ORAL ARGUMENT SCHEDULED FOR MAY 15, 2013

NO. 12-1422

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

NATIONAL ASSOCIATION OF MANUFACTURERS *et al.*,
Petitioners,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,
Respondent,

and

AMNESTY INTERNATIONAL OF THE USA, INC. and
AMNESTY INTERNATIONAL LIMITED,
Proposed Respondents-Intervenors.

On Petition for Review of a Final Rule
Issued by the U.S. Securities and Exchange Commission

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 RESPONDENT

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March 8, 2013

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

(A) Parties and *Amici*

Petitioners

National Association of Manufacturers

Chamber of Commerce of the United States of America

Business Roundtable

***Amici* for Petitioners**

Group of Academics *Amici* – Marcia Narine, Jendayi Frazer, and J. Peter Pham.

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

Respondent

United States Securities and Exchange Commission

Intervenors for Respondent

Amnesty International USA

Amnesty International Ltd.

***Amici* for Respondent**

Global Witness Limited, Fred Robarts, and Gregory Mthembu-Salter.

(B) Rulings Under Review

References to the final rule under review appear in Petitioners' and Respondent's 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 brief.

DATED: March 8, 2013

/s/ Jodi Westbrook Flowers

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), Global Witness Limited hereby 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 the 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 entire tin, tantalum, tungsten and gold supply chains originating in the African Great Lakes region. Global Witness has been a leading organization advocating for 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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GLOSSARY

AGL	African Great Lakes region
DRC	Democratic Republic of the Congo
ICGLR	International Conference on the Great Lakes Region
OECD	Organisation 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 Petitioners' and Respondent's briefs.[1]

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Global Witness is a not-for-profit organization working to promote peace and economic security in the Democratic Republic of the Congo (DRC) and beyond by stopping the financing of armed groups that exploit the conflict minerals sector. Global Witness has played a leading role in developing and implementing transparency and natural-resource governance mechanisms internationally. Global Witness' work on the minerals trade is informed by 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 Democratic Republic of the Congo in 2010 and 2011. Fred Robarts lived and worked in the DRC from 2006 to 2012, undertaking consultancy assignments for the UN Development Programme, Human Rights Watch, the U.K. Department for

[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."

International Development and the International Committee of the Red Cross, amongst others. He is currently studying at the Department of War Studies, King's College London.

Gregory Mthembu-Salter is a former member of the United Nations Group of Experts on the DRC, where he wrote and later assessed implementation of the Group's recommendations for due diligence guidelines for individuals and entities mining and trading minerals from eastern DRC and neighbouring states. He currently runs Phuzumoya Consulting, which assists companies in their implementation of these guidelines. Gregory Mthembu-Salter has been researching and writing on the Great Lakes region and Southern Africa for twenty years.

The role of the United Nations Group of Experts on the DRC has been 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, *amici* and others elucidated the compelling social, economic and policy benefits that the Rule will advance. As Petitioners' lead argument is that the Securities and Exchange Commission (SEC) somehow "failed" to consider benefits and costs, *amici* welcome the opportunity

through this brief to clarify the Rule's compelling benefits and the reasonable associated costs.[2]

All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Petitioners' lead argument is that the Rule should be vacated because the SEC failed to analyze its benefits and costs. That is inaccurate. 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 help address a critical humanitarian crisis. Furthermore, the SEC assessed protections to investors and the benefits for companies that arise through the disclosure of material information. Based on numerous considerations, the SEC reasonably concluded that the disclosures required by the Rule would improve supply chain risk management, cost efficiency through innovation and expanded use of advancing technologies – while weakening the nexus between mining and conflict in the DRC. Moreover, the SEC sensibly concluded that the compliance costs associated with the disclosure requirements were reasonable and justified by the benefits.

[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.

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 the surrounding region; and
- causing detriment to investors in minerals markets.

This Court should uphold the Rule in all respects. It fulfills the Congressional intent and mandate to harmonize and promote due diligence and transparency standards in the DRC – and the African Great Lakes (AGL)[3] region – while ensuring that companies buying Congolese minerals are not funding armed groups that inflict unspeakable violence, particularly violence against women and children.

