No. 13-5252
ORAL ARGUMENT NOT YET SCHEDULED

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

NATIONAL ASSOCIATION OF MANUFACTURERS;
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA;
BUSINESS ROUNDTABLE,

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION

Appellee,

AMNESTY INTERNATIONAL USA; AMNESTY INTERNATIONAL LTD.,

Intervenors-Appellees.

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

BRIEF OF SENATOR DURBIN, CONGRESSMAN MCDERMOTT, ET AL. AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 28(a)(1) and 29(d), the undersigned counsel certifies as follows:

A. Parties and Amici.

To counsel's knowledge, all parties, intervenors, and *amici* appearing before this Court are listed in the Brief for Appellants, except for the following:

Additional Amici for Appellants:

American Petroleum Institute

Retail Litigation Center, Inc.

Complete List of Signers for this *Amicus* brief on behalf of Members of Congress:

Senator Barbara Boxer, Senator Dick Durbin, Senator Ed Markey, former Congressman Howard Berman, Congressman Wm. Lacy Clay, Congressman Keith Ellison, Congressman Eliot Engel, Congressman Raul Grijalva, Congressman John Lewis, Congressman Jim McDermott, Congresswoman Gwen Moore, and Congresswoman Maxine Waters.

B. Rulings Under Review

This appeal challenges the final order in case 1:13-cv-00635, reproduced in the appendix at JA919, entered by Judge Robert L. Wilkins on July 23, 2013, denying Appellants' motion for summary judgment and granting Appellee's and Intervenor-Appellees' cross-motions for summary judgment.

C. Related Cases

This case was previously before this Court as Case No. 12-1422, on a petition for direct review of Final Rule 13p-1 and Form SD, Conflict Minerals, 77 F.R. 56,274 (Sept. 12, 2012). After this Court held in *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013), that it lacked jurisdiction over such petitions, this case was transferred to the district court pursuant to 28 U.S.C. §1631. Order, Case No. 12-1422 (D.C. Cir. filed May 2, 2013). Counsel is aware of no related cases currently pending in any other court.

Dated: October 30, 2013

Respectfully submitted,

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LEGISLATIVE HISTORY

OTHER AUTHORITIES

GLOSSARY

DRC	Democratic Republic of the Congo
ICGLR	International Conference on the Great Lakes Region
NAM	National Association of Manufacturers, Chamber of Commerce of the United States of America, and Business Roundtable
SEC	United States Securities and Exchange Commission
USAID	United States Agency for International Development

STATUTES AND REGULATIONS

With the exception of §1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. 111-203, 124 Stat. 1376, 2220-22 (codified at 15 U.S.C. § 78m(q)), all applicable statutes, etc., are contained in the Brief for Appellant. Section 1504 is included herewith, in an addendum.

STATEMENT OF IDENTITY OF AMICI, THEIR INTEREST IN THE CASE, AND THEIR AUTHORITY TO FILE

Amici curiae are members of the United States Congress who supported the development of conflict mineral legislation, culminating in §1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §1502, 124 Stat. 1376, 2213-18. *Amici* have direct knowledge of the development and drafting of §1502 and the congressional intent that motivated its passage. *Amici* include sponsors of the bills that culminated in §1502, members of the committees that considered the bills, members of the Conference Committee, and members of Congress who travelled to the Democratic Republic of the Congo and witnessed firsthand the suffering there.

Amici curiae are: Senator Barbara Boxer, Senator Dick Durbin, Senator Ed Markey, former Congressman Howard Berman, Congressman Wm. Lacy Clay, Congressman Keith Ellison, Congressman Eliot Engel, Congressman Raul Grijalva, Congressman John Lewis, Congressman Jim McDermott, Congresswoman Gwen Moore, and Congresswoman Maxine Waters. A full description of the *amici* may be found in Appendix A.

Amici have an interest in this case because the final rule adopted by the SEC thoughtfully effectuates congressional intent, while judicial vacatur of the final rule would undermine *amici*'s efforts to further humanitarian and national security

goals, provide stability to the minerals trade, and enable investors to be better informed.

Amici certify that no party's counsel authored this brief, in whole or in part, and no one other than *amici* listed herein or their counsel contributed money intended to fund the preparation or submission of this brief.

All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the conflict minerals reporting provision with bi-partisan support as part of the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376. The conflict minerals provision was offered as an amendment by then-Senator Brownback (R-KS), now Governor of Kansas, and adopted in the Senate by unanimous consent. *See, e.g.*, 156 CONG. REC. S3817 (May 17, 2010) (Senator Dodd (D-CT): "Given the ongoing emergency in the Congo, I am glad that Senator Shelby and I have been able to work out an agreement to adopt this Congo amendment."). The measure was supported and strengthened in Conference, as a similar measure was under consideration in the House of Representatives by the Committee on Ways and Means and the Committee on Foreign Affairs, where it was marked up. *See* Stmt. of Rep. Berman, Chairman of the H. Comm. on Foreign Affairs, July 15, 2010, *available at* http://democrats.foreignaffairs.house.gov/press_display .asp?id=747 ("Our Committee worked hard for months with our House and Senate colleagues to see that this provision was included and strengthened in the Wall Street reform bill.").

