ARGUED JANUARY 7, 2014 DECIDED APRIL 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

OPPOSITION OF THE SECURITIES AND EXCHANGE COMMISSION TO APPELLANTS' MOTION FOR A FULL STAY OF THE COMMISSION'S CONFLICT MINERALS RULE

CERTIFICATE AS TO PARTIES

The following information is provided pursuant to D.C. Circuit Rule 27(a)(4):

Appellants

National Association of Manufacturers

Chamber of Commerce of the United States of America

Business Roundtable

Appellee

U.S. Securities and Exchange Commission

Intervenor-Appellees

Amnesty International USA and Amnesty International Limited

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.; Foodservice Packaging Institute; and North American Metal Packaging Alliance, Inc.

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

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INTRODUCTION

On April 14, 2014, this Court upheld the bulk of the requirements under Securities Exchange Act Rule 13p-1, the Conflict Minerals rule. The Court unanimously rejected all of the challenges brought by appellants based on the Administrative Procedure Act ("APA") and the Securities Exchange Act of 1934 ("Exchange Act"). But a majority of the Court found that one piece of the extensive disclosure required by the rule—the requirement that issuers report to the Securities and Exchange Commission and state on their website "that any of their products have not been found to be 'DRC conflict free'"—compelled speech in violation of the First Amendment. In response to the Court's opinion, the Commission issued an order staying, pending the completion of judicial review, the effective date for compliance with those portions of the rule subject to the Court's constitutional holding. Commission staff also issued a statement providing guidance to issuers as to how to comply with the rule during this interim period.

Appellants now request that this Court stay the entirety of the rule. In doing so, they make no argument that the relief provided by the Commission was insufficient to prevent the risk of First Amendment harm. Nor do they assert that the Court's reasoning with respect to the First Amendment implicates those portions of the rule that remain in effect. Rather, they argue that, because the Court found a single disclosure required by the rule to be invalid, they should also

be relieved of their obligation to comply with the balance of the rule's requirements, which were mandated by Congress and which the Court unanimously upheld. None of the factors that this Court considers in determining whether to grant a stay favors such relief, and appellants' motion should be denied.

BACKGROUND

The Commission adopted the Conflict Minerals rule pursuant to Congress's mandate in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. *Conflict Minerals*, 77 FR 56,274 (Sept. 12, 2012). In Section 1502, Congress stated that the exploitation and trade of certain "conflict minerals" (tin, tantalum, tungsten, and gold) was fueling a humanitarian crisis in the Democratic Republic of the Congo ("DRC"). 77 FR 56,275 (citing Section 1502(a), 124 Stat. 1376, 2213 (2010)). In order to ameliorate this crisis, Congress directed the Commission to promulgate, within 270 days, a rule requiring certain disclosures regarding the use of conflict minerals originating in the DRC or an adjoining country. Section 1502, 124 Stat. at 2213. As the Commission explained in adopting the rule, Congress mandated securities law disclosures "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.

Consistent with these purposes, Rule 13p-1 requires issuers to perform a number of inquiries and to make a number of disclosures. An issuer must first

determine whether any conflict minerals are necessary to the functionality or production of a product it manufactures or contracts to have manufactured. Item 1.01(a), 77 FR 56,362. If so, the issuer must conduct a reasonable country of origin inquiry to determine whether any such minerals originated in the DRC or an adjoining country ("Covered Countries"). *Id.* If the issuer determines that its necessary conflict minerals did not originate in the Covered Countries, that it has no reason to believe that they did, or that it reasonably believes that its minerals came from recycled or scrap sources, the issuer must file a specialized disclosure report ("Form SD") with the Commission. Item 1.01(b), 77 FR 56,363. The Form SD discloses the issuer's determination, briefly describes its inquiry, and describes the results of the inquiry. *Id.*

If, as a result of an issuer's inquiry, it knows that its necessary conflict minerals originated in the Covered Countries and are not from recycled or scrap sources, or it has reason to believe this is the case, the issuer must exercise due diligence on the source and chain of custody of its conflict minerals. Item 1.01(c), 77 FR 56,363. If, as a result of its due diligence, an issuer determines that its minerals either did not originate in the Covered Countries, or that they came from recycled or scrap sources, the issuer must file a Form SD describing its reasonable country of origin inquiry and due diligence efforts, as well as the results of those inquiries. *Id.*

