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 *et al.*,
Appellants,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,
Appellee,

and

AMNESTY INTERNATIONAL OF THE USA, INC. and
AMNESTY INTERNATIONAL LIMITED,
Intervenors for Appellee.

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

BRIEF OF *AMICI CURIAE* GLOBAL WITNESS AND FORMER MEMBERS OF THE UNITED NATIONS GROUP OF EXPERTS ON THE DEMOCRATIC REPUBLIC OF THE CONGO IN SUPPORT OF APPELLEE

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October 30, 2013

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties and *Amici*

Except for the following, all parties, intervenors, and *amici curiae* appearing in this Court are listed in Appellants' Brief:

Additional *Amici* for Appellants:

American Petroleum Institute

Retail Litigation Center, Inc.

(B) Rulings Under Review

References to the Final Rule under review appear in Appellants' Brief.

(C) Related Cases

There are no related cases.

(D) Authority to file *amici curiae* brief

Under D.C. Circuit Rule 29(b), all parties have consented to the filing of this amicus brief.

DATED: October 30, 2013

/s/ Jodi Westbrook Flowers

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), Global Witness Limited states that:

1. Global Witness Limited ("Global Witness") is a nongovernmental, not-for-profit organization founded in 1993 to investigate and campaign to prevent natural resource-related conflict, corruption, and associated environmental and human rights abuses. Global Witness has carried out extensive research on the minerals trade in the eastern Democratic Republic of the Congo through regular, in-depth field investigations and research and interviews with stakeholders along the tin, tantalum, tungsten, and gold supply chains originating in the African Great Lakes region. Global Witness is a leading organization advocating breaking the links between natural resources, armed conflicts, and human rights abuses.

2. Global Witness Limited has no parent corporation and no publicly held corporation owns 10% or more of the stock of Global Witness Limited.

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*Denotes authorities chiefly relied upon.

GLOSSARY

AGL	African Great Lakes region
DRC	Democratic Republic of the Congo
ICGLR	International Conference on the Great Lakes Region
OECD	Organization for Economic Co-operation and Development
SEC	Securities and Exchange Commission
UN	United Nations

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in Appellants' Brief.[1]

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

All parties have consented to the filing of this brief.

Global Witness is a not-for-profit organization working to promote peace and economic security in the DRC by curtailing the financing that abusive armed groups derive from the minerals sector. Global Witness is a leader in developing and implementing transparency and natural resource governance mechanisms internationally. Global Witness' knowledge and experience on the minerals trade in the DRC is based on its regular, in-depth field investigations in the eastern DRC and by interviews with stakeholders in the minerals trade, including miners, traders, government officials, and the Congolese army.

Fred Robarts was Coordinator of the United Nations Group of Experts on the DRC in 2010 and 2011. Fred Robarts resided and worked in the DRC from 2006 to 2012, undertaking consultancy assignments for the UN Development Programme, Human Rights Watch, the United Kingdom's Department for International Development, and the International Committee of the Red Cross.

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[1] As used herein, "Rule" or "Final Rule" refers to the Final Rule of the Securities and Exchange Commission, *Conflict Minerals*, 77 Fed. Reg. 56,274 (9/12/2012); Exchange Act Release No. 34-67716 (8/22/2012), under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213-18 (2010) "Dodd-Frank" or "Section 1502."

Gregory Mthembu-Salter is a former member of the United Nations Group of Experts on the DRC, where he wrote recommendations and assessed implementation of the Group's due diligence guidelines for individuals and entities mining and trading minerals from eastern DRC and neighbouring states. The role of the United Nations Group of Experts on the DRC is to investigate and document evidence regarding the procurement of weapons, equipment, and ammunition by armed groups active in the DRC, their related financial networks, and their involvement in the exploitation and trade of natural resources.

Throughout the rulemaking process, these *amici* elucidated social, economic, and policy benefits that the Rule advances. As Appellants argue that the SEC "failed" to consider benefits and costs, *amici* welcome this opportunity to clarify the Rule's compelling benefits and reasonable associated costs.[2]

SUMMARY OF ARGUMENT

Appellants' overarching argument is that the Rule should be vacated because the SEC failed to analyze its benefits and costs. That is false. The SEC considered benefits of the Rule in light of the Congressional mandate under Section 1502 to reduce violence and disrupt financing of armed groups in the DRC. The SEC considered views from a wide range of commentators who stated that the Rule will

[2] 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 preparing or submitting the brief; and no person (other than *amici curiae*) contributed money that was intended to fund the preparation or submission of this brief.

help address a critical humanitarian crisis. Furthermore, the SEC considered protections to investors and benefits for companies that arise through the disclosure of material information under the Rule. The SEC reasonably concluded that the disclosures required by the Rule improve supply chain risk management and increase cost efficiency through innovation and expanded use of advancing technologies – while weakening the nexus between mining and conflict in the DRC. Moreover, the SEC concluded that the compliance costs associated with the disclosure requirements were reasonable and justified.

Appellants' argument that compliance is infeasible is belied by real-life examples. Claigan Environmental Inc., which works with many corporations on creating and implementing conflict-minerals compliance programs, reports that as of "September of 2013, approximately 2,946 companies were identified to have conflict minerals compliance programs . . . show[ing] a significant level of engagement by industry."[3] Indeed, as of October 2013, Honeywell Electronic Materials, a leading supplier to the worldwide electronics industry, publicly declared that it determined through its Section 1502 compliance program that its

[3] "Update on Industry Status of Conflict Minerals Compliance" (Oct. 17, 2013), Claigan Environmental Inc., available at: http://www.newswire.ca/en/story/1243831/update-on-industry-status-of-conflict-minerals-compliance

"products are DRC Conflict-Free as defined by the Conflict Minerals Law. . . ."[4] Notably, the Chairman and CEO of Honeywell is also the Vice Chair of *Appellant* Business Roundtable;[5] so Appellants know full well that compliance is feasible, workable, and already being done by their own companies today.