[3] As used herein the "AGL" region refers to the area lying between northern Lake Tanganyika, western Lake Victoria, and lakes Kivu, Edward and Albert, which comprises Burundi, Rwanda, and the eastern DRC.

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 lead argument of Petitioners' 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 Petitioners (Pet'rs' Br.) at 26-27 ("Because the Commission failed to analyze properly the costs and benefits of its choices, the Court should vacate."); Brief of *Amicus Curiae* Experts on the Democratic Republic of the Congo in Support of Petitioners' (Academics Br.) at 16-18 (accusing the SEC of "fail[ing] to analyze the rule's benefits[,] ... [b]ypassing any evaluation of a rule's benefits ... render[ing] the SEC's action 'arbitrary and capricious'" under the Administrative Procedures Act[4]). That lead argument fails for many reasons.

First, the SEC, after considering "the public interest" and the "protection of investors," need only "*consider* ... whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f) (emphasis added); *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) (rejecting challenge by Chamber of Commerce against agency regulations, explaining that the agency "is not required

[4] 5 U.S.C. § 500 *et seq*.

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"). As the SEC "quantif[ied] the *certain* costs or explain[ed] why those costs could *not* be quantified" in light of available public data, the SEC's analysis is appropriate. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011) (emphasis added). Indeed, the proxy access rule struck down in *Bus. Roundtable* was not mandated by statute, unlike the mandate by Congress here. Section 1502 *required* the SEC to issue specific rules.

Second, under the plain text of Section 1502, Congress has declared that the benefits of the Rule are to reduce violence and disrupt financing of armed groups in the DRC:

> It is the sense of the Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, 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. Petitioners do not challenge that express "sense" and mandate of Congress.[5] *See Inv. Co. Inst.*, 2012 U.S. Dist. LEXIS 175941 at

[5] *See* Pet'rs' Br. 23, 27 (admitting that the SEC "had a congressional directive to implement" whereby "Congress sought 'to decrease the conflict and violence in the DRC' and 'to reduce the amount of money provided to armed groups.'").

*86 ("The Court does not believe that any more exacting benefit calculation needs to be made in this case, particularly, here, where the agency is fulfilling expanded regulatory responsibilities *mandated* under Dodd-Frank.") (emphasis added).

Third, to attain those benefits mandated by Congress, the SEC faithfully moored the Rule's provisions to Section 1502's mandate to disrupt conflict financing and decrease violence in the DRC: "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.").

Here, the SEC considered 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

[6] 15 U.S.C. § 78w(a)(2).

> 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 how the Rule could protect investors, promote efficiency, and foster 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 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. Simply put, disclosure of information on conflict minerals is not novel and is material to investors.

In the fog of the Petitioners' bluster it is easy to lose sight of the fact that the Rule merely requires companies to disclose whether a product contains conflict minerals from the DRC or surrounding countries, or that they do not know whether a product contains such minerals. Congress regularly requires disclosures to correct information asymmetry and charges the relevant agencies to implement

disclosure requirements that ensure market efficiencies. The very mission of the SEC is founded in disclosure:

> The laws and rules that govern the securities industry in the United States derive from a simple and straight forward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it. To achieve this, the SEC requires companies to disclose meaningful financial or other information to the public.

SEC, "What We Do", available at http://www.sec.gov/about/whatwedo.shtml.

Precisely seeking such disclosure and transparency here, investors in the mining industry have made it clear that disclosure on conflict minerals is material for informed investment decisions. *See supra* at 7-8 (quoting comments of investors to SEC on Rule at 77 Fed. Reg. at 56,335-6); *see generally Securities and Exchange Act of 1934*, 15 U.S.C. § 78a, *et seq*.

B. *Amici's* experience with the DRC minerals sector, including in-depth field investigations and interviews with stakeholders along the supply chain, shows that the Rule will generate compelling social benefits

Seeking to discredit the SEC's consideration of compelling social benefits, *see* 77 Fed. Reg. at 56,335 *supra*, Petitioners 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." Pet'rs' Br. 30. Likewise, the Academics predict that the Rule "will cause further economic harm to the Congolese, aggravate instability, and increase the influence of armed groups in the

DRC." Academics Br. 16. But those dire predictions are belied by empirical facts provided to the SEC by numerous commentators that show the Rule will generate compelling social benefits as Congress intended.