If the issuer does not fall within one of the two categories above, it must file a Conflict Minerals Report as an exhibit to its Form SD. Item 1.01(c), 77 FR 56,363. The Conflict Minerals Report must include a description of the measures the issuer has taken to exercise due diligence on the source and chain of custody of its conflict minerals, including, in some cases, an independent private sector audit of the Conflict Minerals Report. Item 1.01(c)(1), 77 FR 56,363. If an issuer manufactures or contracts to manufacture any products that, after due diligence, have not been found to be "DRC conflict free" as defined in the rule, the Conflict Minerals Report must also include a description of the facilities used to process the necessary conflict minerals in those products, the county of origin of those necessary conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity. Item 1.01(c)(2), 77 FR 56,364. Under the rule as adopted, such an issuer must also provide a description of the products that "have not been found to be 'DRC conflict free.'" *Id.*[1]

This Court invalidated only this final required disclosure. The Court unanimously rejected appellants' APA and Exchange Act challenges, upholding

[1] For a temporary period of two years, or four years for smaller reporting companies, an issuer that is unable to determine after exercising due diligence whether a product it manufactures or contracts to have manufactured qualifies as "DRC conflict free" must provide a description of the facilities used to process the necessary conflict minerals in those products, the country of origin of the minerals, and the mine or location of origin, but may describe those products as "DRC conflict undeterminable." Items 1.01(c)(2)(i), (c)(5), 77 FR 56,364.

the Commission's interpretive decisions and its economic analysis in their entirety. Slip Op. 7-17. But a majority of the Court held that the rule and the statute compel speech in violation of the First Amendment "to the extent" they require issuers to report to the Commission and state on their website "that any of their products have 'not been found to be "DRC conflict free."'" Slip Op. 23.

The Court specifically noted that there was no "First Amendment objection to any other aspect of the conflict minerals report or required disclosures." Slip Op. 17 n.8. And the Court observed that if the requirement that issuers describe their products as having not been found to be "DRC conflict free" is "purely a result of the Commission's rule, then our First Amendment holding leaves the statute itself unaffected." Slip Op. 23 n.14. Indeed, the Court provided examples of alternative disclosures that in its view would be less intrusive on First Amendment rights—such as allowing issuers to use their own language or a Commission compilation of products that do not meet the statutory definition. Slip Op. 22. Without vacating the rule, the Court remanded the case to the district court for further proceedings consistent with its opinion. Slip Op. 23.

In a concurring opinion, Judge Srinivasan agreed fully with the majority's decision rejecting the APA and Exchange Act challenges, but would have held the First Amendment portion of the opinion in abeyance pending the Court's resolution of the *en banc* rehearing in *Am. Meat Inst. v. Dept. of Agric.*, No.13-

5281, a case raising a related First Amendment issue. Concurring Op. 1-3. In Judge Srinivasan's view, the preferred approach would have been for the Court to forbear issuance of the First Amendment portion of its decision and stay enforcement of "the particular requirement that manufacturers categorize certain products as 'not found to be "DRC conflict free."'" Concurring Op. 4. The majority recognized that a stay of the implementation of "the relevant part of the final rule" "might address the risk of irreparable First Amendment harm." Slip Op. 18 n.9. But the Court determined not to "hold the First Amendment portion of [the] opinion in abeyance." *Id.*

On May 2, 2014, the Commission issued an order staying "the effective date for compliance with those portions of Rule 13p-1 and Form SD subject to the Court of Appeals's constitutional holding." *See* Attachment B to Appellants' Motion. Consistent with the views of the panel discussed above, the Commission explained that "a stay of those portions of the rule avoids the risk of First Amendment harm pending further proceedings." *Id*. at 2. Moreover, "limiting the stay to those portions of the rule requiring the disclosures" held unconstitutional "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." *Id*. By its terms, this stay terminates upon "the completion of judicial review." *Id.* The Commission also denied appellants' motion for a stay of the

entire rule. *Id.* For more detailed guidance regarding compliance during the interim period in which the stay is in effect, the Commission referred issuers to a staff statement issued on April 29, 2014. *Id.*

