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,
Respondents-Intervenors.

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

Final Brief of Amnesty International of the USA, Inc. and Amnesty International Limited

Julie A. Murray
Adina H. Rosenbaum
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

Counsel for Amnesty International of the USA, Inc. and Amnesty International Limited

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CERTIFICATE AS TO PARTIES AND AMICI, RULINGS UNDER REVIEW, AND RELATED CASES

Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Final Brief for Petitioners.

Rulings Under Review. Reference to the agency rule at issue in this case appears in the Final Brief for Petitioners.

Related Cases. This case has not previously come before this Court or any other court. The undersigned is not aware of any related cases as defined by Circuit Rule 28(a)(1)(C).

/s/ Julie A. Murray
Julie A. Murray

CORPORATE DISCLOSURE STATEMENT

Amnesty International of the USA, Inc. and Amnesty International Limited are non-profit organizations. Neither organization has a parent corporation. No publicly-held company has a 10% or greater ownership interest in either organization. The general purpose of the organizations is to do research and take action to end grave abuses of human rights around the world.

/s/ Julie A. Murray
Julie A. Murray

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

** Authorities upon which we chiefly rely are marked with asterisks.*

STATUTES

REGULATORY MATERIALS

LEGISLATIVE HISTORY

MISCELLANEOUS

GLOSSARY

APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq*.
API	American Petroleum Institute
DRC	Democratic Republic of the Congo
SEC	U.S. Securities and Exchange Commission

STATEMENT OF JURISDICTION

There is a serious question whether this Court has subject-matter jurisdiction under 15 U.S.C. § 78y(a). This issue is fully briefed in *American Petroleum Institute (API) v. SEC*, No. 12-1398 (D.C. Cir. filed Oct. 10, 2012) (set for oral argument Mar. 22, 2013). In that case, intervenor-respondent Oxfam America has argued that an SEC rule similar in pertinent respects to the rule at issue in this proceeding is not an "order" subject to immediate review in the courts of appeals under 15 U.S.C. § 78y(a). *See* Br. of Oxfam America at 11-13; Oxfam America's Resp. to Petitioners' Mot. to Determine Jurisdiction at 7-10. Amnesty International USA and Amnesty International Limited (collectively, Amnesty International) expect that the Court's resolution of this issue in *API* will control here.

STATUTES AND REGULATIONS

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, 2213-18 (the Dodd-Frank Act), and *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (the Conflict Minerals Rule), are contained in the Addendum to Petitioners' Brief.

INTRODUCTION AND BACKGROUND

For nearly two decades, the Democratic Republic of the Congo (DRC) has been in the grip of armed conflicts that have inflicted great suffering on millions of men, women, and children and that continue to result in frequent human rights abuses by all parties to the conflicts. Today, despite the official end to earlier wars, eastern DRC remains beset by armed groups that commit unlawful killings, summary executions, forced recruitment of children, rape and other forms of sexual violence, large-scale looting, and destruction of property.[1]

An important source of funding for armed groups in eastern DRC is the minerals trade in cassiterite (tin), columbite-tantalite (tantalum), wolframite (tungsten), and gold. The armed groups control or tax many of the mines producing these minerals and pocket the wealth of the region to support actions that terrorize local communities. These

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[1] *See, e.g.*, Amnesty International, *Amnesty International Report 2012: The State of the World's Human Rights* 126-27 (2012), *available at* http://www.amnestyusa.org/sites/default/files/air12-report-english.pdf; *see also* U.N. Human Rights Office of the High Commissioner, Democratic Republic of the Congo, 1993-2003, at 349-67 (2010), *available at* http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf (discussing longstanding link between human rights abuses and natural resource exploitation in the DRC).

minerals are exported or smuggled out of the country, often through neighboring countries. They then go to smelters or refineries for processing before ending up in popular consumer products, such as laptops, cars, and cell phones.

