ORAL ARGUMENT NOT YET SCHEDULED
No. 13-5252

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

NATIONAL ASSOCIATION OF MANUFACTURERS, Chamber of Commerce of the United States of America, Business Roundtable,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent,

AMNESTY INTERNATIONAL USA, Amnesty International Ltd.,

Intervenors.

On Petition for Review of a Final Rule of the Securities and Exchange Commission

---

BRIEF OF *AMICUS CURIAE* EXPERTS ON THE DEMOCRATIC REPUBLIC OF THE CONGO IN SUPPORT OF PETITIONERS

John B. Bellinger, III
Sarah M. Harris
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
(202) 942-5999 (fax)

Counsel for Experts on the Democratic Republic of the Congo

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Experts on the Democratic Republic of the Congo states as follows:

A. Parties and Amici

Petitioners' Brief lists all parties, intervenors, and *amicus curiae* appearing in this Court.

B. Rulings Under Review

References to the final rule under review appear in Petitioners' Brief.

C. Related Cases.

There are no related cases.

Dated: September 18, 2013

Respectfully submitted,

/s/ John B. Bellinger, III
John B. Bellinger, III
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
(202) 942-5999 (fax)
John.Bellinger@aporter.com

Counsel for Experts on the Democratic Republic of the Congo

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

* Authorities upon which this brief chiefly relies are marked with asterisks.

REGULATIONS

OTHER AUTHORITIES

GLOSSARY

CNDP	National Congress for the Defence of the People
DRC	Democratic Republic of the Congo
FDLR	Democratic Forces for the Liberation of Rwanda
FARDC	Armed Forces of the Democratic Republic of the Congo
OECD	Organisation for Economic Co-operation and Development
SEC	Securities and Exchange Commission

STATUTES AND REGULATIONS

All applicable statutes, etc., are contained in Petitioners' Brief.

STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amici are academics and former government officials with expertise in the Democratic Republic of the Congo ("DRC") who submit this brief in support of Petitioners.

Professor Marcia Narine is an Assistant Professor of Law at St. Thomas University School of Law. She is an expert on corporate governance and supply chain management with considerable knowledge of conditions within the DRC, and most recently visited the DRC in October 2011 to research the potential effects of Section 1502. She is a founding board member of a foundation that works to eradicate maternal and infant mortality in the DRC by training midwives in Bukavu and Goma, two towns at the epicenter of the mining industry.

Ambassador Jendayi Frazer served as Assistant Secretary of State for African Affairs from 2005 to 2009 and as Ambassador to South Africa from 2004 to 2005. She also served as Special Assistant to the President and Senior Director for African Affairs at the National Security Council in the White House from 2001 to 2004. She is now the Distinguished Service Professor at Carnegie-Mellon University and the Director of the Center for International Policy and Innovation.

Dr. J. Peter Pham is Director of the Africa Center at the Atlantic Council. He is also the Vice President of the Association for the Study of the Middle East and Africa and Editor-in-Chief of its *Journal of the Middle East and Africa*. Dr. Pham was previously a tenured Associate Professor of Justice Studies, Political Science, and African Studies at James Madison University. His monograph "Imagining the Congo Secure and Stable" was awarded the 2008 Nelson Mandela International Prize for African Security and Development.

Amici have a professional interest in the SEC's implementation of Section 1502 and its unintended harmful consequences. *Amici* have analyzed the sources of conflict in the DRC and have examined the correlation between the demand for minerals in the DRC, sources of funds available to armed militias, and those militias' use of sexual violence as an instrument of warfare. *Amici*'s goal is not to support Petitioners' commercial interests, but rather to emphasize the unfortunate impact of the SEC's rule for the people of the DRC.

Based on their expertise, *amici* believe that the SEC erred in failing to consider whether its final rule would advance Section 1502's objective of weakening armed groups in the DRC. They further believe that the SEC compounded that error by exercising its discretion in ways that render its rule more

likely to harm legitimate economic activity in the DRC and benefit the very armed groups that Congress sought to stifle.[1]

All parties have consented to the filing of this *amicus* brief.

BACKGROUND

The Democratic Republic of the Congo (formerly Zaire) is home to some of the world's richest mineral reserves and poorest inhabitants. Tin, tantalum, tungsten, and gold, among other minerals, are abundant in the DRC, particularly in the eastern provinces of North and South Kivu.[2]

These provinces are much closer to neighboring Rwanda, Uganda, and Burundi than to much farther-off Kinshasa, the DRC's capital. Immense swaths of impassable thick forest and mountainous terrain, as well as the DRC's poor road and rail infrastructure, segregate these provinces further. Mines are sometimes little more than makeshift pits, and virtually all mining is done by hand, not machine. *See* Denis M. Tull, *The Reconfiguration of Political Order in Africa: A Case Study of North Kivu (DR Congo)* 172 (2005); Dep't of State, *Democratic*

---

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person (other than *amicus curiae*) contributed money that was intended to fund the preparation or submission of this brief.

[2] *See* U.S. Gov't Accountability Office, GAO-10-1030, *The Democratic Republic of the Congo: U. S. Agencies Should Take Further Actions to Contribute to the Effective Regulation and Control of the Minerals Trade in Eastern Democratic Republic of the Congo* 3-7 (2011).