In response to the ongoing humanitarian emergency in the Democratic Republic of the Congo ("DRC"), §1502 requires companies to disclose annually whether they use conflict minerals that originated in the DRC or an adjoining

country and, if so, to investigate and disclose the minerals' sources within those countries. As Senator Durbin (D-IL) explained:

> We can't begin to solve the problems of eastern Congo without addressing where the armed groups are receiving their funding, mainly from the mining of a number of key conflict minerals . . . . [I]f a company registered in the United States uses any of a small list of key minerals from the Congo—minerals known to be involved in the conflict areas—then such usage must be disclosed in that company's SEC disclosure.

156 CONG. REC. S3817 (May 17, 2010); *see also Conflict Minerals Trade Act: Markup Before the H. Comm. on Foreign. Affairs.,* 111th Cong. 140 (2010) (Rep. Ros-Lehtinen (R-FL): "This important human rights legislation will help disrupt the illegal mineral trade that funds and fuels the bloody conflict in the Democratic Republic of the Congo.").

When Senator Brownback introduced the first conflict minerals bill in 2008, he explained:

> All we want to do with this is make sure that the coltan, the tantalum we are using, comes from legitimate sources. That is all we are asking . . . we want to know where it is coming from and that it is not conflict coltan that is used to pay for the suffering of so many people. We all must be good actors in this chain. With 1,500 people dying a day, there is no room for turning a blind eye on this matter.

154 CONG. REC. S1049 (Feb. 14, 2008).

The Rule adopted by the SEC implements the statute as Congress intended.[1] Each of the SEC's determinations at issue in this case is consistent with the policy choices made by Congress. And, importantly, the statute and rule are working as intended.

The DRC has gone from exporting ***no*** verifiably clean minerals as of April 2011 to ***over 4,000 tons*** of clean minerals produced in the DRC's Katanga province alone in 2012. Rep. McDermott, SEC Video Message: SEC Roundtable on Conflict Minerals (Oct. 8, 2011); Status Report iTSCi Katanga Field Operations 2, iTSCi and Pact Institute (January-June 2012), *available at* https://www.itri.co.uk; Status Report iTSCi Katanga Field Operations 2, iTSCi and Pact Institute (July-December 2012), *available at* https://www.itri.co.uk. And due diligence and mineral traceability efforts are in place at thousands of mine sites across the DRC and Rwanda, which are producing several thousand tons of conflict free minerals annually. Press Release, iTSCi, Growing Global Participation in iTSCi Conflict Minerals Programme (Oct. 8, 2013) *available at* https://www.itri.co.uk.

Companies are quickly coming into compliance. Apple, the creator of the iPad and iPhone, has already identified 211 smelters and refiners from which its

[1] A summary of the SEC's rule, the decision of the district court, and the standard of review are contained in the appellee brief submitted by the SEC. SEC Br. at 9-26.

suppliers can source conflict-free minerals. Apple Supplier Responsibility: 2013 Progress Report 21, *available at* http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2013_Progress_Report.pdf. Ford Motor Company has been tracking the use of conflict minerals in its vehicles since 2011 and, last year, supplemented its existing International Materials Database System to identify the sources of conflict minerals used in its products. Ford Sustainability Report 2012/2013: Conflict Minerals, *available at* http://corporate.ford.com/microsites/sustainability-report-2012-13/supply-materials-conflict.

As one regulatory compliance expert testified at an oversight hearing on §1502 compliance: "[I]n many ways we are far past the issue of can it be done and is it costly—it can be done and at lower-than-publicized cost." Stmt. of Bruce Calder, General Manager, Claigan Environmental, *available in* Appendix to *The Costs and Consequences of Dodd-Frank Section 1502: Impacts on America and the Congo: Hr'g on Pub. L. 111-203 §1502 Before the H.R. Subcomm. On Int'l Monetary Policy & Trade* (May 10, 2012) (hereinafter "May 2012 Hearing").

The United States approach embodied by §1502 is being emulated by other bodies. The European Union Trade Commissioner Karel De Gucht praised the U.S. approach to conflict mineral regulation and promised a corporate audience that his office is developing a European Union initiative that builds on the efforts

of the United States and the many companies already setting high due diligence standards for themselves. In Africa, a coalition of national governments, including the DRC, has created a regional clean mineral certification program. NGOs and industry groups have created the Conflict Free Smelter Program. Meanwhile, provincial Congolese governments have reported increased revenues resulting from conflict-mineral transparency initiatives; mining companies in the DRC have committed themselves to due diligence procedures; and businesses in the U.S. have strengthened supply chain transparency procedures.

Appellants in this action ("NAM") seek exemptions that would eviscerate the statute. NAM argued for these same exemptions during the statute's consideration by Congress but having failed to get these exemptions from Congress, and having failed to obtain those same desired exemptions during the rulemaking process, NAM now seeks another bite at the apple. This Court should not accept NAM's invitation to rewrite §1502, undercut Congress's clear intent and roll back the progress that is being made to end the mineral-fueled bloodshed in the DRC.