The minerals trade fueling conflict in the DRC comes at a heavy cost to the Congolese people. They pay—with their lives, suffering, and economic livelihood—for the international community's inability to stanch the flow of funding to armed groups. For example, last year, an armed group of defectors from the government armed forces engaged in violent clashes with the government in eastern DRC and took control of the city of Goma, with all parties committing violations of international humanitarian law during the strife.[2] Conflict in the DRC also comes at a cost to the United States, which contributes more than $500 million per year in aid and peacekeeping assistance to promote stability there,

[2] *See, e.g.*, Amnesty International, Press Release, *DR Congo: Civilian Protection Urged as Tens of Thousands Flee Escalation in Fighting* (Nov. 19, 2012), *available at* http://www.amnesty.org/en/news/dr-congo-escalation-fighting-forces-tens-thousands-civilians-flee-2012-11-19.

in effect subsidizing the efforts needed to counteract "the lack of proper controls on international minerals supply chains."[3]

In 2010, Congress targeted the trade in and exploitation of conflict minerals fueling violence in the DRC by passing Section 1502 of the Dodd-Frank Act.[4] It opted to use corporate disclosure to investors and the public as a tool to promote peace and security in the DRC. Specifically, under Section 1502, which amended the Securities Exchange Act of 1934 (Exchange Act), Congress mandated that companies filing reports with the SEC investigate and disclose publicly whether their products rely on conflict minerals from the DRC or adjoining countries and whether the use of such minerals in their products helps finance armed groups that contribute to the conflict and humanitarian crisis. *See* Dodd-Frank Act, § 1502(b), *codified at* 15 U.S.C. § 78m(p)(1). Congress intended the law to "enhance transparency" and "help American consumers and investors make more informed decisions." 156 Cong. Rec. S3976 (May 19, 2010) (statement of

[3] JA 576; *see also* JA 666.

[4] Section 1502(e)(4) defines "conflict minerals" as columbite-tantalite, cassiterite, wolframite, and gold or their derivatives or "any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the [DRC] or an adjoining country."

Sen. Feingold). It viewed public disclosure as a tool to reduce "the exploitation and trade of conflict minerals" from the DRC that are "helping to finance [extremely violent] conflict" in the eastern part of the country and "contributing to an emergency humanitarian situation" there. Dodd-Frank Act, § 1502(a), *reprinted at* 15 U.S.C. § 78a note.

Congress directed the SEC to pass implementing regulations within 270 days of the law's enactment, *id.* § 1502(b), *codified at* 15 U.S.C. § 78m(p)(1)(A), and provided the SEC with clear guidelines for the rulemaking. It defined which companies to cover, made clear certain points that companies' disclosures must include, and identified when disclosure requirements may be revised, waived, or terminated. *Id.*, *codified at* 15 U.S.C. § 78m(p)(1)-(3). Congress also maintained a central and ongoing oversight role, directing the head of the General Accounting Office to submit annual reports to Congress on, among other things, the effectiveness of Section 1502 "in promoting peace and security" in the DRC and adjoining countries. *Id.* § 1502(d)(2).

Section 1502 was the culmination of a multi-year, bipartisan legislative effort to address the role of conflict minerals in fueling violence in the DRC. Earlier bills in the House and Senate proposed

banning or strictly regulating importation of products containing certain conflict minerals from the DRC. *See* Conflict Coltan and Cassiterite Act of 2008, S. 3058, 110th Cong. § 3(a); Conflict Minerals Trade Act, H.R. 4128, 111th Cong. §§ 7, 9 (2009). In 2009, Senators Brownback, Durbin, and Feingold introduced the Congo Conflict Minerals Act, S. 891, 111th Cong. § 5 (2009), which would have required certain companies to report to the SEC about their use of DRC conflict minerals (not including gold). Like Section 1502, that bill was "sensitive to [the] complex reality" that "[a]ll-out prohibitions or blanket sanctions could be counterproductive and negatively affect" the Congolese people. 155 Cong. Rec. S4697 (Apr. 23, 2009) (statement of Sen. Feingold).

Section 1502 was adopted despite heavy industry lobbying. For example, the Lobbying Disclosure Act Database for the House of Representatives between 2009 and 2010 includes more than 220 quarterly lobbying reports for lobbying on "conflict minerals"; the vast majority of those reports were filed by lobbyists representing industry interests, including the Chamber of Commerce. *See* Lobbying Disclosure Act Database, Query by Filing Year (2009 and 2010), Govt Entity Contacted (Senate), and Specific Lobbying Issue (conflict minerals),

http://soprweb.senate.gov/index.cfm?event=selectfields; *see also* JA 87 (discussing electronics industry lobbying of Senate regarding Congo Conflict Minerals Act of 2009).