1. By reducing overall funding to armed groups that control mining sites in conflict regions, the Rule under Section 1502 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.[7]

Decreasing mineral-based funding of armed groups in the DRC is precisely what the Rule as promulgated will do.

[7] Jason Stearns, Written Testimony for the Record to the Subcomm on Int'l Monetary Pol'y and Trade (5/10/2012) . *See also* Final Report of the UN Group of Experts on the Democratic Republic of the Congo, S/2012/843 (11/15/2012), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/843. *See generally* Jason Stearns, DANCING IN THE GLORY OF MONSTERS: THE COLLAPSE OF THE CONGO AND THE GREAT WAR OF AFRICA (2011).

2. The Rule under Section 1502 will serve to 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 supplies to market, can educate their children and may be able to seek employment off the farm.[8]

3. The Rule will serve to promote 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

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[8] Bishop Nicholas Djomo Lola, Written Testimony for the Record to the Subcomm. on Int'l Monetary Pol'y and Trade (5/10/2012) at 5, available at http://financialservices.house.gov/uploadedfiles/hhrg-112-ba20-wstate-ndjomo-20120510.pdf. *See also* Final Report of the UN Group of Experts on the Democratic Republic of the Congo, S/2008/773 (12/12/2008), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2008/773; 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; and Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone* (2009), available at http://www.hrw.org/sites/default/files/reports/drc0709webwcover.pdf.

mining sectors to undertake supply chain due diligence in line with an international standard set by the OECD "to ensure that they do not contribute to human rights violations or conflicts in DRC."[9] This law was introduced, in part, in response to Section 1502 and represents a significant step toward reforming Congo's troubled mining sector.[10] To the extent that it is fully implemented the Congolese law combined with Section 1502 will significantly reduce the ability of armed groups to seek funding through the minerals trade.

Beyond changes inside the DRC, Section 1502 has generated regional momentum for harmonizing and implementing monitoring systems in the minerals sector. For example, the International Conference on the Great Lakes Region (ICGLR), an inter-governmental organization of AGL countries, is developing a regional mineral certification system that provides information and assurances to traders, smelters, and manufacturers on the provenance of minerals they purchase.

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[9] 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.

[10] *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 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.

Such initiatives promote the goals of Section 1502 and enable industry to meet its requirements under the Dodd-Frank legislation.[11]

C. *Amici's* experience in the DRC minerals sector, including in-depth field investigations and interviews with stakeholders along the supply chain, shows that the Rule will also generate competitive benefits for companies, investors and the market

While Petitioners 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; *cf.* Academics Br. 18, Pet'rs' Br. 26-27. Protecting investors, improving market efficiency, and promoting effective risk management for companies are economic benefits that the SEC did consider.[12]

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[11] Briefing Note on the ICGLR Regional Certification Mechanism at 1-2, (June 2012), available at http://www.pacweb.org/Documents/icglr/PAC_Briefing_Note_on_the_ICGLR_Regional_Certification_Mechanism_June_2012.pdf ("In July 2011, the US State Dep't publically acknowledged and encouraged the efforts of the ICGLR and its eleven member states to develop a comprehensive regional certification mechanism and other tools concerning the supply chain in the four 'conflict minerals.'").

[12] *See also* Letter to the SEC from various investor groups on the challenge to the conflict minerals rule (11/30/2012), available at http://www.sourcingnetwork.org/storage/Investor%20Stmt%20on%201502%20Lawsuit%20-%20FINAL%20Nov%2030%202012.pdf.

Beyond ignoring the plain text of the Rule, Petitioners 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).[13] 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 the 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.[14] Even before Section 1502 was signed into law, certain companies began tracing their supply chains. But now, with implementation of the

[13] 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).

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

Rule, "everyone is involved and it's no longer a competitive disadvantage."[15] Thus, from the perspective of those companies, a benefit of the legislation is a leveling of the playing field. Despite the complexities the Petitioners point to, the solutions here are reasonable and feasible. Companies are not going out of business or being subjected to unmanageable costs.[16]

Apple is a noteworthy example. 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."[17] 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 manufacturing of Apple products, as well as the smelters that originally processed the ore."[18] 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

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[15] *Id.* at 19.