Republic of the Congo Mineral Exploitation by Armed Groups & Other Entities (May 23, 2012) ("2012 State Dep't Map").

Although the DRC provides comparatively little of the world's total supply of tin, tantalum, tungsten, and gold, mining is the lifeblood of these provinces' economies. In North Kivu, for instance, ninety percent of export revenue and up to half of provincial government revenues derive from mining those minerals. Men must often leave their villages and move closer to mines to support their families. An estimated one million Congolese earn their livelihoods in the mining trade, including miners; small-scale traders who contract to move the minerals out; porters who transport 100-pound sacks of the minerals from the mines across remote roads to a local trading post; intermediate buyers; transporters who take the minerals from the mines to regional depots; exporters; processors of the minerals; and the civil officials who oversee and tax these activities.[3]

Decades of violent conflict, however, have hampered development in the DRC, especially in North and South Kivu. Beginning in 1994, in the aftermath of

[3] Tull, *supra* at 172; Andrews Atta-Asamoah & Nyambura Githaiga, Institute for Security Studies, Policy Brief No. 35, *Addressing the 'Conflict Minerals' Crisis in the Great Lakes Region* 2 (2012); Letter from Tiffany & Co., (Sept. 29, 2010); Nicholas Garrett & Harrison Mitchell, *Trading Conflict for Development: Utilising the Trade in Minerals from Eastern DR Congo for Development* 23 (2009). The World Bank estimates that the number of Congolese miners may be as high as two million, with an estimated ten million dependents. The World Bank, *Growth with Governance in the Mining Sector* (2008).

the Rwandan genocide, two million Hutu refugees, including perpetrators of the genocide, fled to these neighboring provinces. Their arrival exacerbated existing tensions between rival ethnic groups in the region and spurred a volatile conflict over land and political control. In 1996, a coalition led by Laurent-Désiré Kabila and backed by Uganda and Rwanda attacked the Hutu refugee camps that were harboring former Rwandan Armed Forces and Interhamwe militia fighters responsible for the 1994 genocide. The coalition then consolidated power in the eastern provinces and swiftly moved to topple the national government, controlled since 1967 by the corrupt dictator Mobutu Sese Seko.

Kabila's coalition ousted the Mobutu government in 1997, but when Uganda and Rwanda withdrew their support for Kabila's coalition soon thereafter, the new government fragmented, the former neighboring allies became enemies, and the country descended into an eight-year mixed civil and regional war. Some Congolese Tutsi supported the Rwanda-backed rebel forces, while other Congolese groups that had long opposed the ethnic Tutsis' presence in the DRC formed "Mai-Mai" armed groups to combat them. The recently-arrived Rwandan Hutu *génocidaires* formed the Democratic Forces for the Liberation of Rwanda ("FDLR") and occasionally aligned with Mai-Mai and the remnants of the Kabila coalition's forces. Competing groups indiscriminately employed rape and torture. It is estimated that five million people died; more than two million people were

forced from their homes, including eighty percent of the population of the eastern provinces. International Alert, *Ending the Deadlock: Towards a new vision of peace in eastern DRC* 20-26 (2012); *see generally* Jason Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (2011).

In 2002, a series of peace agreements largely returned control of the country to Kabila's coalition, now led by Laurent-Désiré's son Joseph Kabila. With the notable exception of the FDLR, which still controlled most of the eastern provinces, various armed groups demobilized and integrated into the Congolese army (often referred to by the acronym "FARDC"). In December 2002, the civil war formally ended. The DRC held its first post-conflict elections in 2006, in which Joseph Kabila was elected president. International Alert, *supra*, at 26. The United Nations has maintained a peacekeeping mission in the DRC since 1999, which has deployed over twenty thousand personnel at a cost of over $11 billion.[4]

Yet conflict continued, particularly in the eastern DRC. A splinter group of Tutsi fighters, dissatisfied with the national government and wary of the Hutu-dominated FDLR's strength in the eastern provinces, broke off from the Congolese army and formed the National Congress for the Defence of the People ("CNDP")

[4] U.N. Organization Mission in the Democratic Republic of the Congo: Facts and Figures, http://www.un.org/en/peacekeeping/missions/monuc/facts.shtml; U.N. Organization Stabilization Mission in the Democratic Republic of the Congo: Facts and Figures, http://www.un.org/en/peacekeeping/missions/monusco/facts.shtml.

in late 2006. The ensuing battles between the Hutu-backed FDLR, Mai-Mai, and the Tutsi-led CNDP plunged the eastern provinces into perpetual conflict. After protracted efforts by the Kabila government to broker a deal and re-integrate the CNDP into the Congolese army, an agreement was reached in March 2009.[5] The Congolese army, whose regiments often appear to operate outside civilian or military command, thus expanded its presence in the mineral-rich eastern provinces by assimilating armed groups already there into the Congolese army. Like the rebel groups operating in the region, the Congolese army is widely identified as a perpetrator of rape, extrajudicial killings, and other abuses, and also exploits the region's mineral wealth.[6]

By mid-2010, many mine sites in the eastern DRC had changed hands as different armed groups made inroads in different locations. Some mine sites were still run by villages, independent of any armed group. The FDLR, Mai-Mai, the army, and the CNDP (which remained quasi-independent even as it nominally integrated into the army) controlled the rest.[7]

---

[5] *See* International Alert, *supra*, at 26-27.