The SEC proposed a rule to implement Section 1502 in December 2010. Public participation in the rulemaking was high. The SEC received hundreds of individualized letters; more than 13,000 letters generally urging rapid adoption of a strong rule; two petitions with an aggregate of more than 25,000 signatures in support of the rule; and comments from Section 1502's co-sponsors. Conflict Minerals Rule, JA 722-23. The agency repeatedly met with industry representatives, including the National Association of Manufacturers and the Chamber of Commerce, who urged watering down the proposed rule. *See generally* SEC, Proposed Rule Docket: Conflict Minerals, http://www.sec.gov/comments/s7-40-10/s74010.shtml (last visited Feb. 26, 2013).

The SEC also received comments from investors explaining how they would benefit from and use the disclosures required by the rule. These investors represented the burgeoning socially responsible investment field, whose assets "topped $3 trillion at the end of 2009,

representing one in every nine dollars under professional management in the United States." JA 407. Dozens of investor groups told the SEC that the "conflict minerals disclosures [would be] material." *Id*. Trillium Asset Management—a socially responsible investment company through which Amnesty International USA maintains an investment portfolio, *see* Addendum 3—explained that "sourcing of minerals from conflict zones exposes issuers and their shareholders to reputational, regulatory, litigative and operational risks" and that Section 1502's "high level of disclosure" would "provide better protection for investors from these risks," JA 566. And many other socially responsible investors stated that they would use the disclosures to evaluate a company's "risk exposure to sourcing from conflict[] zones and the company[']s approach to managing those risks." JA 126.

Despite the looming April 2011 deadline to adopt a rule, the SEC extended from January 31, 2011, to March 2 the time for comment, accommodating stakeholders who urged that such an extension would "allow for the collection of information and improve the quality of responses." Conflict Minerals, Proposed Rule, Extension of Comment Period, 76 Fed. Reg. 6110/2 (Feb. 3, 2011). The months wore on after

March without a final rule, however, and the rule's supporters repeatedly warned that the delay in the rulemaking not only contravened the statute, but also left stakeholders without the certainty needed to ensure a smooth transition to the reporting regime. *See, e.g.*, JA 666; JA 678. In August 2012, more than a year after the congressional deadline for regulations had passed, the SEC adopted the rule, SEC Release No. 34-67716, which was published in the Federal Register on September 12, 2012, Conflict Minerals Rule, JA 719.

Although the rule is short, the SEC's exhaustive explanation of the rule and analysis of comments spans more than 85 pages in the Federal Register. As discussed in detail in the SEC's brief, the rule hews closely to the dictates of Section 1502. Importantly, the rule differs from the proposed rule in numerous ways that make it easier and cheaper for companies to comply, and the agency exercised its discretion in other ways to have the same effect.[5] Dissatisfied with the

[5] *See, e.g.*, Conflict Minerals Rule, JA 788 (rejecting approach in proposed rule for standard applicable to when due diligence is necessary because it "would arguably have been more burdensome than necessary to accomplish" the statutory purpose); *id.* 789 (rejecting earlier proposal to require five years of recordkeeping regarding compliance, which would "benefit issuers" by "reducing their compliance costs"); *id.* 792 (continued)

SEC's concessions in the final rule, Petitioners brought this challenge to Section 1502 and the rule.

STANDING

This Court need not inquire whether intervenors-respondent Amnesty International has standing. The SEC unquestionably has standing, and Amnesty International agrees with the SEC's general positions on the merits. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 233 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).

Amnesty International has standing in any event. It is a worldwide organization whose mission is to conduct research and take action to prevent and end grave abuses of human rights. Addendum 1, 8.[6] Amnesty International participated in the underlying rulemaking

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(rejecting alternative objectives for corporate audits as "very costly and burdensome to undertake"); *id.* 793 (excluding from coverage conflict minerals outside of supply chain before January 2013 and noting that an alternative "would greatly increase costs"); *id.* (concluding that uniform timing of disclosure would "reduce . . . costs" for "companies that supply products or components with conflict minerals"); *id.* 794 (interpreting the phrase "necessary to the functionality or production" of a product in a way that "reduces costs to issuers").