[16] SEC Comments from Claigan Environmental (S74010-365, S74010-429, S74010-430, S74010-431, and S74010-459), *see* 77 Fed. Reg. at 56,340-2.

[17] 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.

[18] *Id.*

free sources of tantalum, are certifying their tantalum smelters, or are transitioning their sourcing to already certified tantalum smelters."[19] Hence, Apple already requires suppliers to move their sourcing of minerals to conflict free sources without displaying the parade of horribles speculated by Petitioners or their supporting *amici*.

Apple is not alone. Before, during and after the implementation of the Rule, companies like KEMET Electronics Corp., Intel Corporation, Motorola Solutions Inc., General Electric Company, Dell, Inc. 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.[20] Responsible sourcing of minerals from this region is not only feasible, it is underway.

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

[20] *See* Multi-Stakeholder Group statement on the Challenge to Conflict Mineral Rule (11/19/2012), available at http://www.bostoncommonasset.com/documents/MSGStatementon1502lawsuitNov19_FINAL_000.pdf.

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."[21] 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."[22]

Moreover, compliance with Section 1502 will cause companies to redesign their supply chain to optimize efficiency, responsiveness, and transparency. As put by Brian Martin of Seagate, "[t]he more in depth understanding you have of your supply chain, the more effectively you can manage the performance of your supply chain."[23]

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 motivating companies to innovate and enhance their competitive position is the Solutions for Hope Project. This Project

[21] Green Research Report at 19.

[22] *Id.* at 18.

[23] *Id.* at 20.

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 innovative project not only provides proof 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."[24] Likewise, Intel set a goal of manufacturing a conflict-free microprocessor by the end of 2013.[25] The Rule thereby creates opportunities for companies to both innovate and create business value.

4. The Rule under Section 1502 will support companies in meeting their investors' and consumers' expectations that their products are DRC conflict free

By creating uniformity in supply chain information, backed up by a legal mandate to obtain that information, the Rule facilitates transparency for customers and investors concerned with conflict free sourcing.[26] 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.

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

[25] 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.

[26] Green Research Report at 20.

II. The Rule will not worsen conditions in the DRC

A. The Rule will not cause a permanent *de facto* embargo on the minerals trade in the DRC

The argument that Section 1502 and the Rule have only made matters worse in the DRC is both alarmist and simplistic. Academics Br. 21-27. No single measure can reverse fifteen years of war and transform the DRC's vast natural resources into an engine of stability and development overnight.[27] With the host of social, economic, and political challenges faced by the region, it is short-sighted to suggest that the ills of the DRC are caused by efforts to try to end the flow of funding to armed groups. To suggest that less disclosure on conflict mineral usage will increase legitimate business development in the DRC is nonsensical. Increased disclosure under the Rule is part of the solution, *not* the problem.

It is absurd to suggest that the SEC with this Rule has created a permanent *de facto* embargo on the minerals trade in the DRC. Academics Br. 25. Breaking the conflict mineral supply chain requires change. That is not to say a 'clean' minerals trade cannot replace it – it can and will under 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 has been exacerbated by the concerted efforts of

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

certain U.S. industry associations to fight and delay real reform on responsible mineral sourcing.[28]

The notion that the Rule has only increased poverty in the eastern DRC overlooks realities and complexities on the ground. The export revenues that the Academics point to (and overstate) have 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.[29]

> 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.[30]

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[28] *See* International Corporate Accountability Roundtable, Memorandum from the Division of Corporation Finance, SEC Comment, S74010-439 (8/24/2011).

[29] Fred Robarts, Coordinator for the United Nations Group of Experts on the Democratic Republic of the Congo, SEC Comment, S74010 (10/21/2011). *See also* Sadiki Byombuka, Member of National Parliament, Kinshasa, Congo, CRD, SEC Comment, S740010-536 (4/11/2012).

[30] 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); *accord* Justine Masika Bihamba, North Kivu Women's Synergy for Sexual Violence Victims; Fidel Bafilemba, SOS Africa; Lawyer Gautier Misonia, Research Center on Environment, Democracy, and Human Rights; and Janvier Murairi, Small Farmers' Development Initiatives (collectively "North Kivu Civil Society Groups"), SEC Comment, S74010-285 (8/1/2011).