Not only is implementation of the Rule feasible, implementation of the Rule will not cause permanent trade embargos or economic collapse in the DRC. To the contrary, vacating the Rule will cause grave harm and adverse consequences including:

- increasing the flow of conflict mineral financing to armed groups inflicting violence upon the people of the DRC;
- creating competitive disadvantages for companies that have already begun to implement conflict minerals compliance programs;
- undermining positive reforms in the minerals sector in the DRC and AGL region; and
- causing detriment to investors in minerals markets.

[4] "Honeywell Electronic Materials Conflict Minerals Statement," (Oct. 2013) available at: https://www51.honeywell.com/sm/em/common/documents/HEM_Conflict_Minerals_Compliance_Statement.pdf

[5] http://honeywell.com/About/Honeywellleadership/Pages/david-cote.aspx (as of Oct. 16, 2013)

ARGUMENT

I. The SEC's Rule on conflict minerals will generate compelling benefits for the people of the DRC and companies in the minerals sector

A. The SEC properly considered benefits of the Rule in light of Congress's mandate under Section 1502 to reduce violence and disrupt the financing of armed groups in the DRC

The overarching argument of Appellants and their supporting *amici* is that the Rule should be vacated because the SEC did not conduct a cost-benefit analysis. *See* Opening Brief of Appellants' ("Appellants' Br.") at 47; Brief of *Amicus Curiae* Experts on the Democratic Republic of the Congo (Dkt. 1457279; filed 09/18/2013) ("Academics Br.") at 18; Brief of American Petroleum Institute as *Amicus Curiae* on behalf of Appellants (Dkt. 1457281; filed 09/18/2013) ("API Br.") at 3. But that argument fails for several reasons.

After taking into account "the public interest" and the "protection of investors," the SEC need only "*consider* ... whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f) (emphasis added). As explained by the district court:

> The Commission may deem it appropriate (or even necessary) to weigh the costs and benefits of its proposed action as related to these enumerated factors, but to suggest that the Exchange Act mandates that the SEC conduct some sort of broader, wide-ranging benefits analysis simply reads too much into this statutory language. This is particularly true here, where the resulting benefits Plaintiffs accuse the Commission of ignoring relate to *humanitarian* objectives that Congress concluded would be achieved by the rulemaking, rather than

> some sort of *economic* objectives that Congress concluded would be achieved by the Commission's rule."

JA0874 (emphasis in original); *see also Inv. Co. Inst. v. United States CFTC*, No. 12-00612 (BAH), 2012 U.S. Dist. LEXIS 175941 at *131 (D.D.C. Dec. 12, 2012) (explaining that the agency "is not required to promulgate only rules that have low or no costs; rather, the agency is simply required to show that they 'considered' and 'evaluated' the costs of the rule.).

Next, under the plain text of Section 1502, Congress itself has determined that the aim of the Rule is to reduce financing to armed groups in the DRC:

> It is the sense of the 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], particularly sexual and gender-based violence, and contributing to an emergency humanitarian situation therein. ... As a means to address the humanitarian situation in the [DRC], new Section 13(p) requires issuers to understand and report on their use and source of certain minerals from the Covered Countries.

77 Fed. Reg. at 56,335 n. 715.

Accordingly, as explained by the district court, "the Commission promulgated the Conflict Minerals Rule pursuant to an express, statutory directive *from Congress*, which was driven by *Congress's determination* that the due diligence and disclosure requirements it enacted would help to promote peace and security in the DRC." JA0877 (emphasis in original).

And the fact that Congress *mandated* the SEC to craft this Rule sharply distinguishes this case from the cases that Appellants and their supporting *amici* chiefly rely on involving rules or regulations that were proposed and adopted by the SEC *of its own accord*. *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011) and *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 1144 (D.C. Cir. 2011).

Hence, the district court held that the SEC's "role was not to 'second-guess' Congress's judgment as to the benefits of disclosure, but to, instead, promulgate a rule that would promote the benefits Congress identified and that would hew closely to that congressional command." JA0877; *see also*, *Inv. Co. Inst.*, 2012 U.S. Dist. LEXIS 175941 at *86.

To attain those benefits mandated by Congress, the SEC faithfully moored the Rule's provisions to Section 1502's mandate: "our discretionary choices are informed by the statutory mandate and thus, discussion of the benefits and costs of those choices will necessarily involve the benefits and costs of the underlying statute." 77 Fed. Reg. at 56,335 n. 711; *see also Inv. Co. Inst.*, 2012 U.S. Dist. LEXIS 175941 at *131-132 ("Where the Final Rule is 'moored' to the 'purposes and concerns' of Dodd-Frank, and well within the agency's discretion, and where the agency determines that the costs of the Final Rule are outweighed by its

benefits, this Court finds no reason for finding that the agency acted in a manner that was arbitrary and capricious.").

So the SEC did *consider* compelling benefits that the Rule's disclosure requirements will generate "in furtherance of the purposes of [Section 1502]."[6]

> By mandating the additional disclosure requirements of Exchange Act Section 13(p), we understand that Congress likely sought to reduce the amount of money provided to armed groups engaged in conflict in the DRC, thereby achieving the stated objective of the statute. Some commentators have argued that the Conflict Minerals Statutory Provision has already made progress in this area. For example, some commentators have argued that the Conflict Minerals Statutory Provision has already pressured DRC authorities to begin to demilitarize some mining areas and to increase mining oversight.