BACKGROUND

The mineral-fueled conflict in the DRC threatens regional stability as well as American economic, humanitarian, and national security interests:

- 1,500 people die in the Congolese conflict each day, making it the world's "single deadliest conflict since the Second World War";
- The conflict contributes to regional instability, having drawn in six neighboring countries already;
- The resulting regional instability is a threat to American economic and national security interests, as other nations expand their sphere of economic influence in the region and militant groups expand their sphere of political influence. President George W. Bush and President Barack Obama have deemed the Congolese conflict to be "an unusual and extraordinary threat to the foreign policy of the United States";
- Rape and other forms of sexual violence have become standard tools of war in the DRC;
- The conflict in the DRC inflicts unique horrors on the many children who are conscripted as soldiers, forced to labor in dangerous mines, subject to unspeakable sexual violence, uprooted from their homes and denied access to food, clean water, and basic medical care; and
- The companies that use conflict minerals from Central Africa to manufacture their products are relying on an inherently unstable and volatile black market, and this sourcing represents a risk to investors, companies, consumers, and the national interests of the United States, including U.S. foreign policy goals.[2]

[2] *See, e.g.*, 149 CONG. REC. S7536-37 (June 9, 2003); 152 CONG. REC. H8860-64 (Dec. 6, 2006); 152 CONG. REC. S11836-38 (Dec. 8, 2006); 153 CONG. REC. S13360 (Presidential Rep. on the Nat'l Emergency Declared in Exec. Order 13413) (Oct. 24, 2007); 153 CONG. REC. S13396 (Oct. 25, 2007); 154 CONG. REC. S1047-49 (Feb. 14, 2008); 154 CONG. REC. H8632-33 (Sept. 23, 2008); 155 CONG. REC. S4696-98 (Apr. 23, 2009); 155 CONG. REC. S4745 (Apr. 27, 2009); 155 CONG. REC. H11482 (Presidential Message on the Continuation of the Nat'l

Congress has long understood that an effective response to the Congolese conflict must include scrutiny of the mineral trade. In 2008, Senator Feingold observed that the "lack of mechanisms to regulate or at least scrutinize trade in these resources handicaps our diplomatic and humanitarian efforts to bring peace to" the DRC and address the impact of the black market. *Resource Curse or Blessing? Africa's Mgmt. of its Extractive Industries: Hr'g Before the Sen. Comm. On Foreign Relations*, 110th Cong. 2-3 (2008) (stmt. of Sen. Feingold). Year after year, Senator Brownback placed extensive documentation of the link between conflict mining and human rights violations into the Congressional Record, including a statement from the U.N. Ambassador to the Democratic Republic of the Congo explaining that "the minerals have truly been the driving force behind this war," and Senator Brownback concluded that "by making this supply-chain more translucent, we ultimately can help save millions of innocent Congolese lives." 155 CONG. REC. S4696 (Apr. 23, 2009).

Although the complexity of modern business practices can make transparency and supply chain verification challenging, Congress still chose to pass

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Emergency with Respect to the Dem. Rep. Congo) (Oct. 20, 2009); 155 CONG. REC. S10788-790 (Oct. 27, 2009); 155 CONG. REC. S13030 (Dec. 11, 2009) (statement of Sen. Feingold, observing that the crisis in the DRC is "the single deadliest conflict since the Second World War"); *The D.R.C.: Securing Peace in the Midst of Tragedy, Hr'g Before the H. Subcomm. On Africa, Global Health, & Human Rights,* 112th Cong. 79 (Mar. 8, 2011) (witness quoting Justine Masika, a Congolese women's rights advocate: In the DRC the "link between conflict minerals and mass rape" is "crystal clear").

a law that compels reasonable and proactive transparency throughout the supply chain. *Id.* (Sen. Brownback: "we call for transparency and accountability throughout the supply-chain of these minerals"). As Senator Feingold explained, "[T]his requirement will compel companies to take responsibility for their suppliers and thus bring greater transparency to the trade in these minerals, which may enable more targeted actions down the road. . . . I appreciate that these minerals often pass through extensive supply chains and processing stages before the relevant metals are used . . . but it is something we can and should expect of industry when certain commodities are known to be fueling human rights violations." *Id*. at S4697.

In drafting conflict minerals legislation, Congress carefully considered the views of the business community. Indeed, Congress worked with Appellants, as well as other manufacturing associations, individual manufacturing companies, retailers, and companies throughout the mineral supply and refining chain. Congress took industry concerns into account and adjusted many aspects of the legislation, including: requiring reports from U.S. and non-U.S. businesses alike; requiring the Department of State to work with Central African governments and private industry to support greater minerals governance; and requiring the Secretary of Commerce to report on companies' due diligence measures and to suggest improvements on an annual basis. *See, e.g.*, §1502(d)(3); *see also* 156

CONG. REC. S3976 (May 19, 2010) (Sen. Feingold: The proposed legislation "includes modifications based on discussions with representatives from industry, U.S. Government agencies, and the Banking committee").

The business community, however, did not get everything it asked for from Congress. And now NAM attempts to achieve a number of policy goals that were proposed during the legislative process but that Congress considered and rejected. Congress considered carefully that many products use only small amounts of conflict minerals, that due-diligence does cost money, that supply chains are complex and ever-changing, and that many manufacturers contract with other businesses to fabricate their products. Yet, Congress decided that these factors do not outweigh the benefits of requiring proactive steps from the business community to monitor their supply chains. *See, e.g.*, Remarks of Rep. Howard L. Berman, Chairman of the House Committee on Foreign Affairs, *available in* Appendix to May 2012 Hearing, *supra* 6. ("[Some] companies have said that implementing this law would simply be too difficult and too expensive. They are telling us that, sophisticated as they are, they have no idea where their materials come from. They are saying that if we ask them to be responsible, they cannot make a profit. I take issue with all of those statements.").

