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

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

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

# APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY OF THE SEC'S CONFLICT MINERALS RULE

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page**

## CASES



## STATUTES AND REGULATION



## LEGISLATIVE HISOTRY

## INTRODUCTION

Until last week, the Securities and Exchange Commission ("Commission" or "SEC") had consistently maintained that the scarlet-letter provision "compelling an issuer to confess blood on its hands," Slip Op. at 20, was central to the Conflict Minerals Rule and the underlying statute. 77 Fed. Reg. 56,274, 56,323 (Sept. 12, 2012). Intervenor Amnesty International agreed, *see* Merits Br. of Amnesty Int'l at 35, and so did numerous other supporters of the Rule, *see, e.g.*, JA 85 (Enough Project).

Now that the Court has struck down this requirement as unconstitutional, they have reversed course. No longer is the scarlet-letter provision necessary to "create incentives" and advance "the overall goals" of the statute. *See* 77 Fed. Reg. at 56,276, 56,323. Instead, the forced confession is merely "one piece of the extensive disclosure" and irrelevant to the "sensibl[e]" functioning of the rule. SEC Br. at 1, 9.

The SEC and Amnesty maintain this position even though neither one of them has any response to Appellants' primary argument: Without the forced confession, the current Rule utterly fails to link any issuers to armed groups, which was the *whole reason* for the Rule in the first place. None of the remaining disclosures, individually or in combination, shows which issuers "have blood on their hands," and which are simply obtaining minerals from other, wholly legitimate mines in the region that are not controlled by armed groups. The residual disclosure regime in the current Rule is pointless and fails to serve the Rule's original goals, while requiring extraordinary expenditures by issuers to compile useless reports.

To be sure, there may be ways to fix the Rule. Appellants and the Court have both suggested options, and there are likely others. But one of those options is *not* simply to slice off the centerpiece of the rule, suspend (through Staff "guidance") the audit requirement, and then pretend that the rest of Rule can somehow function on its own. The SEC needs to conduct notice-and-comment rulemaking, and until then, it cannot pick and choose which provisions it will enforce, subject to "further guidance" and without any analysis. Accordingly, this Court should stay or vacate the Rule or at least the June 2 reporting requirement.

## I. Appellants Have A Likelihood Of Success On The Merits Because The Rule Should Be Vacated.

The law is clear that when a part of a regulation is invalidated, the rule must be vacated if it cannot "function sensibly without the stricken provision."[1] *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001). Here, there is no serious dispute that the Rule cannot function sensibly. Not only has the SEC lost the unconstitutional threat of shaming, which was supposed to "create incentives," 77 Fed. Reg. at 56,323, but the current Rule's remaining requirements fail to enable anyone to distinguish between issuers using minerals from mines controlled by armed groups and those using minerals from other mines in the Congo and surrounding

[1] The SEC's argument that vacatur is no longer an option because "the Court did not order vacatur" is unavailing. The Court simply did not address the issue of remedies, and instead remanded to the district court for "further proceedings." Slip Op. at 23.

countries. The SEC and Amnesty do not and cannot dispute this.[2]

Instead, they advance a slew of meritless contentions in an attempt to salvage the remainder of the Rule. First, the SEC now asserts that Congress "mandated" "the balance of the rule's requirements." SEC Br. at 2. But this contention is the exact opposite of what the SEC argued at the merits stage: Congress "deci[ded] not to mandate any solution" and left the Rule's application "to agency discretion." Slip Op. at 12; *see also id.* at 9-10; SEC Merits Br. at 29-30, 38-39, 41.

