *de minimis* exceptions, such as an exception based on the total amount of minerals used by a particular issuer. Several commenters suggested such an exception. One commenter, for instance, suggested that the exception apply "if all widgets that an issuer manufacture[]s ... contain, in the aggregate, only negligible quantities of the subject metals." JA623. Others similarly suggested an exception based on the "fair market value" or total amount of minerals an issuer uses annually. JA460. Under these proposals, the *de minimis* exception would not apply to a computer chip manufacturer who used "tons of tantalum metal annually," even if each individual computer chip used only miniscule amounts. JA602. However, a shoe manufacturer that used only trace amounts of tin in its entire business would not have to "expend[] extraordinary resources to trace the origin of a mineral that sometimes is encountered at *de minimis* levels in a few ... products," as it must under the current rule. *The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo: Hearing Before the Subcomm. on Int'l Monetary Policy & Trade of the H. Comm. on Fin. Servs.*, 112th Cong. 171 (2012) (statement of Stephen Lamar).

The Commission argues that its "broader conclusion rendered such examination [of proposed per–issuer exceptions] unnecessary." Br. 34. But the only concern the Commission identified—that the minerals "are often used in products in very limited quantities"—is inapplicable to the proposed per-issuer exceptions, and thus could not have made consideration of these proposals "unnecessary." *Chamber of*

Commerce v. SEC, 412 F.3d 133, 145 (D.C. Cir. 2005) (holding that failure to consider a suggested alternative violated the APA where the "alternative was neither frivolous nor out of bounds").

The SEC next states that it reasonably rejected a per-issuer exception because, "even if the cumulative amount would be small in numerical terms, it is not clear that this translates to a *de minimis* regulatory effect." Br. 34. This cryptic assertion appears to suggest that a *de minimis* exception would be inappropriate if it exempted too many *companies* from regulation, even if all of those companies combined used only a negligible quantity of the minerals. But that a *de minimis* exception could save large numbers of companies from incurring huge expense is surely no reason to refuse to create one. To the contrary, it shows that this is a classic case for a *de minimis* exception, where "apply[ing] the literal terms of a statute [would] mandate pointless expenditures of effort" and "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. 1980).

Without any *de minimis* exception, many companies that do not even use the minerals will have to incur substantial expenses to exclude the possibility that one or more of their products could contain infinitesimal amounts of the minerals. These quantities could be as low as parts per million or even parts per billion, for instance trace amounts remaining from the use of catalysts during production. ADD-114; American Coatings Br. 11. Although the SEC argues that it reasonably refused to exempt trace amounts remaining from the use of catalysts because "evidence before

the Commission showed that catalysts make up a 'significant market for the minerals,'" Br. 36, the only citation the agency provides for this assertion states that "tools or machines that are necessary for the production" of products and "catalysts" *together* are "a significant market for the minerals," not that catalysts alone are, JA742.

The SEC finally argues that "nothing required the Commission to [exempt trace amounts remaining from the use of catalysts] simply because it could." Br. 36. But "an agency decision as to exemptions must, like other decisions, be the product of reasoned decisionmaking," and the SEC's refusal to create a *de minimis* exception does not meet this standard. *Am. Petroleum Inst.*, 2013 WL 3307114, at *13; *see also* Br. 57 (conceding the Commission should "reduce the burden of compliance where possible"). Imposing staggering costs on companies that in the aggregate use perhaps a few pounds of the minerals per year surely cannot be what the statute demands.

B. The Commission Misinterpreted The Statute's "Did Originate" Requirement, Imposing Unnecessary Burdens.

The Commission defends its requirement that companies file a report if they have a reason to believe their minerals "may have originated" in the DRC region primarily by insisting that no such requirement exists. According to the agency's brief, "[a] report is required only if an issuer knows its minerals originated in the Covered Countries, or the issuer encountered a red flag during its reasonable country of origin inquiry and its due diligence either reveals the minerals originated in the Covered Countries or does not reveal the source of its minerals." Br. 42.