A. Businesses are Quickly Coming into Compliance with §1502 and the SEC's Final Rule.

Businesses are quickly coming into compliance with §1502 and the SEC's rule. The General Manager of Claigan Environmental, a regulatory compliance expert, testified at an oversight hearing that: "I have never seen so many companies becoming compliant before the final rules have come out. I think in many ways we are far past the issue of can it be done and is it costly—it can be done and at lower-than-publicized cost." Stmt. of Bruce Calder, General Manager, Claigan Environmental; *see also* Ford Sustainability Report 2010/2011 (Ford Motor Company took action to begin due diligence well before the final regulations were promulgated) (*both available in* Appendix to May 2012 Hearing, *supra* 6).

Apple, the creator of the iPad and iPhone, has already mapped its supply chain for conflict minerals and identified 211 smelters and refiners from which its suppliers can source conflict-free tin, tantalum, tungsten, and gold. Apple Supplier Responsibility: 2103 Progress Report 21. More than two dozen automotive companies—including Honda, Ford, and the Chrysler Group, working collaboratively with the Automotive Industry Action Group—have developed a web-based platform to help suppliers identify whether products contain conflict minerals. Alison Moodie, *Honda, Ford Spearhead New Conflict Minerals Report Tool*, GreenBiz.com (Sept. 14, 2012), *available at*

http://www.greenbiz.com/news/2012/09/14/honda-ford-conflict-minerals-reporting-tool. H.C. Starck, a global supplier of refractory metal powders, implemented a Supply Chain Management System to guarantee that they purchase only conflict-free raw materials. H.C. Stark Raw Material Procurement Statement. Motorola has been actively working, since even before the passage of §1502, "to improve visibility in the minerals supply chain, with particular focus on identifying sources of specific minerals." Letter from Michael Loch, Director, EHS Strategic Initiatives, Motorola Inc., to Rep. McDermott (Nov. 18, 2009). *See also* Honeywell Electronic Materials Conflict Minerals Statement (Feb. 10, 2011) (Honeywell "actively works with its suppliers to identify the source of the minerals defined in [§1502]"); RF Micro Devices Statement on Conflict Minerals (Feb. 27, 2012) (RF Micro Devices, an integrated circuit manufacturer, is "actively working with its supply chain to certify that metals found in RFMD products are DRC conflict free.").[3]

The solution adopted by Congress—supply chain monitoring—builds on existing business practices. Boeing, for example, has procurement policies already in place designed to "govern the purchase of materials … from the right sources." Boeing: Our Procurement Policies, *available at* http://www.boeingsuppliers.com/procPrac.html. Indeed, Boeing conducts various

[3] The statements cited from H.C. Stark, Motorola, Honeywell, and RF Micro Devices are available in the Appendix to May 2012 Hearing, *supra* 6.

"heightened surveillance activities" at its supplier or supplier subcontractor facilities, which are "designed to be proactive and preventive, rather than reactive." Boeing: Supplier Quality – Supplier Surveillance, *available at* http://www.boeingsuppliers.com/sqs.html. Boeing's procedures include, for example, working with suppliers to insure that country of origin regulations are observed for regulated products and packaging, including even paper stock, rivets, screws, rags, and ball bearings. Boeing Compliance Guide for U.S. Import Country of Origin (CoO) Marking, *available at* http://www.boeingsuppliers.com/Enterprise%20CoO%20Marking%20Compliance%20Guide.pdf.

B. Section 1502 and the SEC's Rule Have Won the Praise of Businesses and Investors.

A broad range of businesses support §1502's goals, including HP, Samsung Electronics, Motorola, Ford, Texas Instruments, and Philips. *See* Appendix to May 2012 Hearing, *supra* 6*; see also* Rep. McDermott, SEC Video Message: SEC Roundtable on Conflict Materials 2 (Oct. 18, 2011) ("Many companies we're talking to . . . think the business know-how they get from their transparency work is hugely valuable. . . . [T]hey can operate more efficiently, they can make better sourcing decisions.").

Businesses have also praised the SEC's final rule. Kemet Corporation, one of the largest users of tantalum in the world, has stated "The Kemet message on the

SEC's 'Conflict Minerals' rule has been clear and consistent: This rule is good for the people of the DRC and Central Africa, and it is good for business overall." Letter of Per Olof Loof, Chief Executive Officer, Kemet Corporation, to Rep. McDermott 2 (Mar. 1, 2013) ("Kemet Letter"). Kemet believes the rule "will strengthen the stability of tantalum in the global marketplace." *Id.*; *see also* Harley Davidson Statement on Conflict Minerals *available at* http://investor.harley-davidson.com/phoenix.zhtml?c=87981&p=irol-govhighlights&locale=en_US&bmLocale=en_US ("Harley Davidson is committed to supporting responsible sourcing … and the related rules and regulations issued by the [SEC]").