Second, the SEC maintains that legislative history shows Congress had other goals aside from shedding light on which issuers were financing or benefitting armed groups. *See* SEC Br. at 11 (quoting statement of Sen. Feingold). But the single floor statement on which the SEC relies only undermines the agency's position. Senator Feingold did not say he wanted disclosure requirements for disclosure's sake. Rather, in his view, Section 1502 would "provide information on measures [issuers] have taken to exercise due diligence on the *source* and chain of custody to ensure activities involving such minerals *did not finance or benefit armed groups*." 156 Cong. Rec. S3976 (daily ed. May 19, 2010) (emphasis added). Thus, the whole point of the disclosure

[2] Amnesty, but not the SEC, asserts that the remaining disclosures could inform investors about a company's "'risk exposure'" resulting from sourcing more generally from "the DRC." Amnesty Br. at 10-11 (citation omitted). But any efforts to get issuers to avoid *that* "risk exposure," as opposed to focusing on those particular DRC mines controlled by armed groups, necessarily would entail the *de facto* embargo of the entire region that Congress and humanitarian groups sought to avoid. *See*, *e.g.*, SEC Merits Br. at 18, 51.

and the underlying due diligence was to identify the "source" (*i.e.*, the mine) and the supply chain to help ensure that mineral mining did not "finance or benefit armed groups." *See also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213 (2010) ("It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict . . . ."). Without the forced confession, the current Rule indisputably does not serve that goal.

Citing only itself, the SEC asserts "Congress's purpose was broader than that." Br. at 12. Oddly, however, the quote that follows demonstrates the contrary: "As the Commission explained in adopting the rule, Congress's goals were 'to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict minerals supply chains.' 77 FR 56,275. " *Id.* The reason members of Congress wanted to shed light on the "source" of conflict minerals was not idle curiosity, but to "ensure activities involving such minerals did not finance or benefit armed groups," 156 Cong. Rec. at S3976, and due diligence on supply chains would supposedly serve that end by improving the reliability of that disclosure. *See also* 77 Fed. Reg. at 56,275-76 ("[W]e understand Congress's main purpose to have been to attempt to inhibit the ability of armed groups in the Covered Countries to fund their activities by exploiting the trade in conflict minerals.").

That is precisely why the Commission itself previously recognized that "the overall goals" of the statute would be "undermine[d]" if the current Rule did not

require companies to confess blood on their hands. 77 Fed. Reg. at 56,323. Only the confession requirement connects issuers to conflict. The rest of the Rule does not.

The Commission nonetheless contends that, whereas allowing issuers to use "a permanent 'DRC conflict undeterminable' category" would undermine the current Rule, a permanent prohibition on all forced confessions would not. Br. at 9. Why that is so, the Commission never explains. Instead, it asserts that "it is of course far from certain" that the "absence" of the confession is "permanent." *Id.* at 10. If this is an allusion to a potential *en banc* proceeding, *see also id.* at 8 n.2, it is no basis for denying a temporary stay in the interim. If it is a suggestion that the Commission could ultimately design an alternative rule with different requirements, it is the proverbial cart before the horse. The Commission may well be able to promulgate a lawful rule, which may or may not be a wholesale revision of the current rule, but that new rule would have to be the product of notice-and-comment rulemaking.[3] In any event, a suggestion from appellate counsel of what is "far from certain" is insufficient to salvage the current Rule, which must be vacated and remanded.

Third, the SEC and Amnesty cite the severability language in the Rule. *See, e.g.*,

[3] Appellants are not judicially estopped from arguing that the remaining disclosures in the current Rule are pointless by themselves. *See* Amnesty Br. at 9. Appellants never argued that those disclosures alone advanced Congress's goals. Rather, Appellants simply recognized that Congress's goals could be achieved through alternative means that did not entail coerced confessions. Indeed, the Commission has such options, which it can pursue after notice-and-comment.

