ARGUED JAN. 7, 2014 DECIDED APR. 14, 2014

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and BUSINESS ROUNDTABLE, Appellants, vs. SECURITIES AND EXCHANGE COMMISSION, Appellee, AMNESTY INTERNATIONAL USA, and AMNESTY INTERNATIONAL LTD., Intervenor-Appellees.	Case No. 13-5252

APPELLANTS' EMERGENCY MOTION FOR STAY OF THE SEC'S CONFLICT MINERALS RULE

(RULING REQUESTED BY MAY 26, 2014)

CERTIFICATE AS TO PARTIES

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

Appellants

National Association of Manufacturers

Chamber of Commerce of the United States of America

Business Roundtable

Amici for Appellants

Professor Marcia Narine; Ambassador Jendayi Frazer; Dr. J. Peter Pham

American Coatings Association, Inc.; American Chemistry Council; Can Manufacturers Institute; Consumer Specialty Products Association; National Retail Federation; Precision Machined Products Association; The Society of the Plastics Industry, Inc.

Appellee

United States Securities and Exchange Commission

Intervenors for Appellee

Amnesty International USA

Amnesty International Ltd.

Amici for Appellee

Better Markets, Inc.

Senator Barbara Boxer, Senator Dick Durbin, Russ Feingold, Howard Berman, Congressman Wm. Lacy Clay, Congressman Keith Ellison, Congressman Raul Grijalva, Congressman John Lewis, Congressman Ed Markey, Congressman Jim McDermott, Congresswoman Gwen Moore, Congresswoman Maxine Waters

Global Witness Limited; Fred Robarts; Gregory Mthembu-Salter

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit 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 $7.4 trillion in annual revenues and more than 16 million employees. BRT member companies comprise more than a third of the

total value of the U.S. stock market and invest $158 billion annually in research and development—equal to 62 percent of U.S. private R&D spending. BRT companies pay more than $200 billion in dividends to shareholders and generate more than $540 billion in sales for small and medium-sized businesses annually. BRT companies give more than $9 billion a year in combined charitable contributions. BRT has no parent corporation, and no publicly held company has 10% or greater ownership in BRT.

REQUEST FOR EXPEDITION

Pursuant to D.C. Circuit Rule 27(f), Appellants request the Court's expedited action on this motion. A decision is needed by May 26, 2014.

On April 14, 2014, this Court struck down as unconstitutional the disclosure requirements of the Securities and Exchange Commission's Conflict Minerals Rule, 77 Fed. Reg. 56,274 (Sept. 12, 2012), codified at 17 C.F.R. §§ 240.13p-1, 249b.400(B), and remanded the case to the district court. The earliest date on which the Court's mandate is likely to issue, however, is June 5, 2014, three days *after* the filing deadline for Form SD and accompanying reports required by the rule. As set forth below, Appellants and their members will suffer irreparable injury in the form of extraordinary and unrecoverable expenditures as well as unresolvable legal uncertainty about the rule's requirements by being compelled to comply with the rule prior to action by the district court on remand.

Accordingly, Appellants propose that opposition briefs be due on Friday, May 9, and the reply brief be due on Tuesday, May 13. The Appellees do not object to this schedule.

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INTRODUCTION

The cornerstone of the Securities and Exchange Commission's ("the Commission" or "SEC") Conflict Minerals Rule, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240.13p-1, 249b.400(B)), is the provision that "compel[s] an issuer to confess blood on its hands," Slip Op. at 20. Certain issuers must declare that their products have not been found to be "DRC conflict free," and thus finance or benefit human rights abuses in the Democratic Republic of the Congo. 17 C.F.R. § 249b.400(F)(1)(d)(4). This requirement, which is the premise of the entire Rule, violates the First Amendment, as this Court held. *See* Slip Op. at 20-23.

Without the compelled confession, the current rule makes little sense as presently designed. It no longer "create[s] incentives" by shaming companies, 77 Fed. Reg. at 56,323, and it no longer "'enhances transparency'" by purportedly informing the public whether an issuer sourced minerals from armed groups in the DRC, *id.* at 56,276 (citation omitted). The remainder of the Rule's disclosure requirements do *not* provide this information. These requirements force disclosure of due diligence procedures, products, processing facilities, country of origin, and efforts to determine the mine or location of origin of the minerals. *Id.* at 56,363-34. But such information—standing alone—does not tell consumers or investors whether the issuer's products include minerals that directly or indirectly financed or benefitted armed groups, especially since control over individual mines in the DRC is constantly

changing, *see State Dep't Map,* JA680; JA694. As the rule was originally designed, the disclosure of the bottom-line information—whether the minerals came from mines controlled by armed groups—rested solely in the sloganistic language that the Court has held cannot be compelled.