[6] *See* U.S. Dep't of State, *Country Reports on Human Rights Practices for 2011: Democratic Republic of the Congo* (2011); Michael Nest, *Coltan* 125 (2011).

[7] *See* U.S. Dep't of State, Democratic Republic of the Congo Mineral Exploitation by Armed Groups (June 28, 2010) ("2010 State Dep't Map"); Peter Eichstaedt, *Consuming the Congo: War and Conflict Minerals in the World's Deadliest Place* 4 (2011).

Congress understandably viewed reports of widespread violence in the DRC, and in particular sexual violence, with alarm. At the urging of human rights activists and policy advocacy groups, Congress included a provision concerning "Conflict Minerals" in the July 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1502 states, "It is the sense of Congress that the exploitation and trade of conflict minerals originating in the [DRC] is helping to finance conflict characterized by extreme levels of violence in the eastern [DRC]," thus "warranting" that securities issuers comply with certain disclosure requirements. Pub. L. 111-203, 124 Stat. 1376 (2010).

As Petitioners detail, Section 1502 requires issuers to ascertain and disclose whether they have used even trace amounts of so-called "conflict minerals" in any of their products. The definition of "conflict minerals" includes tin, tungsten, tantalum, and gold mined from anywhere in the DRC or the nine countries it borders. If the supply chain may contain such minerals, issuers are to investigate whether any of those minerals "directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjourning country." *Id.* Section 1502 charged the SEC with crafting a rule to spell out precisely when and how disclosures would be required, which issuers would need to comply, and the timeframe for doing so. 15 U.S.C. § 78m(p)(1) (2006); Pet'rs' Br. 14-15.

* * *

Since Section 1502 was passed, the legal market for minerals from the DRC has significantly contracted. In September 2010, President Kabila imposed a six-month embargo on exports of minerals mined from North and South Kivu and another province, described as an effort to undercut the armed groups controlling mines there. Though the government embargo ended in March 2011, demand for minerals did not recover, and exports have fallen dramatically.[8]

Press reports and DRC experts confirm that Section 1502 and the SEC's associated rule-making have prompted many companies to cease altogether sourcing minerals from the DRC and its neighbors.[9] The OECD reported that participants in its due diligence pilot program—thirty of the world's largest and most sophisticated companies, who volunteered to conduct due diligence on their mineral suppliers—"have had difficulty convincing suppliers not to boycott the

[8] Laura E. Seay, Center for Global Development, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy*, Working Paper 284 (Jan. 2012); *Digging for Victory*, The Economist (Sept. 24, 2011); Katrina Manson, *Central Africa: The Quest for Clean Hands*, Financial Times (Dec. 18, 2012).

[9] *See, e.g.*, Letter from Martin Kabwelulu, DRC Minister of Mines (Nov. 8, 2011); Seay, *supra*; Severine Autesserre, *Dangerous Tales: Dominant Narratives on the Congo and Their Unintended Consequences*, 111 African Affairs 202, 213 (2012); David Aronson, *How Congress Devastated Congo*, N.Y. Times (Aug. 7, 2011); Mark Drajem, Jesse Hamilton, & Michael J. Kavanagh, *A Rule Aimed at Warlords Upends African Mines*, Businessweek (Aug. 4, 2011); Manson, *Quest for Clean Hands*, *supra*.

DRC."[10] That conclusion is particularly striking because the OECD's due diligence guidance are the only guidelines the SEC expressly endorsed. *See* Conflict Minerals, 77 Fed. Reg. 56,274, 56,281 (Sept. 12, 2012). The considerable hurdles faced even by the companies most committed and able to undertake "responsible" sourcing underscores why very few companies outside the pilot program plan to continue sourcing from the DRC. OECD Report, *supra*, at 15; *see also The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing Before the H.R. Subcomm. on Monetary Policy and Trade* 10-11 (May 21, 2013), http://financialservices.house.gov/uploadedfiles/113-23.pdf (statement of Rick Goss).

For thousands of Congolese whose livelihoods depend on mining, these developments have added a terrible new dimension to the existing crisis. Many miners are out of work; some mine sites appear to have been abandoned. Miners are often the sole breadwinners for entire families, and no other careers are available. Their already-impoverished families have slipped further below subsistence levels.[11] Numerous legitimate local exporters have shut their doors as

---

[10] OECD, *Downstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Final downstream report on one-year pilot implementation of the Supplement on Tin, Tantalum, and Tungsten*, 16 (2013) ("OECD Report").

[11] *See* Letter from Observatoire Gouvernance et Paix and Bureau d'Etudes Scientifiques et Techniques (Dec. 26, 2011); Pact Attach. (Mar. 2, 2011); Katrina

Footnote continued on next page

they cannot find buyers. Of the 29 provincial exporters in business in 2010, only five are still in business. Manson, *Quest for Clean Hands*, *supra*.