Investment groups have also expressed their support for the SEC's final rule. A consortium of investment groups representing $450 billion in assets explained that the SEC's final rule "protects investors" and "provides information needed to make sound financial investments." Investor Statement in Support of SEC Rule 1502 on Conflict Minerals, *available at* http://www.sourcingnetwork.org/storage/minerals-investors-group/CM%20Investor%20Statement%202013-05-28%20FIN.pdf. "Requiring disclosure within a company's supply chain allows investors to evaluate supply chain policies and practices, to make company-to-company comparisons, to calculate the level of risk associated with conflict mineral sourcing, and to provide assurance that companies are not engaging in

destabilizing activities." *Id.* These investment groups expressly oppose NAM's challenge to the final rule. *Id.*

C. Section 1502 and the SEC's Final Rule Are Working As Intended.

The conflict mineral regulations are working as intended. The production of conflict minerals in the Maniema province rose from approximately 10 tons in March of this year to over 90 tons by June. Status Report iTSCi Maniema Field Operations 5, iTSCi and Pact Institute (January-June 2013), *available at* https://www.itri.co.uk/index.php?option=com_mtree&task=viewlink&link_id=53530&Itemid=11. The DRC has gone from exporting ***no*** verifiably clean minerals as of April 2011 to ***over 4,000 tons*** of clean minerals produced in the Katanga province alone in 2012. Rep. McDermott, SEC Video Message: SEC Roundtable on Conflict Minerals (Oct. 8, 2011); Status Report iTSCi Katanga Field Operations 2, iTSCi and Pact Institute (January-June 2012); Status Report iTSCi Katanga Field Operations 2, iTSCi and Pact Institute (July-December 2012). Due diligence and mineral traceability efforts are now in place in thousands of mine sites in the DRC and Rwanda, facilitating market access for several thousand tons of conflict free minerals each year and supporting 45,000 diggers and their dependents. Press Release, iTSCi, Growing Global Participation in iTSCi Conflict Minerals Programme (Oct. 8, 2013). The provincial Maniema government has recorded increased revenues thanks to greater transparency measures and local efforts to

curb the illegal mineral trade. U.N. Midterm Report of the Group of Experts on the Dem. Rep. Congo, S/2013/444 (June 20, 2013) ¶¶ 171-72. Mining companies operating in the DRC have pledged in writing to implement due diligence procedures. *Id.* ¶ 176.

Artisanal mining communities and exporters in the DRC are eager for greater transparency measures, anticipating that such measures will encourage trade. *Id.* ¶¶ 174, 180. And provincial governments, working with the United Nations, continue to certify Congolese mining sites as conflict free. *Id.* ¶ 184 (In July 2012, joint validation team certified 20 mining sites as conflict free in the Kailo and Punia territories). Bishop Nicolas Djomo Lola, President of the Catholic Bishops' Conference of the Congo, has expressed his church's support for the U.S. action on conflict minerals. May 2012 Hearing, *supra* 6, at 21-22 (urging the U.S. to finalize the regulations "as soon as possible").

Neighboring countries like Burundi and Uganda are also making progress. Rep. McDermott, SEC Video Message: SEC Roundtable on Conflict Materials (Oct. 18, 2011). And "as implementation of traceability and transparency measures continues, more companies should and will responsibly source from the region." U.S. Dep't of State, Stmt. Concerning Implementation of Conflict Minerals Due Diligence Pursuant to Section 1502 of the Dodd-Frank Act (Feb. 28,

2013) *available at*

http://www.state.gov/e/eb/rls/othr/2013/205465.htm?goMobile=0.

D. Section 1502 and the SEC's Final Rule Have Spurred the Creation of a Global Framework for Regulating Conflict Minerals.

Section 1502 and the SEC's final rule are an important part of a harmonized global framework. E.U. Trade Commissioner Karel De Gucht recently praised the U.S. approach to conflict mineral regulation and announced that his office is developing an initiative on conflict minerals that builds on the U.S. efforts. *Speech: Conflict Minerals: The Need to Act,* European Commission – SPEECH/13/673 (Sept. 4, 2013), *available at* http://europa.eu/rapid/press-release_SPEECH-13-673_en.htm. He opined that such efforts must be "recognised, encouraged, and even facilitated" with a proper regulatory instrument from the E.U. *Id.* In Africa, the International Conference on the Great Lakes Region (ICGLR), a 12-country regional organization that includes the DRC, has started a mineral certification program that aids in the implementation of the U.S. conflict minerals regulation and is designed to ensure that minerals are sourced from sites that are conflict free. ICGLR Regional Certification Mechanism (RCM): Certification Manual 12, *available at* http://www.oecd.org/investment/mne/49111368.pdf. Industry coalitions have also developed initiatives, such as the Conflict Free Smelter Program, that complement

the U.S. action on conflict minerals. In addition, the Department of State and USAID collaborated with NGOs, industry stakeholders, and other governments to launch the Public-Private Alliance for Responsible Minerals Trade, which supports organizations working within the DRC region to develop verifiable conflict-free supply chains and encourage responsible sourcing from the region. Public-Private Alliance for Responsible Minerals Trade, *available at* http://www.resolv.org/site-ppa/; *see also* GAO Report: SEC Conflict Minerals Rule: Information on Responsible Sourcing and Companies Affected 7 (July 2013). It was the SEC's final rule that helped spur forward these coordinated international efforts. Indeed, as the Department of State reported, "Issuance of the SEC regulations was a vital step in establishing a clear and harmonized global framework" for regulating conflict minerals. U.S. Dep't of State, Stmt. Concerning Implementation of Conflict Minerals Due Diligence Pursuant to Section 1502 of the Dodd-Frank Act (Feb. 28, 2013).