[6] The addendum includes two declarations that Amnesty International submitted in support of its earlier motion to intervene.

and intends to rely on the disclosures required by the rule to make more informed investment, purchasing, and other business decisions. *See id.* 5-6, 10-11. The disclosures will also allow Amnesty International Limited, a component of Amnesty International, to engage in new activities that support its core mission; invalidation of the rule would require Amnesty International Limited to divert resources from those activities to counteract the corresponding reduction in corporate transparency. *Id.* 15-18. Amnesty International thus has standing as an intervenor-respondent in this case based on the harm to its informational and organizational interests that would be certainly impending were the rule or Section 1502's reporting requirement invalidated. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 21 (1998) (informational standing); *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (*Havens* standing).

SUMMARY OF ARGUMENT

Petitioners' challenge in this Court is the latest in a string of efforts to water down or nullify Section 1502 and the rule implementing it. Those efforts are intended to invalidate the requirement that companies investigate and disclose information that many people think

companies should already know: whether their products contain conflict minerals that finance armed groups responsible for appalling human rights abuses, including an epidemic of rape and sexual violence in the DRC that "is quite possibly the worst in the world." 155 Cong. Rec. S4696 (Apr. 23, 2009) (statement of Sen. Brownback). Petitioners and their members unsuccessfully opposed Section 1502 before Congress. Unsatisfied with Congress's considered judgment, they unleashed a lobbying force on the SEC to weaken the resulting rule. Now, not satisfied with the SEC's attempt to make it easier and cheaper for their members to comply with Section 1502 and the rule, Petitioners ask this Court to sweep away Congress's directive and the SEC's compliance with it.

Petitioners' challenge should be rejected.[7] The SEC had no obligation to engage in the type of cost-benefit analysis urged by Petitioners. The agency was neither required nor even permitted to reassess the humanitarian benefits stemming from Section 1502.

[7] Amnesty International does not address each of Petitioners' merits arguments, *see* Circuit Rule 28(d), but instead joins generally in the SEC's arguments. Amnesty International writes separately to emphasize or raise other key points or facts.

Congress determined those benefits and left no room for agency second-guessing. Nor was the SEC required to determine that all costs of the mandatory rule had corresponding benefits, or to quantify all costs and benefits.

Moreover, the SEC appropriately decided not to adopt the purportedly "de minimis" exceptions urged by commenters. The SEC adopted at the very least a permissible interpretation of the statute, based on statutory language, structure, and history, and it adequately explained its reasoning. In addition, the SEC's position is bolstered by Section 1502's "Revisions and Waivers" provision.

Likewise, the SEC reasonably determined that Section 1502 covers companies that "contract to manufacture." Petitioners' contrary reading of the statute would create a large and unacceptable loophole in the reporting requirement.

Finally, Petitioners' First Amendment challenge to the requirement that companies state whether their products are not DRC conflict free (or have not been found to be DRC conflict free) is meritless. Securities disclosures of this kind do not offend the First Amendment, and Petitioners' argument to the contrary has radical

implications for a slew of longstanding government regulations. In any event, Section 1502 and the rule implementing it survive any level of First Amendment scrutiny.

ARGUMENT

I. The SEC Sufficiently Examined the Rule's Costs and Benefits.

Petitioners contend that the SEC failed to determine whether the rule or its alternatives would create benefits, underestimated the rule's costs, and increased the rule's costs without corresponding benefits. *See* Pet. Br. 26-34. Amnesty International writes separately to emphasize that the SEC has no duty to reevaluate the humanitarian benefits of the rule or to engage in a formal, quantified weighing of the rule's costs and benefits. Petitioners' attempt to engraft such requirements onto the SEC's rulemaking authority is at odds with basic principles of administrative law and Congress's clear mandate in Section 1502 that the SEC adopt a broad rule to implement congressional will.

A. The SEC Was Neither Required Nor Permitted to Reevaluate the Humanitarian Benefits That Congress Determined Would Flow from Section 1502.