The SEC's rule and release contradict this litigating position. The rule provides that a company must conduct due diligence if, following an initial inquiry, it "has reason to believe that its necessary conflict minerals *may* have originated" in the DRC region, and do not come from recycled or scrap sources. JA808 (emphasis added). Then, following the due diligence process, the company must file a Conflict Minerals Report unless it dispels such doubt and "determines that its conflict minerals did *not* originate" in the DRC region (or "*did* come from recycled or scrap sources"). *Id.* If a company "cannot determine the source of the conflict minerals," it is "required to submit a Conflict Minerals Report." JA758. Thus, if after its due diligence the company still has reason to believe its minerals "may have originated" in the DRC region, it must file a report. *Id.* The SEC cannot escape what the rule and release actually say.

Nor can it refute that the rule is inconsistent with the plain terms of the statute. Section 1502 states that companies must file reports only "in cases in which such conflict minerals *did originate*" in the DRC region. 15 U.S.C. §78m(p)(1)(A) (emphasis added). "Did" does not mean "may."

Contrary to the agency's brief, the release does not provide that companies must file reports only if they encounter "red flags." Br. 42-45; JA758-59 (referring to the OECD's "*non-exclusive* examples of circumstances, or red flags" as potential triggers for due diligence) (emphasis added). In any event, the SEC's concept of a "red flag" is unusual, at best. According to the SEC, a company must file a report if it

concludes that there is even a *five percent chance* that its minerals originated in the DRC region. JA840; *see* JA897 n.21. A five percent chance is not a "red flag" in any ordinary sense of the phrase.[2]

The SEC argues that this extremely onerous standard is necessary because "without a reason-to-believe standard, issuers could conduct a good-faith inquiry and encounter red flags, yet not be required to conduct due diligence because they would not *know* whether their minerals 'did originate' in the Covered Countries." Br. 45; *see* Congressmen Br. 27. But, as the SEC itself elsewhere points out, Appellants are not challenging the "reason to believe" portion of the standard, which may be appropriate for preventing willful blindness. Br. 43-44. Rather, Appellants challenge the vast expansion of the rule beyond those companies who actually have "reason to believe" that their minerals "*did* originate" in the DRC region to all those who merely have reason to believe their minerals "*may* have originated" in the region. The SEC offers no justification for this expansion. *See* Opening Br. 8-11; JA767.

[2] The SEC and district court take the even more extreme position that a five percent chance would give an issuer not only "reason to believe" the minerals "may have originated" in the DRC region, but also "reason to believe" the minerals "did originate" in the region. JA840; *see* JA897 n.21. This position strains language far past any plausible interpretation. No one would state that a weather forecast predicting a five percent chance of precipitation provides a reason to believe it will rain. To the contrary, such a forecast provides a compelling reason—a ninety-five percent chance—to believe that it will not rain.

Indeed, far from "undermining one of the fundamental requirements of Section 1502" as the Commission contends, Br. 27, a "did originate" standard could be more effective. The SEC's "'might' formulation is too suggestive of mere possibility, however unlikely," and therefore will not single out those companies whose products actually have ties to the DRC conflict. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976). Instead, by requiring disclosures from large numbers of companies who are unable to determine the source of their minerals, the SEC's overbroad standard will result in an "avalanche of trivial information" that will likely "accomplish more harm than good." *Id.*

Thus, even if the Commission had "discretion to require issuers that have a 'reason to believe' that their conflict minerals '*did* originate' in the Covered Countries to file a report," Br. 43-44 (emphasis added), that does not justify the Commission's "*may have* originated" standard. Requiring a report when there is a 95 percent chance the minerals *did not* originate in the DRC region is not a reasonable interpretation of the statute's "did originate" language. *Vill. of Barrington, Ill. v. STB*, 636 F.3d 650, 659-60 (D.C. Cir. 2011) (holding that Congress forecloses an agency interpretation "by granting the agency a range of interpretive discretion that the agency has clearly exceeded"); *see United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring) (A court cannot uphold an "agency interpretation [that] is clearly beyond the scope of any conceivable ambiguity," as "[i]t does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean

'purple'"); *see also* 156 Cong. Rec. S3866 (daily ed. May 18, 2010) (earlier version of Section 1502, not passed, requiring reports for minerals that "originated *or may have originated*" in the DRC region) (emphasis added). And because the SEC is required to avoid unnecessary compliance burdens, 15 U.S.C. §78w(a)(2), its unnecessary expansion of the rule is unsustainable.