E. Congress Continues to Monitor the Effectiveness of the New Law

Congress and the Executive Branch continue to monitor the effectiveness of §1502 and the administrative rule. Congress commissioned a "Baseline Report" from the Comptroller General of the United States that includes an assessment of the violence in the DRC and adjoining countries. §1502(d)(1). Congress further required the Comptroller General to submit an additional report on (a) the

effectiveness of §1502's reporting requirements in promoting peace and security in the DRC region and (b) a description of the issues encountered by the SEC in carrying out the law. §1502(d)(2)(A)-(B). The Secretary of State is required to make available a map of mineral-rich zones, trade routes, and areas under the control of armed groups in the DRC region, and must also submit to Congress "a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products." §1502(c)(1)-(2). The Secretary of Commerce is required to assess the accuracy of the independent audits and due diligence processes, to recommend ways to improve their accuracy, and to establish standards of best practice. §1502(d)(3).

ARGUMENT

A. The SEC Created a Rule that Furthers the Goals and Objectives of §1502. The SEC Properly Refrained from Second Guessing Congress's Judgment of the Benefits of a Disclosure Regime.

Congress enacted §1502 to further the foreign policy and national security interests of the United States. *See* §1502(a) (expressing Sense of the Congress). The SEC in turn has promulgated a final rule consistent with congressional intent, which has garnered praise and swift compliance here and abroad. The SEC considered the impact of its rule on various economic related factors—i.e., efficiency, competition, and capital formation—but as the district court correctly found:

> [T]he 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. As a result, the SEC rightly maintains that its role was not to "secondguess" 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.

Nat'l Ass'n of Mfrs. v. SEC, -- F. Supp. 2d --, 2013 WL 3803918, *16 (D.D.C. July 23, 2013) (citing *Pub. Citizen v. FTC,* 869 F.2d 1541, 1557 (D.C. Cir. 1989) & *Kimberlin v. U.S. Dep't of Justice,* 150 F. Supp. 2d 36, 48 (D.D.C. 2001)) (emphasis in original).

Although NAM and its *amici* assert the conflict minerals rule will not achieve Congress's aims, that assertion is not supported by the facts on the ground, as described above, *supra* 16-17, and Congress continues to monitor the effectiveness of the new law. For example, Congress commissioned an analysis from the Comptroller General on the effectiveness of §1502's reporting requirements in promoting peace and security in the DRC region as well as an analysis of the issues encountered by the SEC in carrying out the law. These reporting requirements will provide valuable information to Congress. The determination of whether the conflict minerals rule continues to be effective in achieving our Nation's foreign policy goals remains committed by statute and by the Constitution to Congress and the President.

B. The SEC Correctly Determined that a *de minimis* Exception Was Not Appropriate.

The SEC believed it had the authority to create a *de minimis* exception. *See Conflict Minerals*, 77 Fed. Reg. 56,295, 56,298 (Sept. 12, 2012). Indeed, the SEC solicited comments on a *de minimis* exception. If, as the district court observed, the SEC "truly thought itself foreclosed from even considering a *de minimis* threshold, then there would have been no reason to solicit feedback on the issue as part of the rulemaking process." *See Nat'l Ass'n of Mfrs.*, 2013 WL 3803918 at *16. The SEC considered comments from industry groups and others, *see* 77 Fed. Reg. 56,295-98, and concluded – as Congress already had – that because conflict minerals are often used in minute quantities, a *de minimis* exception would have a significant impact. *Id*. at 56,298; *see also Nat'l Ass'n of Mfrs.*, 2013 WL 3803918 at *16.

Moreover, the SEC recognized that Congress intentionally did not adopt a *de minimis* exception but instead selected a different threshold: "whether a mineral is necessary to a product's functionality or production." 77 Fed. Reg. 56,298. The SEC final rule implementing that threshold "addresses some of the concerns regarding *de minimis* amounts of minerals." *Id*. "The ability to create a *de minimis* exemption 'is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design.'" *Envtl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 466 amended sub nom. *Envtl. Def. Fund v. EPA*, 92 F.3d 1209 (D.C. Cir.

1996). Finally, although the SEC believed it had the authority to create a *de minimis* exception, Congress had already determined such an exemption would not be in the public interest and explicitly chose a different standard. *Cf.* 15 U.S.C. § 78l(h); 15 U.S.C. § 78mm(a)(1).

Congress considered and rejected a *de minimis* exception when drafting §1502. A draft *de minimis* standard was circulated among congressional offices, discussed extensively with industry, policy experts, and administration officials, but was not adopted because creating a *de minimis* exception for these minerals would have subverted the goals of the law. Indeed, no Member of Congress even offered a *de minimis* amendment.

By comparison, Congress did include a *de minimis* exception—and did so expressly—in §1504 of the same statute, which requires companies involved in the extractive industries to disclose certain payments to the United States and foreign governments. *See* §1504(1)(C) (codified at 15. U.S.C. § 78m(q)(1)(C)(i)(II)). Moreover, Congress expressly vested the President – not the SEC – with the authority to suspend or temporarily revise §1502's reporting requirement. *See* §1502(a). Indeed, a prior version of the legislation had vested that authority in the SEC. *See* Congo Conflict Minerals Act, S. 891, 111th Cong. § 5(m)(4) (2009).