The gravamen of Petitioners cost-benefit challenge is that the SEC "failed to consider" whether the rule or its alternatives would provide

compelling social benefits identified in Section 1502. Pet. Br. 30 (internal quotation marks omitted). Petitioners argue that the SEC should have measured the rule's impact on mining communities, financing of and smuggling by armed groups, and humanitarian atrocities in the DRC, *id.* 29-30, though they concede that this endeavor is no "easy task," *id.* 27. A more reasonable conclusion is that this endeavor is no task at all for the SEC, which was neither required nor permitted to second-guess Congress's decision that the benefits to the DRC of Section 1502 and the rule it requires justify the law's enactment.

As the SEC acknowledges, it was "unable to readily quantify" the social benefits of Section 1502 and "to assess how effective Section 1502 w[ould] be in achieving those benefits." Conflict Minerals Rule, JA 795. As Petitioners recognize, the agency has no expertise in quantifying such benefits. The social benefits intended by Section 1502 are different in kind from those within the agency's bailiwick, that is, "economic or investor protection benefits." *Id.*

But the more fundamental problem with Petitioners' argument is that when Congress passed Section 1502, it made its own determination

that requiring disclosure would lead to humanitarian benefits in the DRC. By setting a deadline for a mandatory rule, Congress directed the SEC to act *on that determination*. The causal link between the tool of disclosure and social benefits to the DRC is not subject to administrative reevaluation; it is a legislative judgment by the elected representatives of the American people. Accordingly, to the extent that the SEC evaluated the benefits of its discretionary actions, it was not permitted to reevaluate the statute's humanitarian benefits to the DRC.

Other provisions of the statute demonstrate that Congress did not intend for the SEC to reevaluate Section 1502's effectiveness in achieving humanitarian benefits in the DRC. Congress expressly conditioned the termination of Section 1502's reporting requirement on the President's determination—not the SEC's—that armed groups do not "continue to be directly involved and benefitting from commercial activity involving conflict minerals." Dodd-Frank Act, § 1502(b), *codified at* 15 U.S.C. § 78m(p)(4). And Congress maintained a close oversight role, directing the head of the General Accounting Office—not the SEC—to submit annual reports to Congress on Section 1502's effectiveness in "promoting peace and stability" in the DRC and

adjoining countries. *Id.* § 1502(d)(2). These provisions reinforce that the SEC was neither required, nor permitted, to undertake its own assessment of any humanitarian benefits to the DRC.

The implication of Petitioners' contention to the contrary is quite radical. Petitioners assert that the SEC should have resolved a dispute among commenters regarding whether Section 1502, and the anticipation that a rule implementing it would be promulgated, had improved or exacerbated eastern DRC's conflict and humanitarian crisis. But the SEC could not have weighed these comments—all based on observations before the final rule's requirements even went into effect—without second-guessing Congress's policy choice in enacting Section 1502.

B. The SEC Had No Obligation to Weigh Quantified Costs and Benefits Before Making Discretionary Choices.

Petitioners repeatedly refer to the SEC's purportedly inadequate "cost-benefit analysis," *see, e.g.*, Pet. Br. 32, arguing that the SEC was required to estimate the "marginal benefits [and] the marginal costs of its choices" to "determine whether those marginal costs are 'necessary or appropriate,'" *id.* 33-34 (citing 15 U.S.C. § 78w(a)(2)). They also fault the SEC for failing "to attach any numbers to the costs or benefits of its

choices." *Id.* 33. In effect, Petitioners ask this Court to impose a mandate of formal, quantified cost-benefit analysis on the SEC, under which the agency must ensure that any costs have "[c]orresponding [b]enefits" before making a policy choice. *Id.* 32. Petitioners' position finds no support in the Administrative Procedure Act (APA) or the Exchange Act.

Standing alone, the APA does not require an agency "to engage in cost-benefit analysis." *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 671 (D.C. Cir. 2011). Rather, as the Supreme Court made clear in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, the APA only requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." 463 U.S. 29, 43 (1983) (internal quotation marks omitted). Moreover, the APA does not "impose[] . . . [a] general obligation on agencies to produce empirical evidence." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009). Indeed, "depending upon the nature of the problem," the SEC "may be entitled to conduct a general analysis based on informed conjecture." *Chamber of Commerce*

v. SEC, 412 F.3d 133, 142 (D.C. Cir. 2005) (internal quotation marks and alterations omitted).