77 Fed. Reg. at 56,335.

Beyond considering compelling public policy and humanitarian interests, the SEC also considered the views of commentators regarding the Rule's protection of investors, promotion of efficiency, and enhancement of effective risk management in supply chains:

> [C]onflict minerals information is material to an investment decision and, therefore, similar to other disclosures required to be filed by issuers. For example, one commentator noted that, "[a]s a sustainable and responsible investor," this commentator "values companies' prudent management of risk in their global supply chains and has been particularly concerned in recent years by the use of certain minerals to fund the continuing bloody conflict in the" DRC. As another example, a different commentator stated that, "[a]s sustainable and responsible investors, we carefully assess the prudent management of risk in companies' global supply chains and we have been particularly

[6] 15 U.S.C. § 78w(a)(2).

> concerned in recent years by the use of certain minerals, namely tin, tantalum, tungsten and gold, to fund the continuing bloody conflict in the" DRC.

77 Fed. Reg. at 56,335-6. And that is precisely why these investors endorsed the district court's decision upholding the Rule under Section 1502:

> As investors, we believe that the Section 1502 (Conflict Minerals Disclosure) of the Dodd-Frank Act provides a critical leverage point to address one of the root causes of the ongoing violence that has plagued the [DRC] for many years. The rule provides investors the information needed to make sound financial investments and to ensure that the companies in which we invest are not associated, either directly or indirectly, with significant human rights risks associated with conflict minerals.[7]

Seeking to discredit the SEC's consideration of compelling social benefits, *see* 77 Fed. Reg. at 56,335 *supra*, Appellants and their supporting *amici* speculate that "[i]t could well be that the SEC's rule will fail to disrupt funding to armed groups, while causing serious harms to the miners and the DRC economy." Appellants' Br. at 49; *see also* Academics Br. at 16-17; API Br. at 23. But those dire predictions are belied by empirical facts provided to the SEC by numerous commentators showing that the Rule will generate compelling social benefits as Congress intended.

[7] Boston Common Asset Management, "Investors Applaud DC District Court's Decision to Uphold Section 1502 of the Dodd Frank Act (Conflict Minerals Disclosure)" (July 24, 2013), available at http://www.bostoncommonasset.com/news/ConflictMineralsDodd-FrankAct.php

1. By reducing overall funding to armed groups that control mining sites in conflict regions, the Rule will reduce conflict financing

Under the Rule, conflict mineral-based financing of armed groups in the DRC will decline:

> [T]here is no doubt about the links between armed groups and mineral exploitation in the eastern Congo. While violence did not initially start due to natural resources, and it would be misleading to state that measures such as Dodd-Frank will end conflict altogether, the mineral trade is probably the single largest source of revenue for many of these groups. This is a conclusion drawn from dozens of interviews I have carried out with armed group officers and businessmen in the region, as well as documentary evidence. Depriving these groups of financing will make demobilization more attractive, and should promote discipline within the Congolese army and reduce violence around mining sites. ... Some of these changes are already apparent.[8]

2. The Rule will improve conditions in the DRC

Bishop Nicholas Djomo Lola, the President of the Catholic Bishops' Conference of the Congo accurately summarized the societal benefits of breaking the link between minerals and conflict:

> If we can sever the link between the mines and the militias, we believe that we can curtail the violence and allow people to rebuild their communities and resolve the underlying causes of their conflicts. The hundreds of thousands of [displaced] people … could return to their homes[;] [t]he women who have been traumatized by rape could receive healing care[;] [h]ealth clinics and schools could be rebuilt[;] [d]evelopment assistance could be expanded … [and] [b]etter crops mean families will have more food, can send their surpluses to

[8] Jason Stearns, Written Testimony for the Record to the Subcommittee on Int'l Monetary Policy and Trade (5/10/2012).

market, can educate their children and may be able to seek employment off the farm.[9]

3. The Rule promotes laws and initiatives within the DRC and the AGL region to stop armed groups from exploiting the minerals trade

In February 2012, the Congolese government introduced domestic legislation requiring companies operating in its tin, tantalum, tungsten, or gold mining sectors to undertake supply chain due diligence that accords with an international standard set by the OECD "to ensure that they do not contribute to human rights violations or conflicts in DRC."[10] This law was introduced, in part, in response to Section 1502 and represents a significant step toward reforming Congo's troubled mining sector.[11] To the extent that it is fully implemented the

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[9] Bishop Nicholas Djomo Lola, Written Testimony for the Record to the Subcommittee on Int'l Monetary Policy and Trade (5/10/2012) at 5, available at http://financialservices.house.gov/uploadedfiles/hhrg-112-ba20-wstate-ndjomo-20120510.pdf. *See also* Global Witness, *Congo's Minerals Trade in the Balance* (5/2011), available at http://www.globalwitness.org/sites/default/files/library/Congo's%20minerals%20trade%20in%20the%20balance%20low%20res.pdf.

[10] Arrêté ministériel N.0057.CAB.MIN/MINES/01/2012 du 29 février 2012 portant mise en œuvre du mécanisme régional de certification de la Conférence Internationale sur la Région des Grands-Lacs « CIRGL » en République Démocratique du Congo, Article 8 (2/29/2012), available at http://www.mines-rdc.cd/fr/documents/Arrete_0057_2012.pdf.

[11] *See* Martin Kabwelulu, Minister of Mines, Democratic Republic of the Congo, SEC Comment, S74010-356 (10/15/2011) (stating that Government of DRC sees Dodd-Frank Section 1502 as "a major opportunity to break the links" between conflict, war, and the minerals trade); Final Report of the UN Group of Experts on

Congolese law combined with Section 1502 will significantly reduce the ability of armed groups to seek funding through the minerals trade.