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

In the release, the SEC stated that "the statutory intent to include issuers that contract to manufacture their products is clear." JA736. The Commission applied "the traditional tools of statutory construction," *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 797 n.4 (D.C. Cir. 2004), examining the statute's text, structure, and purposes, and wrongly concluded that its "interpretation is compelled by Congress," *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006). Therefore, the Commission's interpretation is entitled to no deference. *Id.*

The agency now contends that "a single 'use of the word clear' does not demonstrate that the agency believed its regulatory interpretation was compelled by Congress; rather, the Court considers the totality of the agency's explanation." Br. 39 (citing *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012)). The Commission's statement that "the statutory intent ... is clear," however, is certainly strong evidence that the Commission believed the statute was clear. *Int'l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 709 (D.C. Cir. 1987)

(concluding the NLRB found that a "standard is statutorily required" where the agency stated "Congress clearly intended that ... the Board should apply" the standard).

Moreover, looking to the "totality of the agency's explanation" only confirms that the SEC believed the statute compelled its position. Although the Commission stated that "[t]he absence of the phrase 'contract to manufacture' from the 'person described' definition raised some question" about whether Congress intended to cover non-manufacturers, it concluded that the remainder of the statutory text answered that question: "Based on the *totality of the provision*, however, we .... belie[ve] that the *legislative intent* was for the provision to apply both to issuers that directly manufacture products and to issuers that contract the manufacturing of their products." JA733 (emphasis added). And, the Commission later explained: "[T]he final rule applies to issuers that contract to manufacture products. This requirement is based on *our interpretation of the statute in light of our understanding of the statutory intent and a reading of the statute's text*." JA790 (emphasis added). References to "the purpose of the statutory provision" are in accord; evaluating a statute's "purpose" is one of "the traditional tools of statutory construction" to be used in determining whether a statute is "plain in its meaning." *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000).

In any event, regardless of what the SEC thought it was doing, its interpretation is plainly inconsistent with the statutory text. Section 1502 states that

the disclosure requirement applies only if "conflict minerals are necessary to the functionality or production of a product *manufactured by*" a company, thus limiting the requirement to companies that manufacture products. 15 U.S.C. §78m(p)(2)(B).

The SEC contends that this plain meaning must be rejected, because it would make the statute "internally inconsistent." Br. 38. This argument, however, relies upon a convoluted and meritless interpretation of the statute that the Commission articulated for the first time during this litigation. According to the SEC and Intervenors, the definition of "person described" in §78m(p)(2)(B) must implicitly cover "products contracted to be manufactured," because otherwise issuers would not have "to inquire into the origin of the minerals in those products" under §78m(p)(1)(a)(i) even when such "issuers would be required to report products they contract to have manufactured" under §78m(p)(1)(a)(ii). Br. 38; *see* Intervenors Br. 19-20. But the Court should not imply words that Congress omitted from the statute. Moreover, the SEC and Intervenors find their "inconsistency" only by misconstruing the phrase "minerals that are necessary as described in paragraph (2)(B)." This phrase means what it says— "minerals [that] are necessary to the functionality or production of a product," 15 U.S.C. §78m(p)(1)(A), (2)(B)—and therefore produces no inconsistency. The broader reading proposed by the SEC's litigation counsel renders the words "that are necessary" superfluous, and therefore must be rejected. *Conference of State Bank Supervisors v. Conover*, 715 F.2d 604, 627 (D.C. Cir. 1983).