Congress chose to require reporting not based on the amount or weight of a conflict mineral contained in a product, but whenever the conflict mineral is

"necessary to a product's functionality or production." §1502(b). Congress chose this language to take into account the reality of how conflict minerals are often used in a commercial context. Because conflict minerals are used in small quantities—whether measured by weight or dollar value—a *de minimis* exception would have exempted an unacceptably large portion of the overall market from the statute's requirements. *See* Letter from Rep. Jim McDermott and Sen. Richard Durbin to Mary L. Schapiro, SEC Chairwoman (Oct. 4, 2010) ("McDermott & Durbin 2010 Letter") ("the weight of the conflict minerals so essential to many products is very small, and the percentage by weight or dollar value of the conflict minerals as a proportion of unit cost is often also very small"). Kemet Corporation, one of the largest users of tantalum in the world, agreed: "Having a *de minimis* standard would have been unworkable when the weights and values per unit of a product are so small." Kemet Letter at 4. A *de minimis* exception would have created a loophole that would swallow the rule. McDermott & Durbin 2010 Letter ("Congress carefully considered including a de minimis rule in Section 1502 . . . but a de minimis rule would have created an overly generous loop-hole in the law.").

The legislation's sponsors explained to the SEC that Congress intentionally did not include a *de minimis* exception:

> [W]e intended [the reporting requirements] to cover practically all uses of conflict minerals—except for those that are naturally

> occurring or unintentionally included in a product. . . . In the example of the car whose only conflict minerals are contained in the radio, we would argue that the car manufacturer would, in fact, be covered by Section 1502.

Letter from Rep. Jim McDermott and Sen. Richard Durbin to Mary L. Schapiro, SEC Chairwoman (Feb. 28, 2011) ("McDermott & Durbin 2011 Letter").

Because a *de minimis* exception would have undermined goals and objectives of the legislation and because Congress specifically rejected a *de minimis* exception, the SEC correctly decided not to create one.

C. The SEC's "Reason to Believe" Standard is Consistent with Congressional Intent, and NAM Has Misread §1502.

Section 1502 requires reporting from companies that use conflict minerals that "did originate" in the DRC or an adjoining country. Whether a conflict mineral "did originate" in the DRC is a question of objective fact—that is, a fact that exists independent of a company's knowledge or ignorance of the mineral's origin. As the district court observed, §1502 did not specify "as to *how* companies go about determining 'whether' their minerals 'did originate' in the Covered Countries in the first place." *Nat'l Ass'n of Mfrs.*, 2013 WL 3803918 at *19.

The SEC's final rule requires due diligence if (i) the company "knows that it has necessary conflict minerals that originated in the Covered Countries" or (ii) the company "has reason to believe that its necessary conflict minerals may have originated in the Covered Countries." *Conflict Minerals*, 77 Fed. Reg. 56,313

(Sept. 12, 2012). The "reason to believe" standard is satisfied when the company encounters "red flags," "warning signs" or "other circumstances indicating that [the company's] minerals have originated in a Covered Country." *Id.* Conversely, companies who have no reason to believe that their minerals originated in the DRC do not need to take the additional due diligence steps.

The SEC's final rule promotes Congress' goals of transparency and accountability. *See* Letter from Senators and Congress Members to Mary L. Schapiro, SEC Chairwoman (Feb. 16, 2012); *see also* McDermott & Durbin 2011 Letter (the label of "DRC conflict free" should be limited to companies "who know (and can show) their use of conflict minerals does not foment war" in the DRC region); *see also, e.g.*, Kemet Letter (noting "reason to believe" standard "discourages willful blindness and promotes diligence and greater transparency in the supply chain. This is the legal standard Kemet uses for due diligence in the compliance for all of its products.").

Opponents of the statute complained that §1502 would require extensive due diligence. *See* Statement of Gary Miller (R-CA), May 2012 Hearing, *supra* 6 (complaining that Kraft Food would have to conduct due diligence on products that contain the minerals even if "not necessarily from the region"). Thus, §1502's supporters and opponents alike understood the statute required companies to

proactively investigate the origin of the conflict minerals in their products. The SEC's rule is consistent with this understanding. 77 Fed. Reg. 56,310-14.

NAM argues that the SEC imposed a requirement that exceeds the scope of the statute. That is not so. NAM's reading of the statute would exempt a company from due diligence and reporting requirements even if "warning signs" and "red flags" indicate that the minerals "did originate" in the DRC or an adjoining country. Because the NAM proposal would fail to cover all companies whose conflict minerals "did originate" in the DRC or an adjoining country, the NAM proposal is incompatible with the text and goals of the statute.[4] The SEC's final

[4] NAM's comparison of text from the Senate amendment compares apples and oranges. NAM Br. at 37. Congress considered a variety of bills, all with the goal of greater supply chain transparency and accountability. Senator Brownback's bill, S.891, required companies "to disclose annually to the Commission the country of origin" of specified conflict minerals, and if the country of origin was the DRC or an adjoining country, to disclose as well the specific mine of origin of each mineral. Congo Conflict Minerals Act of 2009, S.891, 111th Cong. § 5(m)(1)(A) (2009). Senator Brownback's amendment to the Dodd-Frank bill required a company to describe the due diligence undertaken to ensure its use of minerals did not directly or indirectly finance or benefit armed groups, if the company used minerals that originated or may have originated in the DRC or an adjoining country. 156 Cong. Rec. S3866 (May 18, 2010). Meanwhile, the companion House bill required audits of conflict minerals processing facilities and would have eventually banned the importation of articles made with components containing conflict minerals from facilities that were not audited. *See* Conflict Minerals Trade Act, H.R. 4128, 111th Cong. § 6(c) (2009). In the Conference Report, Congress ultimately chose to require first a country of origin inquiry and, second, where indicated, a report on, inter alia, the source and chain of custody of conflict minerals and a description of the products that are not DRC conflict free. Indeed, the SEC's interpretation of the law is *more accommodating* of business concerns than Congress had intended. *See* McDermott

rule reflects the text and goals of the statute, as the district court found. *Nat'l Ass'n of Mfrs.*, 2013 WL 3803918 at *19-20.