Suggestions that on-the-ground conditions have only worsened have been vastly exaggerated.[31] Worldwide demand for these minerals is *not* diminishing, and Section 1502 has not caused all manufacturers to abandon the DRC. The Rule 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 illegal for them to continue to do so; however, they must disclose it. Incentives for transparency are real and already working as demonstrated by consumer sentiment and market demand. In addition to Solutions for Hope, *supra*, examples include:

- 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.[32] This

[31] *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-help-efforts-to-end-resource-fuelled-conflict-%E2%80%93-by-fred-robarts-and-gregory-mthembu-salter/; Jason Stearns, Written Testimony (5/10/2012).

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

closed-pipe supply chain has given KEMET greater cost-control over its tantalum supply.[33]

- Two electronics industry associations (Electronic Industry Corporation Citizen 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.[34] As of January 23, 2013, 22 tantalum, 25 gold, 5 tungsten and 11 tin smelters are actively seeking (or have attained) conflict free status through this program.[35] Participation and cooperation will continue to increase as the Rule is fully implemented and efficiencies increase.[36]

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[33] *Id.* at Slide 6.

[34] *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; and Signet Jewelers, SEC Comment, S74010-401 (11/1/2011).

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

[36] *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-

- In October 2012, a group of European companies, in collaboration with the Dutch government, launched the Conflict-Free Tin Initiative 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.[37] After the mine was validated as conflict-free, the first bags of conflict-free tin left the mine on October 24, 2012.[38] Since then, over 210 tons of material has been produced in the

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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").

[37] 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.

[38] 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.

Kalimbi mine.[39] The initiative is significant because it is one of the first attempts by companies covered by the Rule to source from a conflict-affected area of eastern DRC.

The argument that companies only have economic incentives to avoid the DRC because of the Rule misses the mark. On the contrary, many impacted companies are actively engaging in the DRC, and have publicly noted advantages to doing so.[40]

Yet *amici* in support of Petitioners blame the SEC for devastating the DRC by "[c]rushing the open market for minerals". Academics Br. 25. The facts belie this 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 intended, is occurring. That hard-won progress is real. Disclosure of material information such as this 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

[39] Conflict-Free Tin Initiative, "Results", available at http://solutions-network.org/site-cfti/results/.

[40] *See* KEMET's Vertically Integrated Conflict Free Tantalum Supply Chain, at Slide 4 ("Control of raw materials sourcing, and significant reductions in the overall cycle time means greater cost control and eliminated the volatile elements in the supply chain."); Green Research Report discussed *supra* (by supporting companies to meet their consumers' demands for DRC conflict-free products, the Rule generates business advantage); and Multi-Stakeholder Group, *supra note* 20.

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 called upon the SEC both during and after the rulemaking supporting conflict mineral disclosure as necessary to informed investment decisions.[41]

To be sure, full disclosure will not happen overnight.[42] As one investor put it:

> 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.[43]

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[41] *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.

[42] *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.

[43] 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).

There is no permanent *de facto* embargo. Academics Br. 21, 24-25, 27. Instead there are positive changes happening on the ground in the DRC mining sector.

III. Overturning the Rule will have potentially dire consequences in the DRC

Amici 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. Such progress on transparency and meaningful solutions advanced by these efforts will be lost. The 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 disincentivize additional companies from joining in their due diligence efforts, thwarting responsible corporate practices in the region.[44]

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

- Overturning the Rule will allow lucrative financing of armed groups in the region to increase, fuelling violence and the related continued violation of human rights, and jeopardizing additional lives in the DRC.[45]
- Undermining the Rule will create a situation where companies must go back to a patchwork of guidelines thereby losing the efficiencies and significant cost savings of having one Rule. 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."[46]
- Abandoning the Rule would send the wrong message to the DRC and the world regarding the corporate responsibility standards of publicly traded U.S. companies and America's commitment to helping end the bloodshed in the DRC.[47]
- Failure to uphold the Rule will also serve to potentially harm investors, issuers and taxpayers; and only serve to exacerbate a well-documented

[45] 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).

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

[47] 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).

humanitarian crisis with the related increased risk to companies and investors as a result.[48] Without the Rule, companies and investors could be unwittingly complicit in financing of human rights abuses.