Finally, the SEC's interpretation would be arbitrary and capricious even if the statute were ambiguous and the agency had exercised discretion. The SEC contends that applying the rule only to manufacturers "would significantly undermine the purpose of the statutory provision," because companies "could 'evade' the statute by contracting their manufacturing to a third party." Br. 39-40. But if a company manufactures *any* products containing the necessary minerals, it must describe products it contracted to have manufactured, as well as products it manufactured. 15 U.S.C. §78m(p)(1)(A)(ii). Only if a company manufactures *no* products containing the necessary minerals 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, let alone "undermine the disclosure scheme Congress mandated." Br. 53.

D. The SEC Designed An Arbitrary And Capricious Phase-In Period.

According to the Commission, creating a shorter transition period for larger companies is rational because smaller companies "acting alone" "may lack the leverage" to obtain information, but "this lack of leverage may be reduced by the influence exerted over their suppliers by larger issuers using the same supplier base." Br. 46. However, this is an argument *against* the disparate transition period. JA768 n.570. When a supply chain includes both small and large companies (as is generally the case, *see* JA806), the companies will be seeking the same information on the origin

of the same minerals, which they must publicly disclose. If large companies could use their "leverage" to obtain the information, the information would become equally available to small companies; if not, both large and small companies would be equally incapable of obtaining the information. The latter scenario is more likely, because most companies, including large ones, have relationships only with their direct suppliers, and have no "leverage" over their sub-suppliers, often a vast web of companies spread all over the globe. JA160; JA422-23; JA631. In either situation, however, it makes no sense to have a shorter transition period for larger companies, and the SEC's rule is arbitrary and capricious.

E. The Commission Violated Its Statutory Obligation Not To Impose Unnecessary Burdens When It Made Decisions That Increased The Rule's Costs Without Any Identifiable Benefits.

The SEC's argument that it conducted an adequate analysis of the rule's impact boils down to a faulty syllogism: Congress mandated the creation of a disclosure regime; Congress intended the disclosure regime to benefit the DRC; therefore, the SEC cannot evaluate whether the rule will benefit the DRC without impermissibly "second-guessing Congress's judgment." Br. 48.[3]

[3] Amici Better Markets contends that the SEC was not required to conduct a cost-benefit analysis. However, the cases on which it relies, including *National Association of Home Builders v. EPA*, 682 F.3d 1032 (D.C. Cir. 2012), and *Investment Company Institute v. CFTC*, 720 F.3d 370 (D.C. Cir. 2013), involve different agencies subject to different statutory requirements. Unlike those agencies, the SEC has an obligation not only to "consider" the impact of its rule, but also to "not adopt" regulations that impose unnecessary or inappropriate burdens on competition. *See Bus. Roundtable v. SEC*, 647

This syllogism is deeply flawed. First, although Congress required *a* disclosure regime, it did not require *the Commission's* disclosure regime. Congress did no more than "set[] the general contours and direction of the rulemaking." *Paredes Dissent*, JA715. The final rule "is replete with policy choices—elective exercises of Commission discretion—that Congress did *not* mandate." *Gallagher Dissent*, JA710; *see also* JA787-95.

Second, although Congress intended to benefit the DRC, Congress made no determination that more disclosure would always be more beneficial, let alone worth the cost. Indeed, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526. At other points in its brief, the SEC appears to recognize as much. Br. 15-16 (noting limitations on the required disclosure that the agency adopted to reduce costs).

F.3d 1144, 1148 (D.C. Cir. 2011); 15 U.S.C. §78w(a)(2); *see also* Ctr. for Capital Mkts. Competitiveness, *The Importance of Cost-Benefit Analysis in Financial Regulation* 26-27 (Mar. 2013), http://www.centerforcapitalmarkets.com/wp-content/uploads/2010/04/CBA-Report-3.10.13.pdf. Furthermore, because the SEC conducted an economic analysis, albeit a severely flawed one, any contention that such analysis was "not required," or that 15 U.S.C. §78c(f) is inapplicable here, must be "reject[ed]." *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177 (D.C. Cir. 2010).