SEC Br. at 8-10; Amnesty Br. at 7-8. But, as the SEC acknowledges, "severability of a regulation depends upon the intent of the agency *and* 'whether the remainder of the regulation could function sensibly without the stricken provision.'" SEC Br. at 9 (emphasis added) (quoting *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 22). An agency's intent to sever is not enough; it remains for the Court to determine whether "such intent is rational." *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d at 732, 734 (D.C. Cir. 2001). A rule must be vacated in its entirety if a partial rule does not "sensibly serve the goals for which [the rule] was designed." *Id.* And, as discussed, the SEC's hastily reconstructed rule not only fails to "*sensibly* serve the goals" for which the Rule was designed—it fails to serve those goals *at all.* [4]

[4] Amnesty (but not the SEC) contends that Appellants "waived their severability argument by failing to raise it previously in this Court." Br. at 6. But Amnesty cites no case holding that a plaintiff must argue for non-severability at the merits stage, or that a court must sever in the absence of such an argument. In both of the cases Amnesty cites, the district court did *not* sever, and the appellate court simply held that the defendant waived a challenge to that non-severability decision. *See XO Mo., Inc. v. City of Md. Heights*, 362 F.3d 1023, 1025 (8th Cir., 2004) (defendant failed to raise challenge to non-severability on appeal); *Am. Meat Inst. v. Pridgeon*, 724 F.2d 45, 47 (6th Cir. 1984) (defendant failed to address non-severability in district court until motion to reconsider after injunction issued). Courts often consider severability even if the issue was never briefed at all. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (plurality op.). Indeed, it would not be practical to require a plaintiff who raises multiple challenges to a rule to enumerate in advance which of the many possible combinations of partial success on those challenges would justify not severing the rule. Finally, contrary to Amnesty's assertion (Br. at 6), the fact that Appellants argued that their administrative law challenges to the Rule would, if successful, justify vacatur instead of mere remand, does not somehow implicitly waive any argument regarding non-severability.

In any event, a severability provision is not even conclusive of intent. *See, e.g., Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 442 (D.C. Cir. 1982). And, here, it is apparent the Commission did not view the forced confession as just "one piece of disclosure" that was no "more pivotal than others." SEC Br. at 10. Rather, the Commission viewed the provision as essential to advance "the overall goals" of the statute and also as the trigger for many of the remaining disclosure requirements, including the obligations to disclose information about processing facilities, countries of origin, and efforts to identify the mine. By the Rule's plain terms, these requirements apply only to products "that have not been found to be 'DRC conflict free.'" 77 Fed. Reg. at 56,364; *see also* JA 675 (letter of Sen. Boxer et al.) ("If these minerals cannot be labeled 'conflict-free' as defined under the law, companies must complete additional reporting requirements."). The SEC asserts that Appellants "misunderstand[] the rule," Br. at 13, but the text of the Rule speaks for itself.

Finally, the SEC has no response to the fact that the Court's opinion raises numerous issues that must carefully be considered in notice-and-comment rulemaking, if not before, *see* Merits Br. at 13-14, including whether the unconstitutional disclosure "arise[s] as a result of the Commission's discretionary choices" or "of the statute itself," Slip Op. at 23 n.14; *see also* 15 U.S.C. § 78m(p)(1)(A) (requiring disclosure of "a description of the products . . . *that are not DRC conflict free*") (emphasis added). If it is the statute that compels the confession, the Commission or district court must decide whether the provision mandating disclosure, which is

central to the "overall goals" of the statute, is nonetheless severable. If instead it is the Commission's discretionary choice, the Commission must make new choices, and then decide how those new choices impact the rest of the rule. For example, if the Commission chooses to identify smelters that source from "conflict free" mines, Slip. Op. at 22, it would need to decide whether it still makes sense to impose hundreds of millions of dollars of costs on issuers, when some of those costs might be duplicative of the government's efforts and others might simply no longer be necessary.

As Amnesty recognizes, after "a new rulemaking, companies might well find themselves subject to a different regime for reporting." Amnesty Br. at 15. On this point, Amnesty and Appellants have reached common ground. The provision "compelling an issuer to confess blood on its hands" was fundamental to the current Rule, and significant thought must be given to how to make a new rule work. Excising the unconstitutional cornerstone and temporarily preserving the rest of the Rule until the completion of notice-and-comment proceedings is not the answer.