The Commission previously recognized the central significance of the compelled confession. In the preamble, the Commission stated that "the overall goals" of the statute would be "undermine[d]" if the current Rule did not require companies to state whether their products have been found to be "DRC conflict free." 77 Fed. Reg. at 56,323. The Commission thus understood that the entire basis for imposing astronomical costs on U.S. issuers rested on the compelled disclosure that issuers might be funding the conflict in the DRC.

Under settled principles of administrative law, the next steps are clear once the mandate issues and this Court remands. First, the district court should vacate the rule because "unsupported agency action normally warrants vacatur," *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005), and vacatur is plainly necessary given "the seriousness of the rule's deficiencies," *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (alteration omitted)—a constitutional violation lying at the very heart of the rule.

Second, after vacatur of the current rule, the Commission should conduct notice-and-comment rulemaking, so it can decide in a procedurally appropriate way what provisions a new rule should include. *See, e.g.*, *Nat'l Family Planning & Reprod.*

Health Ass'n v. Sullivan, 979 F.2d 227, 235 (D.C. Cir. 1992) ("It is a maxim of administrative law that . . . an amendment to a legislative rule must itself be legislative."). Both the Court and Appellants have laid out options for the Commission to consider, including the government providing a "list of products that it believes are affiliated with the Congo war," Slip Op. at 22, and the Commission and commenters can consider those options (and others) in notice-and-comment rulemaking.

This is what the law requires, but the SEC has chosen a different course. Without notice and comment rulemaking, SEC staff issued a "Statement" on April 29, 2014, indicating that "[p]ending further action" it would suspend or alter some requirements imposed by the Rule, namely the unconstitutional confession provision and the audit requirement, but would enforce the remainder of the rule as originally written, *see* Keith F. Higgins, *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule* (Apr. 29, 2014) (Attachment A), even though that rermainder, standing alone, no longer serves "the overall goals" of the statute. Staff also indicated there might be "additional guidance" in the future. *Id.* On May 2, the Commission then issued a partial stay order. *See* Order Issuing Stay (May 2, 2014) (Attachment B). The Commission stayed only "those portions of Rule 13p-1 and

Form SD that would require the statements by issuers that the Court of Appeals held would violate the First Amendment." *Id.* at 1-2.[1]

Because of the agency's decision to enforce a tremendously costly rule that no longer achieves the statute's goals and that will likely be vacated, Appellants respectfully seek a temporary stay of the Rule until the district court's decision on remand regarding the appropriate remedy. As two Commissioners have stated, "the entirety of the rule should be stayed, and no further regulatory obligations should be imposed, pending the outcome of this litigation." Commissioners Daniel M. Gallagher & Michael S. Piwowar, *Joint Statement on the Conflict Minerals Decision* (Apr. 28, 2014) (Attachment C). At the very least, the June 2, 2014 reporting deadline should be stayed.

First, Appellants have a substantial likelihood of success on the merits. Under well-established case law, vacatur is the "normal[]" remedy given "the seriousness of the rule's deficiencies." *Advocates for Highway & Auto Safety*, 429 F.3d at 1151; *Comcast Corp.*, 579 F.3d at 8. The central disclosure requirement of the Rule is unconstitutional, and the remaining disclosure information that the SEC is continuing to require was designed on the assumption it would support and explain that central disclosure, and serves no purpose standing alone. It may well be that a new rule can

[1] The Commission did not expressly stay the auditing requirement, presumably allowing the Staff to revise its guidance and re-impose that requirement in the future at its discretion.

be crafted consistent with the Court's holding that will still serve the statute's purposes, but the current rule, hastily reconstructed without notice-and-comment rulemaking, plainly does not do that.