In this case, in addition to conducting a quantitative cost analysis of the rule based on available data, the SEC considered in qualitative terms "the costs and benefits" of fourteen major "discretionary choices." Conflict Minerals Rule, JA 787-95. In so doing, the SEC repeatedly opted for policies that would be less costly to industry and rejected alternatives that the rule's supporters had suggested were more consistent with the statute and congressional intent. The agency also identified and assessed benefits that were within its expertise. It determined, for example, that requiring reporting companies to use a nationally or internationally recognized due-diligence framework could "benefit users of the information by making the Conflict Minerals Reports easier to compare." *Id.* 791. The APA requires no more.

Petitioners incorrectly rely on 15 U.S.C. §§ 78c(f) and 78w(a)(2) to claim that the SEC is required to conduct a formal, quantified cost-benefit analysis. But if Congress intends "that an agency engage in cost-benefit analysis," it "clearly indicate[s] such intent on the face of the

statute." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510 & n.30 (1981). Here, neither provision reflects such an intent.

First, Section 78c(f) provides only that when the SEC engages in a rulemaking that requires it "to consider or determine whether an action is necessary or appropriate in the public interest," the agency must "consider . . . the protection of investors" and whether a rule "will promote efficiency, competition, and capital formation." To begin with, Section 78c(f)—by its plain terms—does not pertain to this rulemaking because Section 1502 does not require the SEC "to consider or determine whether [the rule] is necessary or appropriate in the public interest." In this regard, Section 1502 stands in stark contrast to other Exchange Act sections that do. *See, e.g.*, 15 U.S.C. §§ 78f(a); 78*l*(b)(1); 78m(q)(2)(D)(ii)(VII). Thus, even assuming § 78c(f) requires a quantified cost-benefit analysis, the SEC's failure to apply that feature of the statute does not render the agency's analysis arbitrary or capricious.[8]

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[8] *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), does not control here. That case held that the SEC must defend its analysis under the standard it employed in a rulemaking because the SEC had justified its rule based on an unreasoned conclusion that the rule would increase competition, efficiency, and capital formation. *See id.* at 177-79. The Court held that (continued)

But even if § 78c(f) did apply here, a mandate to "consider" factors, even economic ones, in adopting a regulation "does not mean that [a] regulation's benefits must outweigh its costs." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1039 (D.C. Cir. 2012). To the extent that the SEC was required to consider the rule's impact on efficiency, competition, and capital formation, it reasonably did so. Conflict Minerals Rule, JA 780, 795-96. The impossibility of a quantified cost-benefit assessment does not render the agency's analysis arbitrary or capricious.

Nor do this Court's decisions assessing the SEC's obligation to analyze efficiency, competition, and capital formation support Petitioners. *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011), *American Equity Investment Life Insurance Co.*, 613 F.3d 166, and *Chamber of Commerce*, 412 F.3d 133, do not establish a freestanding requirement that the SEC quantify costs and benefits for a rule or for specific discretionary choices. For example, although *Business Roundtable* faulted the agency for failing to "estimate and

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the SEC's conclusion was arbitrary regardless of whether the statute required the agency to analyze these factors.

quantify the costs it expected companies to incur" as a result of a rule, it emphasized that "empirical evidence" about those costs "was readily available" and was, in fact, part of the administrative record. 647 F.3d at 1150. Under these circumstances, the Court concluded that the agency acted arbitrarily and capriciously when it "failed to make tough choices about which of the competing estimates [was] most plausible, or to hazard a guess as to which [was] correct." *Id.* (internal quotation marks and alteration omitted). Similarly, although *Chamber of Commerce* concluded that the SEC failed to adequately consider the costs of two conditions imposed by a rule on mutual funds, it did not hold that the SEC must quantify all of a rule's costs. Indeed, with respect to one of the conditions, the Court recognized that the SEC might not have been able to estimate aggregate costs, and held only that the SEC should have estimated the "cost to an individual fund," which the agency "readily could have" done. 412 F.3d at 144. Moreover, the Court emphasized elsewhere in the decision that "an agency need not—indeed cannot—base its every action upon empirical data." *Id.* at 142.