The staff's April 29, 2014 statement explained that "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." *See* Attachment C to Appellants' Motion. For "companies that are required to file a Conflict Minerals Report, the report should include a description of the due diligence that the company undertook." *Id.* And if the company has products that have not been found to be "DRC conflict free" or are "DRC conflict undeterminable," as those terms are defined in the rule, the company "would not have to identify the products as 'DRC conflict undeterminable' or 'not found to be DRC conflict free.'" *Id.* The company should, however, disclose the facilities used to produce the necessary conflict minerals in those products, the country of origin of the minerals, and the efforts to determine the mine or location of origin. *Id.*

ARGUMENT

This Court considers four factors in determining whether to grant a stay: (1) whether the movant has shown a substantial 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; (4) and the public

interest. *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). None of these factors favors the relief appellants seek. Their motion should be denied.

I. Appellants have not established a substantial likelihood of success on the merits.

Appellants failed to persuade this Court of the merits of their arguments challenging the bulk of Rule 13p-1's requirements, or to persuade this Court to vacate the rule. But they nonetheless argue that they are likely to succeed in convincing the district court that the entire rule should be vacated, going so far as to assert that vacatur is "plainly necessary." Motion 9.[2] This is simply not the case. First, and most obviously, this Court did not order vacatur. *Cf. Oceana, Inc. v. Locke*, 670 F.3d 1238, 1239 (D.C. Cir. 2011) (finding that agency's rule did not comply with statutory mandate and remanding to the district court with instructions that it vacate the rule and remand to the agency for further proceedings). Nor is the district court likely to do so.

1. Appellants rely on the principle that severance and affirmance of a portion of a rule is improper if there is "substantial doubt" that the agency would have considered the regulation severable. Motion 9 (citing *Nat'l Ass'n of Mfrs. v.*

[2] The case will be remanded to the district court for further proceedings consistent with the panel's opinion only if the time for seeking rehearing or rehearing *en banc* expires or the Court denies a petition for rehearing or rehearing *en banc*. The time period for the parties to file petitions for rehearing expires on May 29, 2014.

NLRB, 717 F.3d 947 (D.C. Cir. 2013)). But here there is no doubt, much less a substantial one, about the Commission's intent. In adopting the rule, the Commission stated explicitly that if "any provision of this rule . . . is held to be invalid, such invalidity shall not affect other provisions . . . that can be given effect without the invalid provision." 77 FR 56,333. And in providing a limited stay, the Commission acted consistently with that judgment by directing issuers to staff guidance outlining how the rule is to be given effect without the invalidated portion of the disclosure. In these circumstances, and in light of Congress's desire for a rule, "complete vacatur of a partially valid rule would only serve to stall" the implementation of Congress's mandate. *S. Coast Air Quality Mgmt. Dist. v. EPA*, 489 F.3d 1245, 1248 (D.C. Cir. 2007) (rejecting vacatur and directing agency to promptly revise invalid portion of rule in order to comply with statutory mandate).

2. Appellants argue that vacatur is nonetheless required because the statement held to be unconstitutional lies "at the very heart" of the rule and the rule therefore cannot "function sensibly" without it. Motion 10 (quoting *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001) (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")). In support of this erroneous assertion, they cite the Commission's statement, in rejecting the suggestion that it allow a permanent "DRC conflict undeterminable" category, that

to do so may "undermine the overall goals of Section 1502." *Id.* (quoting 77 FR 56,323).