The decimation of the legitimate market for Congolese minerals has also upended existing methods intended to prevent armed groups from benefiting from mining. Gold is immensely difficult to attribute to a particular site, and thus difficult to certify as "conflict-free" under any circumstances. But before 2010, Congolese miners, government officials, non-governmental organizations, and industry groups were collectively developing measures to increase the traceability of tin, tantalum, and tungsten. One project to implement tracing had started in North and South Kivu. Those measures included "tagging" minerals from legitimate mines not controlled by armed groups as a means of certification. *Id.*

However, these traceability programs have met with skepticism from stakeholders and have been undermined by corruption. Stakeholders have been reluctant to invest in transparency measures that take time to implement when the legal market for minerals from the DRC is collapsing. *See* Letter from Observatoire Gouvernance et Paix and Bureau d'Etudes Scientifiques et Techniques 3 (Dec. 26, 2011); Seay, *What's Wrong With Dodd-Frank*, *supra*. Many issuers appear to have awaited the fate of the SEC's final rule before making

---

Footnote continued from previous page
Manson, *Congo Miners Ban Puts Stress on Firms and Workers*, REUTERS (Sept. 30, 2010).

an economic decision as to whether compliance costs will still make it cost-efficient to source minerals from the DRC. As a result, there are only a handful of mines in the DRC with traceability schemes underway, and the prospect of expanding those programs to other mines is doubtful. *See* OECD Report, *supra*, at 13, 33-34, 60; Atta-Asamoah, *supra*, at 1-2. Indeed, the GAO recently reported that industry officials have expressed "concerns about sourcing from the DRC, even through the in-region sourcing initiatives, because of the impact on brand reputation and financial risk." U.S. Gov't Accountability Office, GAO-13-689, *SEC Conflict Minerals Rule: Information on Responsible Sourcing and Companies Affected* 18 (2013).

The collapse of the market for anything but verifiably "conflict-free" minerals has also had the perverse effect of further undercutting traceability programs and encouraging smuggling. Pressure to produce certifiably "conflict-free" minerals has created more incentives to corrupt traceability initiatives, such as through use of stolen "conflict-free" tags. And the less reliable traceability programs become, the less companies will invest in or rely on them, shrinking the legitimate market yet further. *See* Atta-Asamoah, *supra*, at 1-2; Letter from Metalor Technologies USA (Jun. 13, 2012); Letter from Jewelers of America (Nov. 1, 2011); *see also The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision* 14 (statement of David Aronson). "Since 2007 we were

making advances to ensure less and less smuggling," noted Emmanuel Ndimubanzi, a regional official in North Kivu. The present situation, he said, "was like you had someone just convalescing from a coma, and at that very moment you kill them." Manson, *Quest for Clean Hands*, *supra*. As of July 2013, the GAO noted that according to numerous government and NGO sources, the DRC is incapable of certifying various mines as outside the control of armed groups, regularly inspecting them, stemming corruption, or halting smuggling. GAO, *SEC Conflict Minerals Rule*, *supra*, at 19-20.

The FDLR, Mai-Mai, and dozens of smaller, splintered-off armed groups have instead thrived, not least because of the ease with which many of them can exploit the underground market. *See Digging for Victory*, *supra*. The eastern provinces are still strongholds for dozens of armed groups. Many have "continue[d] and even expand[ed] their mining operations" by relying on smuggling networks to sell those minerals on the black market or to "launder" them into purportedly "conflict-free" minerals. Autesserre, *Dangerous Tales*, *supra*, at 213; *see also The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision* 33-34 (statement of David Aronson).

One group in particular has made significant gains since 2010: the newly-formed M23, previously the CNDP, which rebelled against the government in the eastern provinces in early 2012. M23 has quickly become one of the strongest

armed groups in the region. M23's rise and systemic battles with other groups have also resulted in further human rights abuses as its members are accused of engaging in rape, killings of civilians, torture, and recruitment of child soldiers—as have the groups opposing it. *See* Peter Eichstaedt, *Capturing Congo: Gold, Guns, and Strife*, Foreign Affairs (Dec. 6, 2012).

In sum, since 2010, the legal market for tin, tantalum, tungsten, and gold from the DRC has shriveled, and the eastern provinces hardest-hit by conflict have been disproportionately harmed. Miners and their families are more susceptible than ever to the predations of armed groups. There is little market for minerals whose origins cannot be verified, and companies have voiced wariness about the investments and effort required to make verification processes work. The conflict rages on, and armed groups have taken advantage of opportunities to smuggle or launder minerals at the expense of independent mines and exporters. And infighting among armed groups, offensives by the Congolese army, new alliances, and deals to consolidate armed groups into the Congolese army have produced bewildering changes in control over mining sites and surrounding trade routes. *See The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision* 2, 3-4 (statements of Reps. John Campbell and Bill Huizenga); Autesserre, *Dangerous Tales*, *supra*, at 213; 2012 State Dep't Map, *supra*.

These consequences were apparent by the time the SEC began promulgating its rule. Commenters familiar with conditions in the DRC thus suggested to the SEC that the only hope was that traceability programs might yet appear sufficiently promising and cost-effective to dissuade companies from abandoning the DRC entirely.[12] The SEC, however, failed to minimize the inordinate compliance costs of its rule for issuers, who must undertake burdensome yet possibly inconclusive investigations into whether even trace amounts of tin, tantalum, tungsten, and gold in their products came from mines controlled by armed groups. The SEC thereby all but guaranteed that the *de facto* embargo will become permanent.