Second, the harm from enforcing the SEC staff's reconstructed rule is irreparable. The Commission estimated that the rule would cost issuers $3 to $4 billion for initial compliance, plus $200 to $600 million annually thereafter. That is money that cannot be returned, and as "numerous courts have held . . . , the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013). By staying the rule, or at least the reporting deadline, the Court will enable an orderly and thorough process of responding to the Court's decision on the merits, without forcing companies to comply with a moving target, "[p]ending further action" and SEC staff's desire to "provide additional guidance in advance of the due date."

Finally, the balance of hardships and public interest confirm a stay is warranted. The SEC has no legitimate interest in enforcing an invalid rule that no longer serves "the overall goals" of the statute and that will soon be vacated and remanded. Nor does the public. "Marching ahead with some portion of the rule that might ultimately be invalidated is a waste of the Commission's time and resources . . . and a waste of vast sums of shareholder money." Gallagher & Piwowar, *Joint Statement on the Conflict Minerals Decision*. This Court should enter a stay.

BACKGROUND

On April 14, 2014, this Court held that "15 U.S.C. § 78m(p)(1)(A)(ii) & (E), and the Commission's final rule 56 Fed. Reg. at 56,362-65, violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be DRC conflict free.'" Slip Op. at 23. The Court rejected Appellants' other challenges to the rule, and remanded the case to the district court for "further proceedings consistent with this opinion." *Id.* The earliest date on which the Court's mandate is likely to issue is June 5, 2014, three days *after* the filing deadline for Form SD and accompanying reports.

On April 28, 2014, two of the Commission's five members issued a joint statement calling on the rest of the Commission to stay "the entirety of the rule . . . pending the outcome of this litigation." Gallagher & Piwowar, *Joint Statement on the Conflict Minerals Decision* (Attachment C). Commissioners Gallagher and Piwowar concluded that a "limited modification to our rule eliminating the requirement to declare certain products as 'not DRC conflict free' would fail to fully address the First Amendment violation" and that "even assuming that the due diligence disclosures standing alone do not implicate First Amendment concerns, we believe that the 'name and shame' approach is at the heart of not only the Commission's rule, but of Section 1502 of the Dodd-Frank Act itself." *Id.*

On April 29, 2014, as contemplated by Fed. R. App. P. 18(a)(1) and Circuit

Rule 18(a)(1), Appellants filed a motion for a stay with the Commission. Subsequently, SEC Staff issued a brief "Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule" from Keith F. Higgins, the Director of the Commission's Division of Corporation Finance. That Statement indicated that Staff expects issuers to file Form SD and the accompanying reports by the June 2, 2014 deadline, but that "[n]o company is required to describe its products as 'DRC conflict free,' having 'not been found to be "DRC conflict free,"' or 'DRC conflict undeterminable."' Attachment A. Staff also stated that "[p]ending further action, an [independent private sector audit] will not be required unless a company voluntarily elects to describe a product as 'DRC conflict free' in its Conflict Minerals Report." *Id.* The statement left open the possibility that the Commission might elect to "provide additional guidance in advance of the filing due date." *Id.*

On May 2, 2014, the Commission issued an order denying Appellant's motion for a stay, and staying only "those portions of Rule 13p-1 and Form SD that would require the statements by issuers that the Court of Appeals held would violate the First Amendment." Attachment B. The order contained no analysis and did not address any of Appellants' arguments in support of a stay. Nor did it explain how the remainder of the disclosure requirements, without the confession, would inform the public which issuers might be selling products that contain minerals financing armed conflict. Finally, the Commission did not even attempt to justify the enforcement of a truncated Rule that no longer serves any of "the overall goals" of the statute.

Appellants now seek a stay from this Court.[2]

STANDARD OF REVIEW

"The usual role" of a stay "is to preserve the status quo pending the outcome of litigation." *Cobell v. Kempthorne*, 455 F.3d 301, 314 (D.C. Cir. 2006). Interim relief is necessary when a "reviewing court must bring considered judgment to bear on the matter before it, but that cannot . . . be done quickly enough to afford relief to the party aggrieved by the order under review. The choice for a reviewing court should not be between justice on the fly or participation in what may be an idle ceremony." *Nken v. Holder*, 556 U.S. 418, 427 (2009).

The Court considers four factors in determining whether to grant a stay: (1) the likelihood of success on the merits; (2) the threat of irreparable injury to the movant if a stay is not granted; (3) whether a stay would substantially harm other parties; and (4) the public interest. *Va. Petroleum Jobbers v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also* D.C. Cir. Rule 18(a)(1). "In this circuit, it remains an open question whether the 'likelihood of success' factor is 'an independent, free-standing requirement,' or whether, in cases where the other three factors strongly favor issuing an injunction, a plaintiff need only raise a 'serious legal question' on the merits."