From its faulty premises, the SEC draws the equally flawed conclusion that it could not evaluate the impact of its regulatory choices on the DRC because it had to "accept[] Congress's decision that Section 1502's disclosure scheme would lead to social benefits." Br. 52. To the extent Congress left designing the rule to the SEC's discretion, blaming the statute is no answer. The agency surely cannot claim that *Congress* made a determination that the *Commission's* regulatory choices would benefit the DRC; when it passed the statute, Congress could not have known which regulatory alternatives the Commission would choose. Indeed, the Commission goes on to contradict its own assertion that it could not evaluate the benefits of its rule, claiming that "where it reasonably felt it could, it took into account comments that the benefits may be less than Congress anticipated." *Id.* 55. And the SEC recognized that, in some instances, requiring disclosure would be counter-productive, causing a "*de facto* embargo." *Id.* 51.[4]

The Commission next argues that Congress intended for "*other* agencies and branches of government [to] assess the efficacy of Section 13(p) and Rule 13p-1 in promoting peace and security in the DRC." Br. 49. The statute indeed gives other agencies and branches a role. *See* Section 1502(d)(2)(A); 15 U.S.C. §78m(p)(3)-(4).

[4] The Commission could have used its broad exemptive authority, 15 U.S.C. §§78mm(a)(1), 78*l*(h), as "necessary or appropriate" to avoid an embargo, for instance by exempting from due diligence companies that contractually require suppliers to use certified conflict-free smelters, even if the smelters use minerals from the region.

But Congress assigned the SEC the special task of designing the rule, and it also gave the SEC "unique obligation[s]" to consider the impact of its rules and avoid unnecessary burdens. *Bus. Roundtable*, 647 F.3d at 1148. As the SEC recognizes, these obligations "apply regardless of whether a rule's intended benefits are economic or social." Br. 56. It is therefore highly implausible that Congress—without saying so—intended to relieve the SEC of those obligations, and intended for every entity involved *except for the SEC* to analyze the rule's benefits.

Finally, the Commission contends it did not have to analyze the likely impact of its choices on the DRC because "its extensive analysis of the costs and benefits of its choices *to issuers and users of the disclosures* in comparison to suggested alternatives was sufficient." Br. 52. But the only "benefit" to issuers that the release identifies is "the benefit of lowering the … costs of the rule" compared to even more demanding alternatives. *See* JA787, JA790. The Commission cannot transform a cost into a benefit simply by asserting that the cost could have been even worse. Further, as the Commission stated in the release, the purpose of Section 1502 is not to benefit issuers or investors. Rather, it is to "decrease the conflict and violence in the DRC," a purpose "quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve." JA795; *see id.* (remarking that the rule was "not necessarily intended to generate measurable, direct economic benefits to investors or issuers specifically"). The SEC therefore cannot satisfy its statutory obligation to determine whether the costs it imposed were "necessary or appropriate in furtherance

of the purposes" of Section 1502 without considering the likely impact of the rule on the DRC. 15 U.S.C. §78w(a)(2); *see id.* §78c(f). Yet at no point did the Commission address the "fierce[] debat[e]" in the record on this issue. JA818; JA795.