Second, § 78w(a)(2) requires that the SEC "consider the impact" of a rule on competition and precludes the agency from adopting a rule that "would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter." The SEC appropriately did not interpret § 78w(a)(2) to require a formal, quantified cost-benefit analysis of the rule and its discretionary choices here. *See Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1050 & n.26, 1058-60 (D.C. Cir. 1979) (describing earlier version of § 78w(a) and similar language in other provisions of the Exchange Act and Securities Act of 1933 as providing broad discretion before upholding the agency's decision not to require corporate environmental disclosures to investors, despite the SEC's failure to quantify costs and benefits associated with those disclosures). Instead, it recognized that implementation of the rule, to the extent it "imposes a burden on competition in the industries of affected issuers," would be "necessary and appropriate" to further the congressional purpose. *See Consumer Elec. Ass'n v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003) (concluding that an agency adequately "assessed the benefits" of an order where it concluded in part that the order would "speed[] [a] congressionally-

mandated conversion" to digital television). The SEC's analysis is unquestionably reasonable and provides a satisfactory explanation for the agency's decision under *State Farm*. Section 78w(a)(2) requires nothing more.

II. The SEC Appropriately Declined to Adopt the Purportedly "De Minimis" Exceptions Advanced by Commenters.

The SEC determined that the purportedly "de minimis" exceptions proposed by commenters were inconsistent with Section 1502's text, structure, and congressional intent. The SEC's reasonable interpretation of the statute is entitled to deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), *see Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 444-45 (D.C. Cir. 2012), and the agency adequately explained its decision not to adopt the exceptions under *State Farm*.

Amnesty International writes separately to make two points: (1) Section 1502's "Revisions and Waivers" provision further supports the SEC's conclusion that the exemptions urged by Petitioners would thwart the statute's purpose and congressional intent, and (2) the record supports the SEC's decision to reject such exemptions.

A. Section 1502's "Revisions and Waivers" Provision Supports the SEC's Conclusion Not to Adopt De Minimis Exceptions.

The SEC has general authority under 15 U.S.C. § 78mm(a)(1) to create an exemption from an Exchange Act rule if the exemption "is necessary or appropriate in the public interest" and "consistent with the protection of investors." Where not precluded by statute, the agency may also rely on inherent authority to create a de minimis exemption "when the burdens of regulation yield a gain of trivial or no value." *Envtl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 466, *amended*, 92 F.3d 1209 (D.C. Cir. 1996) (internal quotation marks omitted). The SEC reasonably concluded, however, that the purportedly de minimis exceptions urged by Petitioners—which in fact would have created non-trivial, categorical exemptions—would have thwarted Section 1502's purpose, and it appropriately rejected those exemptions.

A subsection of Section 1502 entitled "Revisions and Waivers" bolsters the SEC's conclusion that the purportedly de minimis exceptions urged by Petitioners were inappropriate. That subsection addresses the circumstances for an exemption from the reporting requirement, providing that the SEC "shall revise or temporarily waive"

the reporting requirement if "the President transmits to the [SEC] a determination," supported by reasons, that the "revision or waiver is in the national security interest of the United States." Dodd-Frank Act, § 1502(b), *codified at* 15 U.S.C. § 78m(p)(3). The subsection limits the President's power in this respect to an "exemption" not exceeding two years. *Id.* Although the SEC did not rely on this provision in its discussion of the de minimis exceptions, *but see* Conflict Minerals Rule, JA 732 (discussing provision in separate context), the Court may nevertheless consider the provision here without running afoul of the *Chenery* rule. Under that rule, the Court may uphold an agency's decision only "on those grounds 'upon which the record discloses that its action was based.'" *Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822, 835 (D.C. Cir. 2000) (quoting *SEC v. Chenery Corp.,* 318 U.S. 80, 87 (1943)). But *Chenery* does not bar the Court from reviewing de novo a statutory argument that supports, rather than supplants, an agency's statutory interpretation advanced during administrative proceedings. *See id.* at 835-36; *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 500 n.10 (D.C. Cir. 2003).

"That Congress provided only one exception to th[e] [reporting] requirement" by adopting the "Revisions and Waivers" subsection "suggests that Congress did not intend any other exceptions," including the exceptions urged by Petitioners. *Sierra Club v. EPA*, 705 F.3d 458, 467 (D.C. Cir. 2013) (holding that EPA lacked authority to create a de minimis exception to a statutory monitoring requirement); *see also Kokechik Fishermen's Ass'n v. Sec'y of Commerce*, 839 F.2d 795, 802 (D.C. Cir. 1988) (holding that an agency was not authorized to create a statutory exemption for takings with a "negligible" effect where the statute already contained a narrow exception for certain incidental takings).