[2] Because the mandate has not issued and time is of the essence, Appellants have not sought a stay from the district court before seeking a stay from this Court.

Aamer v. Obama, 742 F.3d 1023, 1043 (D.C. Cir. 2014). A stay should issue under either standard.

ARGUMENT

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS OF THE QUESTION WHETHER THE RULE SHOULD BE VACATED.

As Appellants argued in their merits briefs, an "unsupported agency action normally warrants vacatur." *Advocates for Highway & Auto Safety*, 429 F.3d at 1151; *see also NRDC v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (Randolph, J., concurring) ("I have long believed that the law requires us to vacate the unlawful agency rule"). There is no reason to believe that the district court will depart from that ordinary practice here. Vacatur is plainly necessary given "the seriousness of the rule's deficiencies," *Comcast Corp.*, 579 F.3d at 8 (alteration omitted), which lie at the very heart of the rule.

Moreover, this Court has often recognized that when there is a "need for wholesale revision on remand" of agency rules, "the appropriate course is to vacate the Rules in their entirety." *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007). "Severance and affirmance of a portion of an administrative regulation is improper if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013) (internal quotation marks and citation omitted); *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008) ("Unfortunately, we cannot pick and choose

portions of CAIR to preserve."). "Whether the offending portion of a regulation is severable depends upon the intent of the agency *and upon whether the remainder of the regulation could function sensibly without the stricken provision*." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) (emphasis added); *see also Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993).

Here, there is "substantial doubt" that the agency that issued the original rule would have kept the rest of the regulation in its current form, and, in any event, the remainder would not "function sensibly without the stricken provision." Indeed, the unconstitutional provision "compelling an issuer to confess blood on its hands," Slip Op. at 20, was the entire premise of the rule. As Commissioners Gallagher and Piwowar have explained, "it is the listing of products—the apotheosis of the diligence process—that is central to the rule." Gallagher & Piwowar, *Joint Statement on the Conflict Minerals Decision*.

In adopting the rule, the Commission expressly shared this view. The preamble emphasized that this disclosure requirement was key to "the overall goals of Section 1502." 77 Fed. Reg. at 56,323. Indeed, the provision was so critical to the Rule that the SEC expressly rejected a commenter's request that it be allowed to state after the phase-in period that its minerals were merely "DRC conflict undeterminable." According to the Commission, even allowing this modified statement in lieu of the more defamatory "not been found to be DRC conflict free" would "undermine" Congress's goals. *Id.*

The Commission expected its scarlet-letter provision to "create incentives" for issuers to identify the sources of their minerals. *Id.* The Commission and its supporters hoped that, by forcing companies to bear the scarlet letter, they would source their minerals differently. *See, e.g.*, JA 70, 85 (statement of The Enough Project); JA 103 (statement of Sen. Richard J. Durbin and Rep. Jim McDermott). In addition, the Commission asserted that disclosure would "'enhance[] transparency'" and inform the public whether an issuer sourced minerals from armed groups in the DRC, 77 Fed. Reg. at 56276 (citation omitted). After reading the issuer's compelled statement, consumer and investors would purportedly know which companies and their suppliers sourced from "conflict free" mines and which ones did not.

Without the forced confession that a company has "blood on its hands," Slip Op. at 20, however, the remainder of the Rule does not provide this information. The Rule requires issuers to disclose their due diligence procedures, a description of their products, the processing facilities, the country of origin, and the efforts to determine the mine or location of origin of the minerals. 77 Fed. Reg. at 56,363-34. But such information—standing alone—does not tell consumers or investors whether the issuer's products came from mines *financing or benefitting armed groups*. Even if an issuer were to report that its minerals originated from mine X in the DRC, that information, without more, does not tell the public whether the issuer, through its supply chain, indirectly helped finance or benefit an armed group in the DRC. To reach that conclusion, the public would first have to know whether an armed group

controlled mine X and, more specifically, that it controlled mine X at whatever point in time the minerals in the issuer's products were extracted from that mine (which is not required to be disclosed). *See State Dep't Map*, JA680 ("The situation on the ground is in flux."); JA694. The current Rule provides no mechanism for supplying this information to public, and without this information (or the unconstitutional scarlet letter), the Rule does not serve "the overall goals" of the statute.