As the Commission explained, however, its concern was that the creation of such a *permanent* category "might create incentives for issuers not to exercise care" in determining the origins of their minerals. 77 FR 56,323. Thus, the Commission's concern was not, as appellants imply (Motion 10), rooted in the proposed change in the language of the required disclosure, but rather in the potential effect on the substantive efforts required of issuers. And the Commission's partial stay preserves those efforts. Moreover, it is of course far from certain that the absence of some sort of description of those products that do not meet the definition of "DRC conflict free," by issuers or otherwise, is permanent. What is at issue here is not a new rulemaking, but rather a temporary step taken during this interim period. Nor is there any other indication that the Commission believed this one piece of disclosure was more pivotal than others. Indeed, the Commission's explicit provision that the rule be severable indicates otherwise.

And there is no indication that Congress believed this one piece of disclosure to be so indispensable that the rule cannot be implemented during this interim period in its absence. Far from "worthless" without the invalidated disclosure (Motion 13), the legislative history of Section 1502 shows that Congress

in fact considered the rule's other requirements important. As described by a co-sponsor, Section 1502's purpose was to "'ensure that companies handling minerals from the DRC exercise due diligence on their suppliers.'" 156 Cong. Rec. S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold) (quoting U.N. Sec. Coun. Res. 1857).

This co-sponsor added that Section 1502 would accomplish that purpose by requiring companies "to make public and disclose annually . . . if the minerals in their products originated or may have originated in Congo or a neighboring country" and by requiring companies "to provide information on measures they 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." *Id*. These requirements, the co-sponsor noted, would "compel companies to take responsibility for their suppliers and thus bring greater transparency to the trade in these minerals, which may enable more targeted actions down the road." 155 Cong. Rec. S4697 (daily ed. Apr. 23, 2009) (statement of Sen. Feingold).[3]

[3] In addition, the due diligence guidance provided by the Organisation for Economic Co-operation and Development ("OECD"), which is "intended to cultivate transparent mineral supply chains" and which the Commission stated issuers may use as a framework for their due diligence, does not require a conclusion as to whether a company's supply chain finances or benefits armed groups. *See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, available at http://www.oecd.org/corporate/mne/GuidanceEdition2.pdf.*

3. Appellants also assert that implementation of the rule absent the invalidated portion of the disclosure requirements cannot further Congress's purpose because it does not inform the public which, if any, of an issuer's particular products include minerals that directly or indirectly finance armed groups in the DRC. Motion 1, 11-12. But Congress's purpose was broader than that. 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.

Appellants provide little explanation as to how providing the bulk of the information called for in the rule fails to further these goals. They cite the statement of two commissioners, in arguing for a full stay, that "the listing of products . . . is central to the rule." Motion 10 (citing Commissioners Daniel M. Gallagher & Michael S. Piwowar, *Joint Statement on the Conflict Minerals Decision* (Apr. 28, 2014) (Attachment C to Appellants' Motion)). But, of course, in denying a full stay, the majority of the Commission rejected this position, concluding instead that limiting the scope of the stay "furthers the public's interest in having issuers comply with the remainder of the rule."

4. Appellants next argue that the rule "was not designed to function without" the piece of the disclosure found to be unconstitutional. Motion 13. In

their view, the "trigger" for the requirement to disclose information about the facilities used to process minerals, the country of origin of minerals, and efforts to determine the mine or location of origin of the minerals is the description by the issuer of its products that have not been found to be "DRC conflict free." But this misunderstands the rule. As the text of the rule makes clear, the trigger for disclosing this information is not an issuer's *description* of its products. Rather, it is the result of an issuer's *due diligence* that triggers both that description and the additional disclosures. 77 FR 56,364. Because the Court's holding reaches only the issuers' description of its products (Slip Op. 17 n.8), the rest of the disclosure is unaffected. And appellants identify no reason it cannot function independently.

5. Finally, appellants revert to general arguments about when vacatur is appropriate. They first cite *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005), for the proposition that "an 'unsupported agency action normally warrants vacatur,'" and assert that there "is no reason to believe that the district court will depart from that ordinary practice here." Motion 9. But this Court unanimously rejected appellants' contention that those portions of the rule unaffected by the Commission's limited stay constitute unsupported agency action. And in *Advocates for Highway & Auto Safety*, the court did not vacate the rule; it found that the rule needed to be modified on remand to the agency but that it "may do some good" in the interim.