Section 1502 and the Rule have also inspired positive developments on a local level in the DRC. Civil society groups, journalists and, in some cases, state agents, mining police, and mineral traders operating in mining areas in North and South Kivu and Katanga provinces have formed monitoring groups or have become whistleblowers flagging supply chain risks, including the involvement of armed men, as they arise.[12] In Mwenga territory, South Kivu, an independent journalist has uncovered cases of corruption and armed group involvement in local mining sites and discussed these on the radio. In North Kivu, a coalition of mineral traders, called Save Act Mine (SAM), has formed with the goal of promoting OECD supply chain due diligence and conflict-free trade. SAM operates a toll-free telephone hotline for people to anonymously report suspicious activity related to mineral trading; at last count as of July 2013, this service had

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the Democratic Republic of the Congo, S/2011/738 (12/2/2011), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/738

[12] Global Witness, "Putting Principles into Practice: Risks and Opportunities for Conflict-Free Sourcing in Eastern Congo" at p. 4 (May 7, 2013), available at http://www.globalwitness.org/sites/default/files/library/Putting%20principles%20into%20practice.pdf; *see also* "iTSCi National, Provincial and Local Stakeholder Committees" available at https://www.itri.co.uk/index.php?option=com_mtree&task=att_download&link_id=52434&cf_id=24

flagged over 120 cases of alleged cross-border smuggling. The establishment of SAM is in direct response to Section 1502 and the Rule "because [the members of SAM] understand that without clean supply chains, they will fail to sell their minerals to the American market."[13]

B. *Amici's* experience in the DRC minerals sector shows that the Rule will also generate competitive benefits for companies, investors, and the market

While Appellants and their supporting *amici* argue that the SEC failed to consider economic benefits of the Rule, this argument ignores that the Rule *does* consider commentators' views that the Rule benefits companies, investors, and the market by requiring disclosure of "information [that] is material to an investment decision" and promotes corporate efficiency through "prudent management of risk in companies' global supply chains." 77 Fed. Reg. at 56,335-6.[14]

As put by Judge Wilkins below, "the Court is easily convinced that the Commission discharged any potential responsibility to consider whether the Final Rule will 'promote efficiency, competition, and capital formation,' and that the

[13] Putting Principles into Practice, page 4, available http://www.globalwitness.org/sites/default/files/library/Putting%20principles%20into%20practice.pdf

[14] *See also* November 30, 2012 Letter to the SEC from various investor groups explaining how the Rule would protect investors, improve market efficiencies, and promote effective risk management; available at http://www.sourcingnetwork.org/storage/Investor%20Stmt%20on%201502%20Lawsuit%20-%20FINAL%20Nov%2030%202012.pdf.

Commission appropriately considered the Rule's impact on competition more generally"[15] by:

- "explaining 'that the required disclosure will help investors in pricing the securities of the issuers subject to the Conflict Minerals Statutory Provision' and 'could improve informational efficiency' 77 Fed. Reg. at 56,350"[16];
- "consider[ing] whether the Rule would 'have a significant impact on capital formation,' explaining that it '[did] not expect that the rule would negatively impact prospects of the affected industries to the extend that would result in withdrawal of capital from these industries.' *Id.* at 56,350-56,351"[17]; and
- "consider[ing] the Rule's effect on competition, noting that 'issuers with a reporting obligation under the Conflict Minerals Statutory Provision could be put at a competitive disadvantage with respect to private companies that do not have such an obligation.' *Id.* at 56,350."[18]

[15] JA0877

[16] JA0878

[17] JA0879

[18] JA0879

Appellants also ignore studies in the record submitted to the SEC during the long process of crafting the Rule. Those studies detail economic benefits the Rule will generate for individual companies and the market. For example, Global Witness sponsored an independent study conducted and submitted by Green Research, entitled "The Costs and Benefits of Dodd-Frank Section 1502: A Company-Level Perspective" (Green Research Report).[19] Based on interviews with over twenty companies subject to Section 1502, the Green Research Report found that Section 1502 will generate competitive business benefits including: leveling the playing field, better supply chain risk management, improved supply chain performance, new innovation opportunities, and enhanced ability to satisfy consumers' and market expectations that products are conflict free.

1. The Rule will level the playing field for companies that have already implemented monitoring systems

The Green Research Report found that some companies subject to Section 1502 have already committed to ensuring that their purchases of minerals do not fund conflict in the DRC.[20] Even before Section 1502 was signed into law, certain companies began tracing their supply chains. But now, with implementation of the

[19] Green Research, "The Costs and Benefits of Dodd-Frank Section 1502: A Company-Level Perspective," available at http://www.sec.gov/comments/s7-40-10/s74010-470.pdf (submitted to SEC on Jan. 27, 2012).

[20] *Id.* at 18-19.

Rule, "everyone is involved and it's no longer a competitive disadvantage."[21] Thus, from the perspective of those companies, a benefit of the legislation is a leveling of the playing field. Despite complexities the Appellants point to, the solutions here are reasonable and feasible. The Rule is not causing companies to go out of business or subjecting them to unmanageable costs.[22]

Apple is a good example of a company that has demonstrated the feasibility of supply chain due diligence. In early 2010, Apple "started by mapping [its] supply chain to the smelter level, so that [it] know[s] which suppliers are using tantalum, tin, tungsten, or gold and where they are getting the metal."[23] That same year, Apple completed a detailed investigation into the use of extractives at all levels of its supply chain. The results included "both component and subcomponent suppliers that use tantalum, tin, tungsten, or gold in the

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[21] *Id.* at 19.