"What is left [of the Rule] makes little sense." *See* Melissa J. Anderson, *Conflict Minerals Ruling Puts Boards in Limbo*, Agenda (Apr. 28, 2014) (statement of Paul Atkins, former SEC Commissioner); *see also* Press Release, Global Witness, *U.S. Appeals Court ruling on conflict minerals law is a partial victory, says Global Witness: Court's decision on free speech violation disappointing* (Apr. 15, 2014) (statement of Corinna Gilfillan, head of U.S. office of Global Witness, that the invalidated language in the disclosure requirement is "critical" for "investors and consumers seeking to assess due diligence carried out by companies whose purchases may have fuelled human rights abuses and conflict"). This alone justifies vacatur and a new round of notice-and-comment rulemaking. On remand, the Commission can assess whether there are other ways to make the Rule "function[s] sensibly." It can, for instance, consider the alternatives suggested by this Court and Appellants, including that the government itself provide information linking issuers or products to the Congo war. Slip Op. at 22. The Commission has options, but it may not simply shave off the unconstitutional premise of the Rule and, without notice or comment, declare that the remainder, which does not serve "the

overall goals" of the statute (or any other discernible policy goals), nonetheless survives.

Moreover, the remainder of the Rule was not designed to function without the unconstitutional confession. By its terms, the Rule requires issues to disclose "a description of [its] products, the facilities used to process the necessary conflict minerals in those products, the country of origin of the necessary conflict minerals in those products, and the efforts to determined the mine or location of origin with the greatest possible specificity"—*only if* those products "have not been found to be 'DRC conflict free.'" *See* 77 Fed. Reg. at 56,364; *see also id.* at 56,363 (requiring certain actions only if product are "'DRC conflict undeterminable'"). Thus, the trigger for disclosing information about products, facilities, and supply-chain sources, *id.* at 56,364, *is* the unconstitutional confession. The Rule did not contemplate such disclosures without the forced confession, and for good reason: Without the forced confession, the current disclosures are worthless, as they fail to link the conflict minerals in products to the armed groups.

Finally, vacatur is the appropriate remedy—and thus Appellants are likely to succeed on the merits of the remedy question—because the Court's opinion raises a host of issues that need to be carefully considered in notice-and-comment rulemaking before imposing enormous, unprecedented costs on industry. Before proceeding, the Commission will have to reinterpret the statute and assess the scope of the Commission's discretion to craft a disclosure that comports with both the statute and

the First Amendment. The district court and Commission will also have to determine whether the existing disclosure requirement is compelled by the statute. *See* Slip Op. at 23 n.14 (raising issue whether unconstitutional disclosure "arise[s] as a result of the Commission's discretionary choices" or "of the statute itself"). If so, the Commission must determine whether it is severable from the remainder of the statute. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently.").

If the disclosure is not compelled by the statute, the Commission will have to determine what type of disclosure should replace the unconstitutional requirement, and whether the changes to the disclosure requirement will necessitate corresponding changes to the rule's diligence requirements as well. Further, the Commission will have to re-analyze the costs and benefits of the rule in light of these changes. All of these issues will need to be considered through further litigation proceedings and notice-and-comment rulemaking. The questions cannot be assumed away through *ipse dixit*, as the Commission chose to do by carving up its rule and in denying Appellants' stay request.

II. APPELLANTS WILL SUFFER IRREPARABLE HARM ABSENT A STAY.

Movants will be irreparably harmed without a stay. Courts have recognized that irreparable harm includes economic harm in suits against the government where

sovereign immunity bars any remedy. *See Odebrecht Const.,* 715 F.3d at 1289 ("[N]umerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable."); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010) (same); *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) ("Because the Eleventh Amendment bars a legal remedy in damages ... plaintiffs' injury was irreparable.").

Here, the Commission estimated that the rule would cost issuers $3 to $4 billion for initial compliance, plus $200 to $600 million annually thereafter. 77 Fed. Reg. at 56,334. While issuers have already expended large sums attempting to comply with the rule, many issuers would have to spend substantial additional funds conducting due diligence and drafting, finalizing, and filing their reports. *See* Anderson, *Conflict Minerals Ruling Puts Boards in Limbo* (citing a survey estimating that 90% of affected issuers "still have significant work to do" on their due diligence and conflict minerals reports).