## II. Appellants Would Suffer Irreparable Injury.

The fact that the Rule must be vacated should be the end of the matter. Indeed, as the SEC itself notes, *see* SEC Br. at 8, this Court has the power to vacate the Rule. And, because vacatur is not only a "likelihood" but the legally correct result, the Court should do just that. *See Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083-84 (D.C. Cir. 2001) (no need to show irreparable injury for vacatur).

Alternatively, as Appellants have argued, the Court could take the lesser step of

simply maintaining the status quo until the district court has resolved the vacatur issue in the first instance. Doing so would eliminate the irreparable economic harm issuers would suffer, both before the June 2 deadline *and thereafter*, *see* 77 Fed. Reg. at 56,334 ($200 to $600 million in ongoing annual expenditures *after* initial billions of dollars in start-up costs); *see also* SEC Br. at 16 (recognizing that "costs . . . remain" before June 2). It would also eliminate the confusion spawned by the Commission's partial stay and the Staff's *ad hoc* additional alterations and admonition that "additional guidance" may be provided in the weeks before the filing deadline.

The SEC and Amnesty contend that staying the Rule requires a greater showing than outright vacating the Rule. *See, e.g.*, SEC Br. at 14 (need to satisfy "high standard for irreparable injury" to obtain a stay); Amnesty Br. at 12. That makes little sense. Once the parties have been fully heard on the merits, temporarily maintaining the status quo should not require a higher burden than vacating the rule.

In any event, Appellees' argument that unrecoverable compliance costs—no matter how large—can never constitute irreparable harm proves too much. *See* SEC Br. at 15; Amnesty Br. at 12-13. On this theory, the SEC or any agency could adopt any rule in open defiance of the requirement of notice-and-comment rulemaking, and industry would never be entitled to a stay or a preliminary injunction, regardless of the expenses prior to a decision on the merits, and regardless of sovereign immunity.[5]

[5] Amnesty contends that, in assessing irreparable harm, the Court should fault (cont.)

Courts are not powerless to require notice-and-comment rulemaking.

### III. The Balance of Equities and the Public Interest.

Neither the public nor the SEC has any interest in enforcing a costly rule that provides it with no meaningful information, that no longer "create[s] incentives" or "enhance[s] transparency," and that "undermine[s]" Congress's very objectives in enacting the statute. 77 Fed. Reg. at 56,276, 56,323. By contrast, issuers have a strong interest in avoiding the expensive and unpredictable consequences of attempting to comply with a patchwork of invalid rules, agency stay orders, and informal "statements" of "guidance."

Moreover, the reconstructed rule would not eliminate the "burden . . . on non-governmental organizations to investigate independently," Amnesty Br. at 19, because the remaining provisions do not shed light on which issuers are benefitting or financing armed groups, and which ones are sourcing from other mines. Choking off funds to perpetrators of violence in the Congo is an indisputably laudable goal, but the partially stayed Rule does nothing to advance it.

## CONCLUSION

This Court should stay or vacate the Rule or at least the reporting requirement.

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Appellants for not seeking a stay or a preliminary injunction a year and a half ago. *See* Amnesty Br. at 15-16. But the basis for the relief Appellants are now seeking did not previously exist. It arose only after the Court struck down the unconstitutional heart of the Rule and the Commission nonetheless decided to plow ahead with the remainder. Appellants filed their stay motion just two business days later.

Dated: May 13, 2014

Respectfully submitted,

/s/ Peter D. Keisler

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

*Of Counsel*:
Rachel L. Brand
Steven P. Lehotsky
National Chamber Litigation Center, Inc.
1615 H St., NW
Washington, DC 20062
202.463.5337
*Counsel for Appellant the Chamber of Commerce of the United States of America*

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

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

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of May, 2014, I electronically filed the foregoing Appellants' Reply in Support of 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