[22] SEC Comments from Claigan Environmental (S74010-365, S74010-429, S74010-430, S74010-431, and S74010-459) (Oct. 28, 2011 & Dec. 16, 2011), *see* 77 Fed. Reg. at 56,340-2. Notably, as of October 2013, "[o]bserved costs incurred by companies have been within approximately 25% of the costs originally projected in Claigan's submissions to the SEC on December 16, 2011, In a number of cases the cost for larger entities has been significantly lower than originally projected." *See* "Update on Industry Status of Conflict Minerals Compliance" (Oct. 17, 2013), Claigan Environmental Inc., available at: http://www.newswire.ca/en/story/1243831/update-on-industry-status-of-conflict-minerals-compliance

[23] Apple Inc., 2011 Supplier Responsibility Progress Report (2/2011) at 11, available at http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2011_Progress_Report.pdf.

manufacturing of Apple products, as well as the smelters that originally processed the ore."[24] As of December 2012, by actively surveying suppliers to confirm their smelter sources, Apple "identified 211 smelters and refiners from which [its] suppliers source tin, tantalum, tungsten, or gold. Apple suppliers are using conflict free sources of tantalum, are certifying their tantalum smelters, or are transitioning their sourcing to already certified tantalum smelters."[25]

Apple is not alone. Before, during, and after the implementation of the Rule, companies like KEMET Electronics Corp., Intel Corporation, Motorola Solutions Inc., Hewlett Packard and others have proven that compliance under the Rule and related international standards is feasible and reasonable. Since the rulemaking, a multi-stakeholder group representing diverse organizations from several industrial sectors, investment institutions, and non-governmental organizations, has committed to developing transparent supply chains free of conflict minerals further underscoring the feasibility of the Rule's disclosure requirements.[26] Responsible sourcing of minerals from this region is not only feasible, it is underway.

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[24] *Id.*

[25] Apple Inc., 2013 Supplier Responsibility Progress Report (2013) at 21, available at http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2013_Progress_Report.pdf.

[26] *See* Multi-Stakeholder Group statement on the Challenge to Conflict Mineral Rule (11/19/2012), available at

Indeed, today compliance with the Rule is ongoing by *thousands* of companies. Claigan Environmental Inc., which works with many corporations to create and implement conflict-minerals compliance programs under the Rule, reports that as of "September of 2013, approximately 2,946 companies were identified to have conflict minerals compliance programs. This likely only represents a subset of companies with conflict minerals policies, but does show a significant level of engagement by industry."[27]

A striking example is that as of October 2013, Honeywell Electronic Materials ("HEM"), a leading supplier to the worldwide electronics industry, publicly declared that that its "products are DRC Conflict-Free."[28] This determination was made through a compliance program under the Rule:

> We have implemented the following actions as part of a compliance program relating to Section 1502 and associated SEC regulations:
>
> 1. Determine which HEM products contain conflict minerals and whether the conflict minerals are necessary for the functionality

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http://www.bostoncommonasset.com/documents/MSGStatementon1502lawsuitNov19_FINAL_000.pdf.

[27] "Update on Industry Status of Conflict Minerals Compliance" (Oct. 17, 2013), Claigan Environmental Inc., available at: http://www.newswire.ca/en/story/1243831/update-on-industry-status-of-conflict-minerals-compliance

[28] "Honeywell Electronic Materials Conflict Minerals Statement," (Oct. 2013) available at: https://www51.honeywell.com/sm/em/common/documents/HEM_Conflict_Minerals_Compliance_Statement.pdf

> or production of the product or are otherwise covered by the Conflict Minerals Law;
>
> 2. Utilize reasonable due diligence to assess the country of origin of the conflict minerals;
>
> 3. Communicate with our global suppliers (and potentially our second tier suppliers) regarding country of origin of the conflict minerals; and
>
> 4. Complete a third party audit to confirm HEM's conflict free status.
>
> HEM has obtained information from its current metal suppliers concerning the origin of conflict minerals that are used in HEM's products. Based on our supplier's responses, our reasonable due diligence, and a third party audit, to the best of our knowledge, HEM's products are DRC Conflict-Free as defined by the Conflict Minerals Law….[29]

Honeywell's successful and continuing implementation of a compliance program under Section 1502 and the Rule renders hollow Appellants argument that the regime is infeasible, unworkable, and unreasonable. Appellants need only speak to David M. Cote, the Chairman and CEO of Honeywell *and* Vice Chair of Appellant Business Roundtable,[30] to understand that compliance is feasible, workable, and already being done by their member companies today.

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[29] "Honeywell Electronic Materials Conflict Minerals Statement," (Oct. 2013) available and accessed on Oct. 17, 2013 at: https://www51.honeywell.com/sm/em/common/documents/HEM_Conflict_Minerals_Compliance_Statement.pdf

[30] http://honeywell.com/About/Honeywellleadership/Pages/david-cote.aspx (as of Oct. 16, 2013) (emphasis added).

2. The Rule under Section 1502 will improve supply chain risk management and performance

Many companies have commented that by requiring them to obtain more information about their supply chains, the Rule will enhance their supply-chain risk management: "The more transparency that we have in our supply chain, the lower the risk for us."[31] As stated by senior vice president of supply chains at Johnson & Johnson, "[t]he more that you understand the full extent of your supply chain that helps you to craft business continuity plans that are more robust. … There's no argument about reduction in risk."[32]

Moreover, compliance with Section 1502 will cause companies to redesign their supply chain to optimize efficiency, responsiveness, and transparency. As Brian Martin of Seagate stated concisely, "[t]he more in depth understanding you have of your supply chain, the more effectively you can manage the performance of your supply chain."[33]

3. The Rule under Section 1502 will cause companies to innovate to improve cost-effectiveness and efficiency of their conflict minerals compliance programs, thereby generating business value

A powerful example of Section 1502 and the Rule motivating companies to innovate and enhance their competitive position is the Solutions for Hope project.

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[31] Green Research Report at 19.

[32] *Id.* at 18.

[33] *Id.* at 20.