SUMMARY OF ARGUMENT

The SEC developed its final rule to implement Section 1502 during a two-year period in which conditions in the DRC and in the market for minerals changed considerably. Many comments submitted to the SEC—backed by extensive literature and eyewitness reporting—highlighted the correlation between falling demand for DRC minerals in the open market, disruptions to existing transparency initiatives, increased smuggling, and greater instability benefiting armed groups. These comments lauded Section 1502's aims of reducing violence and disrupting

[12] *See* Letter from Fédération des Entreprises du Congo (Feb. 25, 2011); Letter from Générale des Coopératives Minières du Sud Kivu (Apr. 8, 2011); Letter from Southern Africa Resource Watch (Apr. 4, 2012); Letter from Observatoire Gouvernance et Paix and Bureau d'Etudes Scientifiques et Techniques (Dec. 26, 2011).

armed groups in the DRC. But as the SEC noted, the comments "were concerned about potentially negative effects of the Conflict Minerals Statutory Provision and the resulting rule," and "argued that the provision and/or rule could lead to a de facto boycott or embargo on conflict minerals." 77 Fed. Reg. at 56,278.

Rather than addressing significant questions as to whether the rule would attain Congress's intended objectives, the SEC ducked the issue. Though the SEC acknowledged its duty to evaluate both benefits and costs, its argument as to why it discharged that obligation is patently flawed. According to the SEC, its rule necessarily advances Congress's goals of reducing violence and disrupting armed groups because the rule hews closely to the statutory mandate. That bootstrap theory not only dangerously lessens scrutiny of the SEC's rules, but is also at odds with the SEC's reasoning elsewhere in the rule. And the SEC's other justification, that the agency is ill-equipped to analyze a rule aimed at social benefits, relies on the astonishing proposition that an analysis is no longer mandatory if it is difficult. To allow the SEC simply to assert that its rule will advance statutory benefits would nullify the SEC's obligation to analyze what benefits and costs its chosen rule will likely produce.

Not only did the SEC fail to do a quantitative or even qualitative analysis of the rule's benefits; the SEC made discretionary choices that many comments established will cause further economic harm to the Congolese, aggravate

instability, and increase the influence of armed groups in the DRC. The SEC's due diligence requirements make it prohibitively expensive for issuers to make even a preliminary determination that their minerals may have originated in the DRC or its neighbors. That initial determination triggers due diligence obligations to discern where the minerals ultimately originated and whether they indirectly or directly benefited armed groups, to obtain a private sector audit, and to file an additional and exhaustive disclosure report to the SEC. *See* Pet'rs' Br. 4-5.

Rather than minimizing these burdens, the SEC extended those costs to a far wider range of issuers than Section 1502 required. The SEC justified those costs by saying that they were warranted to advance Section 1502's humanitarian objectives. But the SEC acknowledged that the higher these compliance costs are, the greater the incentive for issuers to avoid triggering these due diligence obligations altogether—by abandoning sourcing from the DRC and its neighbors entirely. Avoiding a permanent *de facto* embargo should have been among the SEC's highest priorities, given the numerous comments stressing that the consequences of such an embargo would render the rule disastrously counterproductive.

Rather than craft a less burdensome rule, the SEC opted to throw the baby out with the bathwater. The SEC's attempt to portray its convoluted transition rules as a means of avoiding a *de facto* embargo establishes that the SEC

recognized the undesirability of such a result. But the SEC offered no basis for concluding the phase-in it selected will do anything other than add another layer of confusion to an already byzantine process.

ARGUMENT

I. THE SEC IGNORED ITS STATUTORY OBLIGATION TO ANALYZE THE RULE'S PURPORTED BENEFITS

A. The SEC Should Have Considered The Benefits As Well As The Costs Of Its Rule

The SEC's obligation to evaluate the benefits as well as the costs of its proposed rules is unequivocal. The SEC must "consider or determine whether an action is necessary or appropriate in the public interest" and "promote[s] efficiency, competition, and capital formation," 15 U.S.C. § 77b(b), and "shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter." *Id.* § 78w(a)(2). And this Court has held repeatedly that the SEC must "do what it can to apprise itself—and hence the public and Congress—of the economic consequences of a proposed regulation." *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005); *see also Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

The SEC's analysis of the benefits of a proposed rule is a fundamental aspect of that obligation, because the SEC's conclusion that a rule's economic

costs are justified necessarily depends upon finding that the rule will be effective in attaining countervailing benefits. The district court's conclusion that the SEC need only consider the impact of a rule on *economic* factors, JA874, is thus legally erroneous. And bypassing any evaluation of a rule's benefits is tantamount to "entirely fail[ing] to consider an important aspect of the problem," and renders the SEC's action "arbitrary and capricious" under the Administrative Procedure Act. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1222 (D.C. Cir. 2004).