- Vacating the Rule will serve to create continued instability with related risk to the markets and investors that comes with market uncertainty and increased risk. Companies are realizing they cannot turn a blind eye to this problem any longer, nor will consumers of their products.[49]
- 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.[50]

The reasons for positive changes in the DRC and global minerals markets are no mystery. Section 1502 and the Rule have brought companies to the table in a way that voluntary initiatives alone could not.[51]

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

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

[50] 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.")

IV. The Final Rule is in harmony with transparency and due diligence initiatives around the world on conflict minerals

SEC Conflict Mineral Regulations are consistent with binding UN Security Council Resolutions and international custom and practice. After years of study, the UN Security Council unanimously adopted Resolution 1896 in 2009 which:

> *Calls upon* Member States to take measures to ensure that importers, processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase.

S/Res/1896 ¶14 (2009).

Security Council Resolutions are accepted and binding on all 192 UN Member States pursuant to Article 25 of the UN Charter. UN Security resolutions are binding on States and not on private individuals unless they are self-executing. *See generally, Medellin v. Texas*, 552 U.S. 491, 508-509 (2008). Section 1502 and the Rule as promulgated are the domestic embodiment of these internationally agreed upon and binding Security Council Resolutions.

Consistent with the UN's mandate, Congress enacted the Section 1502 to encourage U.S. businesses to exercise due diligence with respect to the purchase of minerals from the DRC.[52] In 2010, the UN Security Council adopted the Final

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[51] U.S. House, Subcomm. on Int'l Monetary Pol'y 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).

[52] *See* 156 Cong. Rec. S3965, 3976 (5/19/2010) (statement of Sen. Feingold); 156 Cong. Rec. S1049 (2/18/2008) (statement of Sen. Brownback).

Report of the committee on the DRC that it established in 2004 to consult with minerals-sector stakeholders worldwide.[53] The Final Report supports the Security Council's due diligence recommendations for importers, processing industries and consumers of Congolese mineral products and:

> *Calls upon* all States to take appropriate steps to raise awareness of the due diligence guidelines referred to above, and to urge importers, processing industries and consumers of Congolese mineral products to exercise due diligence by applying the aforementioned guidelines, or equivalent guidelines, containing the following steps as described in the final report (S/2010/596): strengthening company management systems, identifying and assessing supply chain risks, designing and implementing strategies to respond to identified risks, conducting independent audits, and publicly disclosing supply chain due diligence and findings.

S/RES/1952, ¶8 (2010).

The UN due diligence requirements and statements were informed by the OECD. The OECD includes the U.S. and 33 other member States seeking to promote economic cooperation and social development. The OECD due diligence guidance has now been endorsed by the UN Security Council, the ICGLR, and the European Union, among others, and has emerged as the international standard for due diligence. The Rule is consistent with OECD due diligence recommendations and the views of the international community. It is important to note that OECD

[53] Final Report of the Security Council Comm. established pursuant to UN Security Council Resolution 1533 (2004) concerning the DRC, S/2010/596 (11/29/2010), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2010/596. For the list of meetings and stakeholders, see id. at Annex 1, 99-103.

due diligence guidance was developed with the participation and endorsement of companies. The private sector's involvement is further evidence of the feasibility of the Rule's implementation.

Rather than flee the DRC, many successful companies continue to develop due diligence programs consistent with the OECD/UN guidance. Contrary to the 'sky is falling' scenario described by Petitioners, in the wake of the Rule, U.S. standards are now in harmony with those of the international community and due diligence measures are being implemented by U.S. companies committed to these principles.

Armed conflict in the DRC may be seen by some as intractable and inevitable, but the financing of that conflict through the minerals trade can and must be stopped. The Rule will advance – not hinder – that worthy goal.

CONCLUSION

For the above reasons, this Court should reject the Petitioners' arguments and uphold the Rule.

Respectfully Submitted,

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Date: March 8, 2013

CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,976 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 Members of Congress and Better Markets, Inc. I understand that the issues addressed in the other *amicus* briefs are materially distinct from those addressed herein and, accordingly, consolidation of the briefs is not practicable or feasible.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 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, and the Court's Order of November 27, 2012, eight (8) paper copies of the foregoing brief will be hand-delivered to the Clerk of the Court.

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