This project was jointly undertaken by Motorola Solutions, Inc. and AVX Corporation to source DRC conflict free tantalum and create DRC conflict free tantalum capacitors for the electronics industry. This project not only proves that conflict free minerals can be mined in the DRC in accordance with Section 1502, but also "positions AVX as a provider of a new product line of conflict free components."[34] There are now nine major end-user companies, including Hewlett Packard, Intel, Nokia, and Research in Motion, who are purchasing this conflict-free material. Intel is now working towards their goal of manufacturing a conflict free microprocessor by the end of 2013.[35] Since the initiative's inception, Solutions for Hope has processed over 145 metric tons of conflict-free tantalum.[36]

In addition to Solutions for Hope, there are many examples of companies implementing innovative, efficient, cost-effective compliance programs including:

- KEMET, which specializes in capacitor products and controls all material mined from its tantalum mining site in DRC's Katanga province, tracks the material along the supply chain through production of its capacitors.[37] And

[34] *Id.* at 19-20.

[35] Intel Corp., "Intel's Efforts to Achieve 'Conflict-Free' Supply Chain" (Feb. 2013), available at http://www.intel.com/content/dam/doc/policy/policy-conflict-minerals.pdf.

[36] Resolve, "Solutions for Hope: Results." (Jun. 2013), available at http://solutions-network.org/site-solutionsforhope/results/

[37] KEMET, "The Most Reliable Source of Conflict Free Tantalum & Polymer Capacitors: KEMET's Fully Integrated and Conflict Free Tantalum Supply Chain"

"[c]ontrol of raw materials sourcing, and significant reductions in the overall cycle time means greater cost control and elimination of the volatile elements in the supply chain."[38]

- Two electronics industry associations (Electronic Industry Citizenship Coalition and Global e-Sustainability Initiative) have set up the Conflict-Free Smelter Program, an auditing system for smelters and refiners seeking to meet the requirements of Section 1502.[39] As of September 25, 2013, there are 54 compliant smelters and refiners; another 66 are currently

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at Slide 4, available at http://www.kemet.com/kemet/web/homepage/kechome.nsf/file/Sourcing%20Reliable%20Conflict%20Free%20Tantalum%20Capacitors/$file/Sourcing%20Reliable%20Conflict%20Free%20Tantalum%20Capacitors.pdf.

[38] *Id.*

[39] *See* Roundtable on Issues Relating to Conflict Minerals, Release No. 34-65508, 76 Fed. Reg. 63,573 (proposed Oct. 7, 2011) (transcript available at http://www.sec.gov/spotlight/conflictminerals/conflictmineralsroundtable101811-transcript.txt. (Mike Davis, Global Witness: "at an international level, electronics industry associations have come together to develop a system for assessing the supply chain controls adopted by metal refiners, which are the key bottleneck in the supply chain for these materials. This conflict-free smelter program is now well advanced and stands to help companies in conducting the due diligence which this law requires."); Intel's Efforts to Achieve a "Conflict Free" Supply Chain (11/22/2011), available at http://www.sec.gov/comments/s7-40-10/s74010-419.pdf

seeking conflict free status.[40] Participation will continue to increase as the Rule is fully implemented and efficiencies increase.[41]

In October 2012, a group of European companies, in collaboration with the Dutch government, launched the Conflict-Free Tin Initiative (CFTI) in the South Kivu province in eastern DRC. After the tin is mined, it is 'bagged and tagged' through a certification scheme and becomes available for participants to purchase. When this initiative launched, there were nine companies and organizations committed to it, including: Royal Philips Electronics, Tata Steel, Motorola Solutions, Research in Motion, Alpha, AIM Metals & Alloys, Malaysia Smelting Corporation Berhad, Traxys, and the International Tin Research Institute.[42] After the mine was validated as conflict-free, the first bags of conflict-free tin left the mine on October

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[40] Conflict Free Smelter, "Program Indicators", available at http://www.conflictfreesmelter.org/CFSindicators.htm.

[41] *See* Roundtable on Issues Relating to Conflict Minerals, Release No. 34-65508, 76 Fed. Reg. 63,573 (proposed Oct. 7, 2011) (transcript available at 116-117, available at http://www.sec.gov/spotlight/conflictminerals/conflictmineralsroundtable101811-transcript.txt (Tim Mohin, Director of Global Corporate Responsibility, Advanced Micro Devices Inc.: "no single company, government agency, or NGO can achieve this outcome by working on their own. But by working together we can help the DRC region develop a sustainable conflict free minerals trade.") (David Bouffard, Vice President, Public Relations, Signet Jewelers Ltd.: "we're inspired by the responsible smelter programs that are underway").

[42] Conflict-Free Tin Initiative, Press Release, "*Conflict-Free Tin Initiative announced*" (9/18/2012), available at http://solutions-network.org/site-cfti/files/2012/09/Press-statement-Conflict-Free-Tin-Initiative-Press-Release-18-Sept.pdf.

24, 2012.[43] Production levels at the mine site, which typically employs around 1,200 artisanal miners, *have risen steadily* and average over 100 tons of tin ore per month. In addition, the CFTI website reports that income for these miners "has more than *doubled* from USD 2 to USD 4 – USD 6 per kilo, depending on the quality of the tin and the world price."[44]

4. The Rule under Section 1502 will enhance companies' ability to meet investors' and consumers' expectations that their products are DRC conflict free

By creating uniformity in supply chain information, reinforced by a legal mandate to obtain that information, the Rule facilitates transparency for customers and investors concerned with conflict free sourcing.[45] By satisfying customer and investor expectations, and making companies more responsive to those expectations, the competitive market will generate market stability and economic benefits for companies. As recently explained by Sonal Sinha, Associate Vice President of Industry Solutions at MetricStream Inc., a developer of enterprise governance, risk, and compliance solutions:

> regulators are not going to be the only ones judging companies' compliance efforts. That judgment will also rest with various

[43] Conflict-Free Tin Initiative, Press Release, *First Bags of Conflict-Free Tin Leave a Congolese Mine* (10/24/2012), available at http://solutions-network.org/site-cfti/files/2012/10/CFTI-Press-Statement-October-24-2012.pdf.