Amici (but not the SEC) argue that this Court should uphold the SEC's analysis because "the statute and rule are working as intended." Congressmen Br. 5; *see* Global Witness Br. 9-29. This contention is legally irrelevant, but it is also unsupported by the evidence. Amici first argue that the rule is working because companies are complying with it, but companies obviously must use their best efforts to comply with applicable legal requirements. And the OECD's 2013 report confirms that tracing the minerals remains highly challenging due to the "depth and complexity of [companies'] supply chains" and their "lack of control and insight beyond their immediate suppliers." OECD, *Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* 59-60 (Jan. 2013), http://www.oecd.org/daf/inv/mne/ DDguidanceTTTpilotJan2013.pdf (*OECD Report*); *see id.* 34-35, 39-41, 57-58. Amici point out that Apple has reportedly mapped its supply chain, but Apple's supply chain is relatively simple, consisting of only a few hundred suppliers of the minerals. http://www.apple.com/supplierresponsibility/code-of-conduct/labor-and-human-rights.html. Depending upon the industry, other companies might have tens of thousands or more of such suppliers, making mapping exponentially more difficult. *See* JA590; JA571; JA630.

Amici also contend that the rule is having the intended effect on the DRC, but most sources show "very strong indication[s] that the impact has been counterproductive," and that the rule "only exacerbates the problem that it was intended to combat." *The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing Before the Subcomm. on Monetary Policy & Trade of the H. Comm. on Fin. Servs.*, 113 Cong. 4-5 (2013) (*House Testimony*). Although several traceability schemes have been set up to attempt to promote "conflict-free" sourcing from the region, rampant corruption and smuggling "not only undermine[] due diligence efforts aimed at stamping out conflict minerals in the Democratic Republic of the Congo, but also jeopardize[] traceability schemes," United Nations Sec. Council, *Midterm Report of the Group of Experts on the Democratic Republic of the Congo*, S/2013/433, at ¶153 (June 20, 2013) (*U.N. Report*).

Nor has the SEC's rule helped to advance these traceability schemes, as amici suggest. To the contrary, the "spread of such practices is challenged by the final SEC rule." *OECD Report* 59. Because "[t]he SEC Rule creates a disincentive to source minerals from the DRC and its nine neighboring countries" even when those minerals are "conflict-free," *id.*, "as a consequence of section 1502 ... many companies simply ceased purchasing minerals from the [DRC] region" entirely, *U.N. Report* ¶170. Finally, there is no indication that the rule has reduced funding to armed groups. Rather, "most armed groups have shifted to exploiting gold, which is easier to smuggle, has a high value per volume," *id.* ¶152, and is largely sold to non-U.S.

markets such as the United Arab Emirates, *id.* ¶¶159-160. Overall, the evidence indicates that the rule continues to drive a *de facto* embargo and "has had a significant adverse effect on innocent bystanders in the DRC." *House Testimony* 2.

F. The Commission's Errors Require Vacatur.

The deep deficiencies in the Commission's analysis and statutory interpretation require vacatur, particularly given the rule's enormous compliance costs. *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). Indeed, the Commission does not dispute that vacatur is appropriate if the Court reverses, and states only that "the appropriate remedy is assessed on a case-by-case basis." Br. 66.

II. SECTION 1502 AND THE RULE VIOLATE THE FIRST AMENDMENT.

The SEC contends that rational basis review applies to the question whether Section 1502 and the rule unconstitutionally compel speech, arguing that "the Supreme Court has applied heightened scrutiny to regulations requiring disclosures only in limited circumstances, none of which is present here." Br. 59. To the contrary, this Circuit has held that there are only a "handful of 'narrow and well-understood exceptions' to the general rule" that compelled speech is "subject to strict scrutiny." *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012). Compelled "'purely factual and uncontroversial' disclosures are permissible if they are 'reasonably related to the State's interest in preventing deception of consumers.'" *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651

(1985)). But this exception has no application here because, as the SEC conceded below, the purpose of the rule is not to prevent consumer deception. JA909; *see R.J. Reynolds*, 696 F.3d at 1214. When *Zauderer* is inapplicable, the Court applies at least intermediate scrutiny, for instance to compelled disclosures of commercial speech. *R.J. Reynolds*, 696 F.3d at 1212.