The SEC's obligation to evaluate both benefits and costs plainly required it to consider whether its rule would produce the "compelling social benefits" of cutting funding streams for Congolese armed groups, as Congress intended. 77 Fed. Reg. at 56,335. Nothing in Section 1502's text suggests that Congress intended to relieve the SEC of this obligation. Quite the contrary: because Section 1502's duration—and thus the duration of the SEC's regulatory power—depends on whether armed militias continue to control mines in the DRC, the SEC's consideration of benefits is all the more essential. Section 1502 provides that the President may terminate the requirements after 2015 upon a determination "that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals." 15 U.S.C. § 78m(p)(4). If the SEC

promulgates a rule that unintentionally exacerbates armed groups' control over conflict minerals, the SEC effectively extends the duration of its own regulatory power. Scrutinizing whether this rule will achieve Congress's intended benefits thus creates an important check on the SEC's ability, inadvertent or not, to perpetuate its own powers.

In any event, the SEC justified this rule by claiming to have adequately "considered the costs and benefits imposed by the new rule and form we are adopting." 77 Fed. Reg. at 56,334. The SEC accordingly "must defend its analysis before the court" on this basis. *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177 (D.C. Cir. 2010); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

B. The SEC Cannot Satisfy This Obligation Merely By Asserting That Its Rule Necessarily Advances Section 1502's Objectives

The SEC's explanation why its rule will advance Congress's objectives pays lip service to the SEC's obligation to consider benefits while blatantly evading it. The SEC asserted that because the "discretionary choices" it made in the final rule "are informed by the statutory mandate," any "discussion of the benefits and costs of those choices will necessarily involve the benefits and costs of the underlying statute." Because the rule ostensibly advanced Congress's aim of promoting peace and security in the DRC, the SEC assumed no further analysis was needed. 77 Fed. Reg. at 56,335 n.711.

This explanation is riddled with flaws. As Commissioner Gallagher emphasized, "[t]he statutory framework that establishes the SEC's economic analysis obligations does not permit the agency to infer benefits." Gallagher Dissent. This explanation also depends upon the erroneous premise that the SEC's many discretionary choices were driven by statutory requirements and not really "discretionary" at all. That is plainly false, as evidenced by the radical differences between the proposed and final rule and by the dozens of choices the SEC's own release describes. *See* 77 Fed. Reg. 56,342-50; Gallagher Dissent; Paredes Dissent.

The SEC's assertion that its rule necessarily advances Congress's goals is also inconsistent with the SEC's position that it could not say whether the rule had any benefits. "The statute . . . aims to achieve compelling social benefits, which we are unable to readily quantify with any precision," the SEC declared elsewhere in the rule, "both because we do not have the data to quantify the benefits and because we are not able to assess how effective Section 1502 will be in achieving those benefits." 77 Fed. Reg. at 56,350. That position, too, is indefensible. A wealth of comments from Congolese groups, experts on the DRC, and human rights organizations presented detailed views of whether the rule would achieve any benefits. The SEC acknowledged that these comments related to its proposed rule, not merely Section 1502. *Id.* at 56,278. Yet the SEC did "not attempt[] to

quantify the benefits of the final rule" at all, or even qualify them. *Id.* The SEC thus had no basis even to guess whether its rule advances Congress's aims. The SEC has no excuse for this shortcoming, because the many comments concerning the rule's impact on the DRC gave the SEC extensive information on all facets of the problem. The SEC simply chose to ignore them.[13]

The SEC undoubtedly faced a difficult task in estimating the benefits of its rule. But as Commissioner Paredes explained, "[a]lthough the Commission finds itself in a difficult position . . . the agency still must base its final rule on a reasoned assessment that considers the potential consequences of its judgments," because "[o]therwise, one cannot determine whether the rule is likely to do more good than harm." Paredes Dissent.

II. THE RULE WILL LIKELY WORSEN CONDITIONS IN THE DRC

A. The Rule Incentivizes A Permanent *De Facto* Embargo, As The SEC Itself Acknowledged

The SEC's assumption that statutory benefits follow inexorably from its rule is particularly flawed because the SEC has exercised its discretion in a manner that practically ensures worse conditions in the DRC. The SEC exercised its rule-making discretion in ways that not only increased compliance costs by orders of

[13] The SEC's final rule merely stated that a handful of comments from organizations operating within the DRC expressed concerns about the rule's potentially devastating effect on the market for DRC minerals. But the SEC failed to analyze the validity of those concerns. *See* 77 Fed. Reg. at 56,335 n.719.

magnitude, but also created compelling incentives for companies to avoid sourcing from the DRC entirely. In particular, the SEC arbitrarily imposed its rule upon non-manufacturers, extending the applicability of its rule, and thus its severe burdens, to many more issuers. *See* Pet'rs' Br. 30-46.[14]

The SEC's choices not only increase the rule's burdens without warrant, but also reduce the rule's chances of undermining armed groups in the DRC. That is because, as the SEC concedes, the higher the costs of complying with its rule, the more likely the rule will incentivize companies to avoid being subject to compliance requirements and seek minerals elsewhere. As the SEC acknowledged, "[t]he high cost of compliance provides an incentive for issuers to choose only suppliers that obtain their minerals exclusively from outside the [DRC and its neighbors], thereby avoiding the need to prepare a Conflict Minerals Report." 77 Fed. Reg. at 56,351. Those concerns are especially acute for non-manufacturers, whose limited oversight of their supply chains adds to their

[14] In addition to the above due diligence costs, due diligence is further hampered by ambiguities as to whether the Congolese army is, or shortly will be, defined as an "armed group." The State Department's Country Reports define whether an entity is an "armed group" for purposes of Section 1502, *see* 77 Fed. Reg. at 56,320. The 2011 report does not explicitly list the Congolese army as an "armed group," but does stress the army's role in perpetuating rape, torture, extrajudicial killings, and other abuses, as well as its efficacy in exploiting the mines it controls. U.S. Dep't of State, *Country Reports*, *supra*.

incentives to obtain assurances that minerals in their supply chain come from outside sub-Saharan Africa.