[44] Conflict-Free Tin Initiative, "Stats", available at http://solutions-network.org/site-cfti/status/.

[45] Green Research Report at 20.

> stakeholders, such as nongovernmental organizations, investors, and customers, who will review a company's published conflict minerals report and determine whether reasonable 'good faith' efforts have gone into the report. This suggests that conflict minerals will continue to move from a compliance issue to a brand and reputation issue, which by default is also a financial issue: Customers can easily take their business to another company that is visibly more committed to responsible sourcing.[46]

As concisely put by Gerrit Reepmeyer, director of energy and utilities for Severstal North America, a steelmaker with headquarters in Dearborn, Michigan: "We believe focusing on this effort will give us a commercial edge in the industry," and "[t]hat's why we've taken steps in recent months as a proactive tool in the way we do sourcing."[47]

II. The Rule will not worsen conditions in the DRC let alone cause a "permanent *de facto* embargo" on the minerals trade in the DRC.

The doomsday argument by Appellants and their supporting *amici* that Section 1502 and the Rule will make matters worse in the DRC is alarmist and belied by facts on the ground. Appellants' Br. at 16-17, 48-49; Academics Br. 21-27; API Br. at 23 (each predicting a "*de facto* embargo"). No single measure can

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[46] Sonal Sinha, *Quality Digest*, "The Business Case for a Long-Term Conflict Minerals Program" (9/24/2013), available at http://www.qualitydigest.com/inside/quality-insider-column/business-case-long-term-conflicts-minerals-program.html

[47] Crain's Detroit Business, "Auto industry steels itself for 'conflict minerals' rule" (9/24/2013), available at:

http://www.crainsdetroit.com/article/20130922/NEWS/309229971/auto-industry-steels-itself-for-conflcit-minerals-rule

reverse fifteen years of war and transform the DRC's natural resources into an engine of stability and development overnight.[48] With the host of social, economic, and political challenges faced by the region, it is short-sighted and misleading to suggest that the ills of the DRC are caused by efforts to *break* the links between armed groups and the minerals trade, as Appellants suggest.

Likewise, suggesting that less disclosure on conflict mineral usage will increase legitimate business development in the DRC is nonsensical. The absence of transparency and due diligence in mineral supply chains from eastern DRC has been a driver of conflict, not prosperity. Increased disclosure under the Rule is part of the solution, *not* the problem.

While Appellants and their supporting *amici* foretell doom by the Rule, Appellants Br. at 16; Academics Br. 25; API Br. at 23, it is false for them to assert that the Rule has created a permanent "*de facto* embargo" on the minerals trade in the DRC. Breaking the conflict mineral supply chain and replacing it with 'clean' minerals trade is a process of change – and that change can happen, is happening, and will continue to happen under Section 1502 and the Rule. Mineral exports from the region declined in 2010, a downturn that stemmed from a six-month suspension of mining and trading activities imposed by the Congolese government in September of 2010. This was exacerbated by the concerted efforts of certain

[48] Peter Rosenblum, Columbia Law School, SEC Comment, S74010-306 (9/7/2011), at 1.

U.S. industry associations to fight and delay real reform on responsible mineral sourcing.

The notion that the Rule has only increased poverty in the eastern DRC overlooks realities and complexities. The "export revenue" that the Academics point to (and overstate) has lined the pockets of armed groups first and foremost. Academics Br. 4. Moreover, it is the industry reaction to Section 1502 that has rendered some miners displaced.[49]

> As a result of the de facto embargo instituted by some companies, some people are losing the income they made from the mines, while others continue to work. We know, however, that the meager income they receive comes from difficult and often dangerous jobs that risk their health and security. … We also know that mining employs a relatively small percentage of people in the eastern Congo. Many more people have been displaced by the violence than receive income from mining.[50]

Appellants' suggestions that conditions have only worsened are vastly exaggerated. Worldwide demand for these minerals is *not* diminishing, and Section 1502 has not caused all manufacturers to abandon the DRC.[51] The Rule

[49] Fred Robarts, Coordinator for the United Nations Group of Experts on the Democratic Republic of the Congo, SEC Comment, S74010 (10/21/2011).

[50] Nicolas Djomo Lola, Bishop of Tshumbe, President Episcopal Conference of Catholic Bishops of the Democratic Republic of the Congo, SEC Comment, S74010-411 (11/8/2011).

[51] *See* Fred Robarts & Gregory Mthembu-Salter, *Congo: Efforts to End Resource-Fuelled Conflict With Due Diligence*, AFRICAN ARGUMENTS (Feb. 15, 2012), available at http://africanarguments.org/2012/02/15/congo-due-diligence-can-

does not place any permanent or temporary embargo on minerals from the DRC – it is a disclosure requirement only. It places no ban or penalty on the use of conflict minerals. If companies discover they have been sourcing conflict minerals from DRC or adjoining countries, it is not even illegal for them to continue to do so; they simply must disclose it.