429 F.3d at 1152; *see also Ill. Public Telecomm. Ass'n v. FCC*, 123 F.3d 693, 694 (D.C. Cir. 1997) (unsupported agency action normally warrants vacatur of *only* that portion of a rule found to be the product of arbitrary and capricious agency action). The same is true here.

No more helpful to appellants is their citation to this Court's statement in *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262 (D.C. Cir. 2007), 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." Motion 9. Again, the Court upheld the bulk of the rule's requirements, invalidating only one piece of the required disclosure. There is therefore no inherent need for "wholesale revision" of Rule 13p-1. Indeed, the Court itself proposed some "intuitive alternatives" that might ameliorate First Amendment concerns without affecting the balance of the rule. Slip Op. 22; Concurring Op. 4-5.

II. Appellants will not suffer irreparable harm absent a stay.

This Court "'has set a high standard for irreparable injury'" sufficient to obtain a stay. *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (citation omitted). Such harm "must be 'both certain and great,' 'actual and not theoretical,' 'beyond remediation,' and also 'of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" *Id.* (citation omitted). Appellants do not assert, nor can they, that without a full stay they are at risk of

any harm traceable to the constitutional flaw identified by the Court. The partial stay entered by the Commission addresses that risk. *See* Attachment B to Appellants' Motion; *see also* Slip Op. 18 n.9; Concurring Op. 4-5. Instead, appellants contend that without a stay of the entire rule they will suffer irreparable harm in the form of compliance costs. Motion 14-15.

But "ordinary compliance costs are typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (citing *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980)). To "constitute irreparable harm, the threatened injury must be, in some way, 'peculiar.'" *Am. Hosp. Ass'n*, 625 F.3d at 1331 (quoting *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527 (3d Cir. 1976)). "'Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough.'" *Id.* (quoting *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). "Any time a corporation complies with a government regulation that requires corporate action, it spends money and loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction." *A.O. Smith*, 530 F.2d at 527.

Nor is it clear that granting a full stay at this juncture would relieve appellants of the bulk of the costs they complain of. The staff guidance alleviates the major component of continuing compliance costs—the audit requirement. 77

FR 56,354. *See* Attachment A to Appellants' Motion. And the rule has been in effect since November 2012, with compliance beginning on January 1, 2013. Thus, as appellants concede (Motion 15), issuers have already incurred a substantial portion of the compliance costs. *See Am. Hosp. Ass'n*, 625 F.3d at 1331 (finding no irreparable harm in part because "many of the complained of costs should already have been incurred" in light of the regulation's approaching compliance date). Moreover, it is far from certain that the costs that remain would be wasted even if the entire rule is subsequently vacated.

Unless Section 1502 is itself deemed unconstitutional (a question left open by the Court and on which appellants have not demonstrated a substantial likelihood of success), the Commission must adopt some version of Rule 13p-1 pursuant to Congress's mandate. Any expenditures made now to trace the origins of an issuer's minerals would likely aid compliance with that revised rule. In these circumstances, the costs of complying with the balance of Rule 13p-1's requirments do not constitute irreparable harm. *See Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011) (finding "little chance" of irreparable harm justifying a stay "because it is unlikely that significant changes will be made to the standards upon reconsideration").

Appellants also raise the specter of "confusion" if a stay is denied, referring to the staff's guidance as "*ad hoc* modifications, . . . adopted without notice-and-

comment rulemaking," that "are subject to change at any time." Motion 15. But the staff did not "modify" the rule; it issued guidance in light of the Court's opinion. And the Commission itself temporarily stayed those portions of the rule that this Court invalidated pending the completion of judicial review, referring issuers to the staff's statement for guidance. Nor does the fact that the Commission's order and the staff guidance refer to the possibility of further guidance constitute irreparable harm. Motion 16. Rather, it reflects the Commission's prudent recognition that circumstances may change or issuers themselves may seek further clarity. Moreover, any assertion that subsequent guidance would add to, rather than alleviate, issuers' obligations under the rule is entirely speculative. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (irreparable harm must not be speculative).