D. Congress Intended §1502 to Apply to Companies that Contract to Manufacture Products Involving Conflict Minerals.

Congress intended §1502 to apply to issuers that exercise control over the manufacture of their products, including companies that contract to manufacture their products through other entities. This scope of coverage is critical to the effectiveness of §1502, as Senator Durbin and Congressman McDermott explained prior to the promulgation of the SEC's final rule:

> [One] area of concern has been over which companies are manufacturers and which are not. . . . [P]roducts that the retailer contracts to be manufactured or for which the retailer issues unique product requirements must be included [within the scope of the rule]. . . . Many companies use component parts from any one of several suppliers when assembling their products. This business model . . . creates complexity, which has served as a rationale for not requiring responsibility to date – and which has enabled the black market for conflict minerals to grow. ***It is of paramount importance that this business model choice not be used as a rationale to avoid reporting and transparency.***

McDermott & Durbin 2010 Letter (emphasis added). In its brief, NAM invoked generic canons of statutory construction to support its position. Whatever merit those assumptions may have generally in discerning legislative intent, here the

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& Durbin 2011 Letter (The SEC rule "differentiates between the country of origin inquiry and the due diligence involved in determining the source and chain of custody of conflict minerals, indicating that the former could be 'less exhaustive.' This is a misreading of our intent—we see no difference in the effort that should be exercised in each case.").

legislature's intent is known: §1502 was meant to include companies that contract to manufacture their products. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 675 (1990) (opining that canons of construction are "notoriously numerous and manipulable"); *see also* Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). The SEC correctly recognized that intent, and the final rule is wholly consistent with that intent. 77 Fed. Reg. 56,290-91. Although different bill sponsors may have used varying language, Congress consistently intended to exclude pure retailers while including retailers that exercise some control over the manufacture of their products, including companies that contract to manufacture. Accordingly, the district court correctly concluded that the SEC's application of the conflict minerals rule to companies that "contract to manufacture" products is a "perfectly permissible construction" of §1502.

NAM's reading of the statute, by contrast, is contrary to congressional intent. *Pub. Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 454 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees . . . seems inconsistent with Congress's intention"). NAM's reading of the statute would exempt from investigation and due diligence requirements key companies that exercise control over products entering the market—undermining

the purpose of the statute. Congress did not intend to exempt such key actors in the conflict minerals supply chain. Indeed, the sponsors of the statute alerted the SEC that the exemption of companies that contract to manufacture would "directly subvert[ ] the policy intention of the law." *See* McDermott & Durbin 2010 Letter; *see also* Kemet Letter (praising SEC's decision to include companies that contract to manufacture because "consistently-applied requirements for all companies is a competitive issue").

Congress intended §1502 to apply to companies that manufacture and contract to manufacture products, as is necessary to establish transparency and accountability in the conflict mineral supply chain. NAM's attempt to roll back legislative and administrative efforts to establish much needed accountability and transparency should be denied.

CONCLUSION

For the above reasons, the decision of the district court should be affirmed.

Dated: October 30, 2013

Respectfully submitted,

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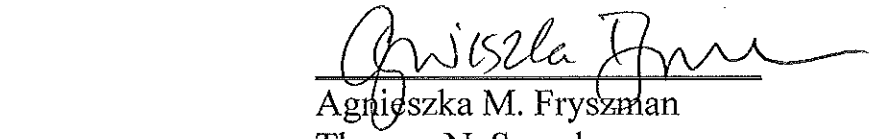
CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Times New Roman typeface and is double-spaced (except for headings and footnotes). The undersigned further certifies that the brief is proportionally spaced and contains 6,739 words exclusive of the portions exempted under the applicable rules, and therefore satisfies the type-volume limitation of Fed. R. App. P. 29(d).

This *amicus* brief has been joined by current and former Senators and Members of Congress. I have been informed that there are separate *amicus* briefs being submitted in support of Appellee by Global Witness and Better Markets. The issues addressed in the other *amicus* briefs are materially distinct from those addressed herein and accordingly consolidation of the briefs is not feasible.

Dated: October 30, 2013

Respectfully submitted,



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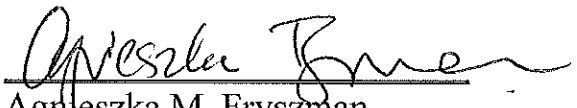
CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2013, I electronically filed the foregoing Brief for current and former Senators and Members of Congress Barbara Boxer, Dick Durbin, Ed Markey, Howard Berman, Wm. Lacy Clay, Keith Ellison, Eliot Engel, Raul Grijalva, John Lewis, Jim McDermott, Gwen Moore, and Maxine Waters as *amici curiae* supporting Respondent-Appellee with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the use of the Appellate CM/ECF system, with paper copies to follow via hand-delivery. Service was automatically accomplished on all registered participants by the CM/ECF system, as stated on the relevant Notice of Docket Activity.



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