This candid admission suggests the SEC's rule may well create the worst of all worlds. Issuers—who have minimal visibility beyond a few layers of suppliers—must scour their entire supply chains to identify where the minerals used in their products originated. Issuers with any control over their supply chains have an immense incentive simply to avoid sourcing any minerals from the DRC or its neighbors to avoid the costs of verifying whether buying particular DRC minerals directly or indirectly financed armed groups—even if the alternative sources cost more.[15] Even the highly sophisticated companies participating in the OECD's due diligence pilot program report "an increasing number of their customers requesting the exclusion of minerals coming from the [eastern DRC] due to the SEC Final Rule, which in their view creates increased cost and public disclosure," and identify the SEC's rule as "the primary incentive for companies to stop sourcing from the region." OECD Report, *supra*, at 17-18; *see also id.* 13, 33-34, 61.

[15] The DRC has no monopoly on so-called "conflict minerals," and alternate sources are readily identifiable. Indeed, as of 2010, the DRC produced only 12 percent of the world's tantalum supply, less than 1 percent of tungsten and gold supplies, and 3 percent of the tin supply. GAO, *SEC Conflict Minerals Rule*, *supra*, at 10.

The SEC, however, failed to undertake the logical next step in the analysis and consider whether this outcome would decimate the rule's intended benefits. This head-in-the-sand approach to a difficult problem raised by the rule is precisely the kind of reasoning that renders a rule arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

This shortcoming is all the worse because, as numerous commenters warned, a permanent *de facto* embargo will only devastate Congolese miners and the Congolese economy further, while allowing armed groups to readily smuggle minerals. For instance, the Fédération des Entreprises du Congo, a group of minerals exporters from the North Kivu region, explained that such an embargo "causes very big problems to the whole economy and stability of the area," results in "more smuggling activities," and "does not give chance for the improvements that had already begun to work." Fédération des Entreprises du Congo, Comment 1 Letter (Oct. 28, 2011).[16]

Crushing the open market for minerals achieves the opposite of Section 1502's stated aims. Creating a permanent *de facto* embargo would permanently deprive many miners of their livelihoods, make them more likely to join armed

[16] Many other commenters raised this same point. *See, e.g.*, Letter from Observatoire Gouvernance et Paix and Bureau d'Etudes Scientifiques et Techniques (Dec. 26, 2011); Letter from Groupe Weyi International (Mar. 15, 2012); Letter from Mining Industry Association of Southern Africa (Mar. 1, 2011); Letter from AngloGold Ashanti Limited (Jan. 31, 2011).

groups, and harm communities that have thus far resisted being taken over by armed groups. Creating a permanent *de facto* embargo would also entrench the smuggling of minerals out of the DRC, where they will either be falsely labeled as originating elsewhere, or will be sold to buyers indifferent to provenance.

Creating a permanent *de facto* embargo would similarly disrupt existing transparency measures. Stakeholders are more likely to abandon or decline to participate in expensive on-the-ground transparency measures absent some certainty that they can realize economic gains from being able to certify their minerals. And a permanent *de facto* embargo would benefit the armed groups that Section 1502 intended to cripple. Armed groups are the best equipped to respond to a shrinking legal market for minerals by establishing smuggling routes into neighboring countries—as borne out by the effectiveness with which these groups have already exploited the black market and opportunities to circumvent traceability schemes.[17]

Nor is it a response to suggest that a *de facto* embargo already exists, and that the SEC's discretionary choices do not materially worsen it. That is certainly not a response the SEC made in its final rule, and the SEC cannot use post-hoc

[17] *See* Letter from Observatoire Gouvernance et Paix and Bureau d'Etudes Scientifiques et Techniques (Dec. 26, 2011); *accord The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision* (statement of David Aronson); Seay, *What's Wrong With Dodd-Frank*, *supra*; Manson, *Quest for Clean Hands*, *supra*; Autesserre, *Dangerous Tales*, *supra*, at 213-14.

litigation positions to remedy deficiencies in its analysis. *Chenery*, 318 U.S. at 87. That argument is in any event wrong. For an issuer considering where to source its minerals, the SEC's exorbitantly costly compliance regime adds to the already-considerable costs of supporting traceability schemes at particular mines in the DRC. And any company that can choose to avoid the DRC entirely in its supply chain has a strong economic incentive to do so. Moreover, as discussed below, the SEC could have exercised its discretion to implement a different phase-in period that could have alleviated the risk of a *de facto* embargo, but did not.