Appellants' suggestion that "notice and comment rulemaking" was required before these actions were taken is similarly without merit. Motion 15, 17. Again, there has been no "reconstruct[ion]" of or "amend[ment]" to the rule, by the staff or otherwise. Motion 17. The staff issued a statement to provide guidance for complying with the rule in light of the Court's opinion. And the Commission then temporarily stayed the portion of the rule this Court invalidated and explicitly incorporated the staff's guidance. Both actions give effect to the parameters of this Court's decision. Appellants cite no authority for the proposition that notice and

an opportunity for comment were required before taking these interim steps. And Section 705 of the APA, pursuant to which the Commission issued its stay, makes no reference to such a requirement. Nor did appellants when they invoked that provision as authority for the Commission to stay the entire rule immediately without notice or the opportunity for comment. Appellants provide no reason why notice and comment would be necessary for the Commission to give them a portion of the relief they sought.

Finally, appellants contend that "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." Motion 16. But they have not challenged the requirement that Conflict Minerals Reports be "filed" in this litigation. And as the Commission noted in adopting the rule, there is a good faith defense to the civil liability appellants fear. 77 FR 56,304. In light of this defense, any suggestion that issuers who complied with staff guidance could nonetheless be harmed by civil liability is again pure speculation.

III. Neither the balance of the equities nor the public interest favors a stay.

In arguing that the public interest favors the comprehensive stay they seek, appellants reiterate their arguments that the rule does not further Congress's purposes without the single disclosure found to be unconstitutional. Motion 16-17.

But these arguments are no more persuasive in this context than in weighing the first two factors for granting a stay.

Appellants argue that 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." Motion 16. But as the Commission concluded, implementation of those portions of the rule unaffected by the Court's constitutional holding does "further[] the public's interest." Requiring that issuers perform a reasonable country of origin inquiry and disclose the results furthers Congress's goals to "enhance transparency" and "to bring greater public awareness of the source of issuers' conflict minerals." 77 FR 56,275, 56,276. As does requiring certain issuers to exercise due diligence on the source and chain of custody of their conflict minerals and disclose the due diligence undertaken. And certainly these requirements "promote the exercise of due diligence on conflict minerals supply chains." 77 FR 56,275.

Moreover, statements by both the State Department and the United Nations call into doubt any assertion that there is no public interest in encouraging due diligence in the absence of the invalidated disclosure. *See*, *e.g.*, Under Secretary of State Robert D. Hormats, Statement Concerning Continued Implementation of Conflict Minerals Due Diligence Pursuant to Section 1502 of the Dodd-Frank Act at 1-2 (Feb. 28, 2013) ("the United States government continues to encourage

companies to exercise due diligence based on the guidance issued by the [OECD]"); U.N. Sec. Coun. Res. 1952 ¶¶7, 8 (Nov. 29, 2010); U.N. Sec. Coun. Res. 1896 ¶ ¶7, 14 (Dec. 7, 2009); U.N. Sec. Coun. Res. 1857 ¶15 (Dec. 22, 2008).

Finally, by both mandating a rule and setting a deadline for a rule to be adopted, Congress expressed a desire for expeditious reporting. And, indeed, many issuers have devoted significant time and resources to complying with the rule's provisions. Neither they nor the public should lose the benefit of those efforts.

CONCLUSION

For the foregoing reasons, the Commission requests that appellants' motion for a full stay of the Conflict Minerals rule be denied.

Respectfully submitted,

ANNE K. SMALL
General Counsel

MICHAEL A. CONLEY
Deputy General Counsel

/s/ *Tracey A. Hardin*
TRACEY A. HARDIN
Assistant General Counsel

BENJAMIN L. SCHIFFRIN
Senior Litigation Counsel

Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-9040
(202) 551-5048 (Hardin)

May 9, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2014, I caused a copy of the foregoing Opposition of the Securities and Exchange Commission to Appellants' Motion for a Full Stay of the Commission's Conflict Minerals Rule to be served on counsel of record for all parties by filing the opposition using the Court's CM/ECF system.

/s/ Benjamin L. Schiffrin
Benjamin L. Schiffrin