Further, denying a stay would only generate confusion. Recognizing that the Rule no longer functions on its own, SEC Staff issued a statement, suspending all requirements "pending further action" that issuers state whether their products are conflict free or underterminable, and altering the obligation that companies obtain an independent audit. These *ad hoc* modifications, however, adopted without notice-and-comment rulemaking, are subject to change at any time. The Staff Statement and the

Commission's Stay Order even forewarned that the Staff might choose to provide "additional guidance in advance of the filing due date." Higgins, *Statement on the Effect of the Recent Court of Appeals Decision on the Conflict Minerals Rule*; *see also* Stay Order at 2 ("For more detailed guidance regarding compliance, issuers should refer to the statement issued by the staff on April 29, 2014, and any further guidance subsequently provided.").

What that guidance might say, nobody knows. Moreover, no mere "guidance" could absolve issuers of the prospect of civil liability, which the Commission previously created by requiring by Rule that the Form SD and related reports be filed. *See* 77 Fed. Reg. at 56, 348 ("Requiring covered issuers to file, instead of furnish, their Conflict Minerals Reports gives investors the ability to bring suit if issuers fail to comply with the new disclosure requirements.").

III. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR A STAY.

Finally, the balance of equities and the public interest both favor a stay of the rule. Neither the SEC nor the public has an interest in the temporary enforcement of a rule that no longer serves the statute's or the Commission's original goals, and that must be vacated and remanded. As two Commissioners have explained, "[m]arching ahead with some portion of the rule that might ultimately be invalidated is a waste of the Commission's time and resources . . . and a waste of vast sums of shareholder money." Gallagher & Piwowar, *Joint Statement on the Conflict Minerals Decision*.

Enforcing a reconstructed portion of the rule, revised through a Staff statement, would also violate the Administrative Procedure Act, which requires notice and comment rulemaking before regulations are amended. *See, e.g.*, *Nat'l Family Planning & Reprod. Health Ass'n, Inc.*, 979 F.2d at 235.

Moreover, denying a stay and allowing the Commission to go forward with its hastily reconstructed rule—that no longer "create[s] incentives" or "enhances transparency"—provides no benefit to consumers, investors, or the DRC (even assuming the Rule ever did). Indeed, all interested parties would be better off if the Commission hit the pause button, engaged in notice-and-comment rulemaking, considered the options proposed by this Court and Appellants, and designed a more sensible rule that survives constitutional scrutiny.

Finally, granting a stay would not impose "disruptive consequences" that sometimes counsel against vacating a rule. *Allied–Signal*, 988 F.2d at 150. Companies have not yet filed disclosures, so there is still time to revise compliance programs to address what new requirements emerge should the district court determine on remand that the Commission still has the authority to promulgate a new rule. By contrast, denying a stay is incredibly disruptive, forcing companies to implement an interim procedure for filing truncated reports under unilateral staff guidance that is subject to change at any time.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Conflict Minerals Rule, or at the least the Rule's June 2, 2014 reporting deadline, be stayed until the district court has addressed the Court's remand order and ordered an appropriate remedy.

Dated: May 5, 2014

Respectfully submitted,

/s/ Peter D. Keisler

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2014, I electronically filed the foregoing Appellant's Emergency Motion for Stay of the SEC's Conflict Minerals Rule with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Peter D. Keisler
Peter D. Keisler

Attachment A

Keith F. Higgins
Director, SEC Division of Corporation Finance

April 29, 2014

On April 14, 2014, the United States Court of Appeals for the District of Columbia Circuit issued a decision in *National Association of Manufacturers, et al. v. SEC, et al.*, No. 13-5252 (D.C. Cir. April 14, 2014). That case involved a challenge to Exchange Act Rule 13p-1 and Form SD.[1] Rule 13p-1 and Form SD were adopted pursuant to Exchange Act Section 13(p), which was added by Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. [2] The Court of Appeals rejected all of the challenges to the rule based on the Administrative Procedure Act and the Securities Exchange Act of 1934. The Court, however, concluded that Section 13(p)(1) and Rule 13p-1 "violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be "DRC conflict free."'"[3] In so concluding, the Court specifically noted that there was no "First Amendment objection to any other aspect of the conflict minerals report or required disclosures."[4] In an order issued concurrently with the decision, the Court of Appeals withheld the issuance of its mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. As a result, the earliest date on which the Court's mandate is likely to issue is June 5, 2014. Under Rule 13p-1, the first reports are due to be filed on June 2, 2014.