Yet *amici* in support of Appellants blame the SEC for devastating the DRC by "[c]rushing the open market for minerals". Academics Br. 25. The facts belie that hyperbole. A transformation of the eastern DRC's minerals sector, whereby companies are cleaning up supply chains and taking necessary steps to ensure minerals are conflict free as Section 1502 mandates, is occurring. That hard-won progress is real. Disclosure of material information regarding the origin of minerals benefits investors and market efficiency; it does *not* destroy them. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 (1976) (fundamental purpose of federal securities regulations is to provide investors "with full disclosure of material information" to "protect investors" and "to promote ethical standards of honesty and fair dealing" in market); *see* 15 U.S.C. § 78a, *et seq*. Investors have

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help-efforts-to-end-resource-fuelled-conflict-%E2%80%93-by-fred-robarts-and-gregory-mthembu-salter/

emphasized to the SEC both during and after the rulemaking the importance of conflict mineral disclosure to inform investment decisions.[52]

To be sure, full disclosure will not happen overnight.[53] As one investor astutely observed:

> We understand that initial reporting may be uneven, yet the objective should be to trace and to disclose such origins with growing transparency, consistency and credibility year by year across the value chain. And we are encouraged, encouraged by certain factors already apparent; that internationally accepted due diligence guidelines are already in place; that many companies are already using supply chain audit systems; and that on the ground training and monitoring systems are developing rapidly as well.[54]

III. Overturning the Rule would have dire consequences in the DRC

We also urge the Court to consider some practical consequences of vacating the Rule:

- Responsible companies have already made significant progress in creating conflict free supply chains and due diligence initiatives. The

[52] *See* Sourcing Network, *Investor Statement on the Challenge to Conflict Minerals Rule* (11/30/2012), available at http://www.sourcingnetwork.org/storage/Investor%20Stmt%20on%201502%20Lawsuit%20-%20FINAL%20Nov%2030%202012.pdf.

[53] *See* Global Witness, *Congo's Minerals Trade in the Balance* (5/2011), available at http://www.globalwitness.org/sites/default/files/library/Congo's%20minerals%20trade%20in%20the%20balance%20low%20res.pdf.

[54] Bennett Freeman, Senior Vice President of Sustainability Research and Policy, Calvert Investments, Inc., Roundtable on Issues Relating to Conflict Minerals, SEC Comment, Release No. 34-65508, 76 Fed. Reg. 63,573 (proposed Oct. 7, 2011).

progress and reforms underway in the region will be jeopardized and progress compromised if the Petitioners are successful.

- Vacating the Rule will result in discouraging, even penalizing, socially responsible companies that have worked to clean up supply chains in the DRC and discourage additional companies from undertaking due diligence efforts.[55]
- Overturning the Rule will allow lucrative financing of armed groups in the region to increase, fuelling gross violations of human rights including horrific violence against women and children. This will jeopardize additional lives in the DRC.[56]
- Undermining the Rule will create a situation where companies lose the efficiencies of having one rule and must return to the uncertainty of a patchwork of guidelines. As one comment stated, "The 'genie is out of the bottle.' Conflict mineral compliance will not stop because there is no final SEC Rule. It will just become less expensive if there is one."[57]

[55] North Kivu Civil Society Groups, SEC Comment, S74010-285 (8/1/2011).

[56] Gautier Muhindo Misonia & Isaac Mumbere Wikerevolo, Right to Peace and Natural Resources Program, SEC Comment, S74010-359 (10/28/2011); North Kivu Civil Society Groups, SEC Comment, S74010-285 (8/1/2011).

[57] Claigan Environmental, SEC Comment, S74010-431 (12/16/2011) at 9.

- Abandoning the Rule would undermine the corporate responsibility standards of publicly traded U.S. companies and America's commitment to helping end the bloodshed, mass rape, and violence in the DRC.[58]
- Failing to uphold the Rule will also serve to harm investors, issuers, and taxpayers; increase risk to companies and investors; and exacerbate a massive, well-documented humanitarian crisis.[59] Companies are realizing they cannot turn a blind eye to this problem any longer, nor will consumers accept conflict minerals in their products.[60]
- Overturning the Rule would undermine U.S. foreign policy and subvert what the U.S. State Department has said publicly regarding both the need for and propriety of this Rule.[61]

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[58] Members of Congress, SEC Comment, S74010-549 (5/17/2012); Representatives of Congress, SEC Comment, S74010-313 (9/23/2011); Margot Wallstrom, UN Special Representative of the Secretary-General on Sexual Violence in Conflict, SEC Comment, S74010-336 (10/18/2011).

[59] Civil Society Organizations, SEC Comment, S74010-438 (12/22/2011) at 1.

[60] Kathy Mulvey, Conflict Risk Network, SEC Comment, S74010-491 (2/7/2012) at 2.

[61] Robert D. Hormats, Under Secretary for Economic Growth, Energy, and the Environment, U.S. Dept. of State, Statement Concerning Continued Implementation of Conflict Minerals Due Diligence Pursuant to Section 1502 of the Dodd-Frank Act (2/28/2013) p. 2 (the Rule is "a vital step in establishing a clear and harmonizing global framework for responsible minerals trade from the region.")

The source of positive changes in the DRC and global minerals markets is no mystery; vacating the Rule will destroy both drivers and positive results of that change. Section 1502 and the Rule have brought companies to the table in a way that voluntary initiatives alone could not.[62]

CONCLUSION

For the above reasons, this Court should affirm the district court's judgment and uphold the Rule.

Respectfully Submitted,

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Date: October 30, 2013

[62] U.S. House, Subcomm. on Int'l Monetary Policy and Trade of the Comm. on Fin. Services, *The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo*, Hearing (5/10/2012).

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,993 words and therefore satisfies the type-volume limitation of Fed. R. App. P. 29(d).

This *amici* brief has been joined by Global Witness and Former Members of the United Nations Group of Experts on the Democratic Republic of the Congo, Fred Robarts and Gregory Mthembu-Salter.

I have been advised that there are separate *amicus* briefs being submitted in support of Respondents by Congress and Better Markets, Inc. The issues addressed in the other *amicus* briefs are materially distinct from those addressed herein and, accordingly, consolidation of the briefs is not feasible.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2013, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Pursuant to D.C. Circuit Rules 25 and 31, eight (8) paper copies of the foregoing brief will be hand-delivered to the Clerk of the Court.

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