The SEC nonetheless argues, relying on several out-of-circuit cases, that rational basis review applies because "Rule 13p-1 requires the 'disclosure of economically significant information designed to forward ordinary regulatory purposes.'" Br. 59. But even if this Court could disregard *R.J. Reynolds*, this regime is nothing like the ordinary disclosure regimes that other courts have upheld under rational basis review. *See, e.g.*, *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (upholding a requirement that pharmacy benefit managers disclose conflicts of interest and certain financial arrangements to their clients); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (upholding a requirement that companies label products as containing mercury). Instead, as the SEC recognized in the release, the rule is intended to promote "social benefits," that are "quite different from the economic or investor protection benefits that our rules ordinarily strive to achieve." JA795.

The SEC contends that the compelled speech is "factual," because it merely requires companies to disclose their determination whether "their products meet the statutory definition of DRC conflict free or do not." Br. 60. But the statutory

definition of "DRC conflict free" is itself pregnant with political judgments: A product is defined as "DRC conflict free" if it "do[es] not contain conflict minerals that directly or indirectly finance or benefit armed groups" in the DRC region that are "perpetrators of serious human rights abuses." Section 1502(e)(3); 15 U.S.C. §78m(p)(1)(A)(ii), 78m(p)(5). The SEC's contention that "the required disclosure involves no statement about human rights abuses" is therefore simply incorrect. Br. 60 n.23. In effect, companies are being compelled to state that their products are not "human rights abuse free." Moreover, the compelled speech will mislead consumers because it lumps together companies that "directly or indirectly finance or benefit armed groups" with those who have no connection at all with the groups but cannot confirm that their vast web of suppliers and sub-suppliers are "conflict-free." JA244-46.

Relying on *Meese v. Keene*, 481 U.S. 465 (1987), the SEC argues that "the Supreme Court has rejected appellants' argument that the potential for 'stigma' requires heightened scrutiny." Br. 60. But *Meese* was not a compelled speech case: The *government* characterized the communications at issue as "political propaganda," but did not require any private party to do so. 481 U.S. at 467. Furthermore, contrary to the SEC's argument, the compelled speech here does "alter[] the speaker's pre-existing message," Br. 61, as companies must make this speech on their own websites, affecting their pre-existing messages about their products, their brands, and, frequently, their views on corporate social responsibility.

Intervenors—but not the SEC—additionally argue for a relaxed standard of review on the basis that Section 1502 regulates securities. Intervenors Br. 29-32. But Section 1502 does not regulate "speech employed directly or indirectly to sell securities." *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988). Instead, as the SEC itself recognizes, Section 1502 is intended to achieve "social benefits" rather than "economic or investor protection benefits." JA795. If the relaxed *Wall Street Publishing* standard could apply here, then Congress could evade First Amendment scrutiny for *any* speech restrictions on public companies, no matter how far removed from the traditional domain of the securities laws, and no matter how misleading, simply by codifying them in title 15 of the United States Code.

Finally, the SEC and Intervenors argue that even if heightened scrutiny applies, Section 1502 and the rule satisfy that standard. However, they point to nothing to justify the government's decision to impose a "scarlet letter," *Gallagher Dissent*, JA710, forcing companies to denounce their own products on their own websites in language chosen by the government. The SEC's bare assertion that the government's chosen method "is a more effective means," Br. 65, is clearly inadequate to show that the statute and rule will directly advance the government's intended goals and are not more extensive than necessary. *R.J. Reynolds*, 696 F.3d at 1212, 1217. Requiring a company to publicly condemn itself is undoubtedly a more "effective" way for the government to stigmatize and shape behavior than for the government to have to

convey its views itself, but that makes the requirement more constitutionally offensive, not less so.

CONCLUSION

For the foregoing reasons, Appellants request that the district court's judgment be reversed.

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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 6,999 words exclusive of the table of contents, table of authorities, glossary, signature lines, and certificates of service and compliance. The words of the Reply Brief of Appellants do not exceed 7,000 words, as mandated by Fed. R. App. P. 32(a)(7)(B)(ii). The undersigned used Microsoft Word 2007 to compute the count.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2013, I electronically filed the foregoing Reply Brief of Appellants with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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