Subject to the guidance below and any further action that may be taken either by the Commission or a court, the Division expects companies to file any reports required under Rule 13p-1 on or before the due date. The Form SD, and any related Conflict Minerals Report, should comply with and address those portions of Rule 13p-1 and Form SD that the Court upheld. Thus, companies that do not need to file a Conflict Minerals Report should disclose their reasonable country of origin inquiry and briefly describe the inquiry they undertook. For those companies that are required to file a Conflict Minerals Report, the report should include a description of the due diligence that the company undertook. If the company has products that fall within the scope of Items 1.01(c)(2) or 1.01(c)(2)(i) of Form SD, it would not have to identify the products as "DRC conflict undeterminable" or "not found to be 'DRC conflict free,'" but should disclose, for those products, the facilities used to produce the conflict minerals, the country of origin of the minerals and the efforts to determine the mine or location of origin.

No company is required to describe its products as "DRC conflict free," having "not been found to be 'DRC conflict free,'" or "DRC conflict undeterminable." If a company voluntarily elects to describe any of its products as "DRC conflict free" in its Conflict Minerals Report, it would be permitted to do so provided it had obtained an independent private sector audit (IPSA) as required by the rule.[5] Pending further action, an IPSA will not be required unless a company voluntarily elects to describe a product as "DRC conflict free" in its Conflict Minerals Report.

The Division will consider the need to provide additional guidance in advance of the filing due date. Companies with questions about the content of the Form SD and Conflict Minerals Report should contact the Office of Rulemaking in the Division of Corporation Finance at (202) 551-3430.

[1] *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).

[2] PL 111-203, 124 Stat. 1376, 2213 (2010).

[3] Slip Op. at 23.

[4] Slip Op. at 17 n.8.

[5] FAQ #15 at http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm.

Attachment B

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72079 / May 2, 2014

File No. S7-40-10

In the Matter of Exchange Act Rule 13p-1 and Form SD	)	**ORDER ISSUING STAY**

On April 14, 2014, the United States Court of Appeals for the District of Columbia Circuit issued a decision in National Association of Manufacturers, et al. v. SEC, et al., No. 13-5252 (D.C. Cir. April 14, 2014). That case involved a challenge to Exchange Act Rule 13p-1 and Form SD.[1] The rule and form were adopted pursuant to Section 13(p) of the Securities Exchange Act of 1934, which was added by Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[2] The Court of Appeals rejected all of the challenges to the rule based on the Administrative Procedure Act and the Exchange Act. The Court of Appeals, however, concluded that Section 13(p) and Rule 13p-1 "violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be "DRC conflict free."'"[3] In so concluding, the Court of Appeals specifically noted that there was no "First Amendment objection to any other aspect of the conflict minerals report or required disclosures."[4] In an order issued concurrently with the decision, the Court of Appeals withheld the issuance of its mandate until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. As a result, the earliest date on which the Court of Appeals's mandate is likely to issue is June 5, 2014. Under Rule 13p-1, the first reports are due to be filed on June 2, 2014.

Section 705 of the Administrative Procedure Act provides that an agency may postpone the effective date of an action taken by it pending judicial review when it finds that "justice so requires." 5 U.S.C. 705. In light of the Court of Appeals's decision, the Commission finds that it is consistent with what justice requires to stay the effective date for compliance with those portions of Rule 13p-1 and Form SD that would require the

[1] Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§ 240, 249b).

[2] PL 111-203, 124 Stat. 1376, 2213 (2010).

[3] Slip. Op. at 23.

[4] Slip. Op. at 17 n.8.

statements by issuers that the Court of Appeals held would violate the First Amendment. Among other things, a stay of those portions of the rule avoids the risk of First Amendment harm pending further proceedings. Moreover, limiting the stay to those portions of the rule requiring the disclosures that the Court of Appeals held would impinge on issuers' First Amendment rights furthers the public's interest in having issuers comply with the remainder of the rule, which was mandated by Congress in Section 1502 and upheld by the Court of Appeals.