In sum, even the SEC's own reasoning suggests its rule achieves no benefits, and will be counterproductive. The SEC's rule added massive burdens by rejecting a *de minimis* exception, imposing reporting obligations on companies whose minerals "may," rather than "did," originate in the DRC or neighboring countries, and extended the rule to companies that manufacture nothing. The SEC's only justification for these immense costs is that "we believe the burden is necessary and appropriate in furtherance of the purposes" of "helping end the conflict in the DRC and promoting peace and security in the DRC." 77 Fed. Reg. at 56,350. The SEC concedes the higher the rule's costs, the more likely companies are to avoid obtaining minerals from the DRC entirely, even if it were possible to identify legitimate sources. And the evidence that a permanent *de facto* embargo will

undercut peace and security and potentially aid armed groups is unambiguous. A rule that so plainly ignores this evidence is, by definition, arbitrary.

B. The SEC's Phase-In Period Does Not Mitigate This Risk

The SEC cursorily asserts that the rule's phase-in period will solve the risk of a *de facto* embargo. "Based on the comments we have received," the SEC stated, "we believe that permitting all issuers to describe their products as 'DRC conflict undeterminable' for a two-year period is appropriate to allow viable tracking systems to be put in place . . . and avoid a de-facto embargo on conflict minerals" from the DRC and neighboring countries. 77 Fed. Reg. at 56,322.

That position is illogical. The SEC's confident prediction that its phase-in will avoid a *de facto* embargo conspicuously fails to identify any specific comments that support this position. The SEC's position also appears to rely on comments that merely suggested that two years could be enough time for companies to have "viable tracking systems" in place if they needed them. *Id.* Those estimates miss the very point that the SEC raised when discussing the *de facto* embargo problem in the first instance. *Id.* at 56,351. Even if a company *could* implement a compliance process within two years—a contention Petitioners challenge—the costs of actually doing so may be too high. Avoiding minerals from the DRC and its neighbors entirely may be comparatively cheaper, even if a compliance system is hypothetically feasible.

Nor is there any reason to believe this phase-in will ease the immediate burdens of compliance in any meaningful way. The phase-in is merely a transition period during which issuers can indicate that they were unable to determine whether minerals from the DRC or its neighbors are supporting armed groups. Issuers still have to undertake extensive due diligence and report on their efforts to isolate where particular minerals came from and whether armed groups benefited. They are merely spared the additional cost of an independent audit. *See id.* at 56,363. The SEC offers no reason to think that eliminating this additional obligation while imposing other, substantial compliance obligations will materially reduce the rule's burdens. *See* Pet'rs' Br. 45-46.

Indeed, if anything, the phase-in increases companies' incentives to avoid the additional due diligence process altogether. The SEC structured the phase-in period in a way that creates troubling uncertainties as to whether large issuers will be able to fully identify the origins of their minerals after two years, or will instead have to indicate their products are not conflict-free. Larger issuers believe it will be difficult, and potentially impossible for them to comply in two years without assistance from the smaller issuers who are often also large issuers' suppliers. Yet small issuers lack the infrastructure to comply within two years and will find it difficult to conduct a full inquiry into the origin of their minerals within four years. *See* Pet'rs' Br. 46. These factors offer issuers all the more reason to extricate

themselves from any involvement with any minerals from anywhere in the DRC. Thus, rather than mitigating the risk of a permanent *de facto* embargo, the SEC's convoluted phase-in period arguably heightens it.

CONCLUSION

The severe defects in the SEC's analysis of this rule warrant vacatur. The comments, voluminous literature, and the SEC's admission that the immense compliance costs of its rule incentivize a *de facto* embargo underscore the slim odds that the SEC could justify its chosen rule in a less cursory analysis. This consideration, combined with the fact that the SEC's rule has only just gone into effect, strongly favors vacatur. *See Am. Equity*, 613 F.3d at 179; *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993).

Respectfully submitted,

/s/ John B. Bellinger, III
John B. Bellinger, III
Sarah M. Harris
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004
(202) 942-5000
(202) 942-5999 (fax)

Counsel for Experts on the Democratic Republic of the Congo

Dated: September 18, 2013

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,995 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

/s/ John B. Bellinger, III
John B. Bellinger, III

CERTIFICATE OF SERVICE

I hereby certify that, on September 18, 2013, I electronically filed the foregoing *Brief of Amicus Curiae Experts on the Democratic Republic of the Congo in Support of Petitioners* with the Clerk of the Court by using the Court's appellate CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the Court's CM/ECF system. In addition, an original and eight paper copies were filed with the Court via hand delivery.

I also served two paper copies via U.S. Mail, First-Class postage pre-paid, on the following:

Peter Douglas Keisler
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005

Quentin Riegel
National Association of Manufacturers
1331 Pennsylvania Avenue, NW
North Tower - Suite 1500
Washington, DC 20004-1790

Robin S. Conrad
U.S. Chamber of Commerce
National Chamber Litigation Center
Suite 230
1615 H Street, NW
Washington, DC 20062

Tracey Anne Hardin
Securities and Exchange Commission
Room 8214
100 F Street, NE
Washington, DC 20549-9040

Julie Alyssa Murray
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009

/s/ John B. Bellinger, III
John B. Bellinger, III