Accordingly, it is ORDERED, pursuant to Section 705 of the Administrative Procedure Act, that the effective date for compliance with those portions of Rule 13p-1 and Form SD subject to the Court of Appeals's constitutional holding are hereby stayed pending the completion of judicial review, at which point the stay will terminate. For more detailed guidance regarding compliance, issuers should refer to the statement issued by the staff on April 29, 2014, and any further guidance subsequently provided.[5]

By the Commission.

Kevin M. O'Neill
Deputy Secretary

[5] On April 30, 2014, the National Association of Manufacturers, the Chamber of Commerce, and Business Roundtable filed a motion requesting that the Commission stay Rule 13p-1 in its entirety. In accordance with the above order, the motion is denied.

Attachment C

Commissioners Daniel M. Gallagher and Michael S. Piwowar

April 28, 2014

On April 14, 2014, the D.C. Circuit decided that requiring issuers to describe certain of their products as not DRC conflict free violated the First Amendment.[1] It remanded the case to the district court to determine how much of the Commission's conflict minerals rule is therefore unconstitutional. We believe that the entirety of the rule should be stayed, and no further regulatory obligations should be imposed, pending the outcome of this litigation. Indeed, a stay should have been granted when the litigation commenced in 2012.

A full stay is essential because the district court could (and, in our view, should) determine that the entire rule is invalid.

First, the First Amendment concerns permeate all the required disclosures, not just the listing of products that have not been determined to be DRC conflict free. As the D.C. Circuit noted, an issuer is required "to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups."[2] A limited modification to our rule eliminating the requirement to declare certain products as "not DRC conflict free" would fail to fully address the First Amendment violation. For example, the fact that an issuer would still be required to include a description of its due diligence procedures in its reports would suggest that the issuer may have "blood on its hands" for its products since it is sourcing certain minerals from the DRC. Moreover, current staff guidance restricts an issuer from stating that its products are not indirectly financing or benefiting armed groups in the DRC in the absence of a costly independent private sector audit report.[3]

Second, even assuming that the due diligence disclosures standing alone do not implicate First Amendment concerns, we believe that the "name and shame" approach is at the heart of not only the Commission's rule, but of Section 1502 of the Dodd-Frank Act itself. The disclosures about the due diligence process are not themselves sufficient to achieve the benefits that Congress sought to advance. Rather, it is the listing of products—the apotheosis of the diligence process—that is central to the rule. Thus, disclosures about the due diligence process should not be seen as severable from the unconstitutional scarlet letter of not DRC conflict free.

A finding that the entire rule is invalid, and that the invalidity is rooted in the statute, would permit Congress to reconsider whether Section 1502 achieves the benefits that it was supposed to attain. Unfortunately, the evidence is that it has been profoundly counterproductive, resulting in a de facto embargo on Congolese tin, tantalum, tungsten, and gold, thereby impoverishing approximately a million legitimate miners who cannot sell their products up the supply chain to U.S. companies.[4] Reconsidering Section 1502's core approach would also save investors billions of dollars in compliance costs,[5] and ease the problem of information overload by eliminating special interest disclosures that are immaterial to investment decisions.

Perhaps the District Court will not ultimately agree with us, and will permit some portion of the Commission's rule to continue in force. But given the uncertainty, the wisest course of action would be for the Commission to stay the effectiveness of the entire rule until the litigation has concluded. Marching ahead with some portion of the rule that might ultimately be invalidated is a waste of the Commission's time and resources—far too much of which have been spent on this rule already—and a waste of vast sums of shareholder money. A full stay of the effective and compliance dates of the conflict minerals rule would not fix the damage this rule has already caused, but it would at least stanch some of the bleeding.

[1] Nat'l Ass'n of Mfgrs v. SEC, No. 13-5252 (D.C. Cir. Apr. 14, 2014).

[2] Id. at 20.

[3] Division of Corporation Finance, Frequently Asked Questions on Conflict Minerals, *available at* http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm (Question 15).

[4] See, e.g., *The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision*, Hearing before the Subcommittee on Monetary Policy and Trade of the U.S. House Committee on Financial Services, No. 113-23 (May 21, 2013).

[5] The Commission estimated compliance costs at $3–4 billion for initial compliance, and $207–609 million per year thereafter. See Rel. 34-67716, *Conflict Minerals* (Aug. 22, 2012) at 302.

Last modified: April 28, 2014