Moreover, the legislative history of the "Revisions and Waivers" provision indicates, consistent with the SEC's view, that adoption of the exemptions urged by Petitioners would have been inappropriate under the SEC's general exemptive authority. As initially proposed in a predecessor Senate bill to Section 1502, the "Revisions and Waivers" section stated that the SEC "may revise or temporarily waive" the conflict minerals reporting requirement if the agency "determines that such revision or waiver is . . . necessary for the protection of investors,

and in the public interest." S. 891, 111th Cong. § 5. That language was narrower than and clearly inconsistent with the SEC's general exemptive authority under 15 U.S.C. § 78mm(a)(1), as it would have made the SEC's authority to create any exemption temporary and limited it to circumstances where an exemption was "necessary," not just "appropriate." When the Senate added the conflict minerals provision as an amendment to the bill that would become the Dodd-Frank Act, it kept the "Revisions and Waivers" section from the predecessor bill but shifted the power to create a temporary exemption away from the SEC, providing that the agency "shall revise or temporarily waive" the reporting requirement "if the *President* determines that such revision or waiver is in the public interest." Restoring America's Financial Stability Act of 2010, H.R. 4173 (Engrossed Sen. Amend.), 111th Cong. § 1502. At conference, Congress limited the President's power to revise or waive the requirement even further, to circumstances where national security so requires. *See* H.R. Rep. No. 111-517, at 734 (2010) (Conf. Rep.). The history of the "Revisions and Waivers" section indicates that the legislative drafters

expressly considered and narrowly limited the circumstances in which an exemption would be permissible.

Finally, Petitioners' contention that the exceptions are consistent with Section 1502's purpose would lead to perverse results in light of the "Revisions and Waivers" section. It is extremely unlikely that Congress would limit to two years the President's power to waive or revise the reporting requirement to protect national security interests, but place no time limit on the SEC's power to waive the reporting requirement in a broader range of circumstances based on a determination that an exemption is in the public interest and consistent with the interest of investors.

B. The Record Supports the SEC's Conclusion That the Purportedly De Minimis Exceptions Would Undermine the Statute's Purpose.

Petitioners separately fault the SEC's conclusion that conflict minerals are frequently used in small quantities and that the exceptions urged by commenters would, therefore, have a significant impact on the rule. Pet. Br. 37. They contend that the SEC should have "determine[d] how frequently minerals are used in small quantities, or how small those quantities typically are," and whether an exception

would have any impact on "armed groups' revenues." *Id.* Petitioners' argument, premised on a claimed violation of *State Farm*, should be rejected.

State Farm's requirement that an agency provide a satisfactory explanation is satisfied where "the agency's response to public comments . . . enable[s] [the Court] to see what major issues of policy were ventilated and why the agency reacted to them as it did." *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (internal quotation marks and alteration omitted). The SEC's analysis, in which it discussed the proposals for purportedly de minimis exceptions and its reasons for rejecting them, meets this standard. *See* Conflict Minerals Rule, JA 740, 743.

Moreover, as the SEC recognized, many comments supported the agency's conclusion not to adopt the proposed exceptions. One commenter, for example, highlighted that products such as cell phones contain only small amounts of conflict minerals, but those minerals by "volume add[] up in large quantity of units (1.6 billion cell phones were sold globally in 2010)." JA 581, *cited at* Conflict Minerals Rule, JA 740 n.213; *see also* JA 602. Such comments make clear that exceptions

based on the volume or weight of a conflict mineral in a product would exempt companies using large quantities of minerals, an unacceptable loophole. In addition, as one commenter explained, Section 1502 is intended "to reduce the scope of extremely murderous and abusive armed groups" in the DRC benefiting from the conflict minerals trade. JA 578. One "can't really boil" support for those groups "down to a[n] [acceptable] level," *id.*, because "[e]ven a small portion of an end-product containing" a conflict mineral "can represent significant value to armed groups perpetuating the bloody conflict in the DRC." JA 581, *cited at* Conflict Minerals Rule, JA 740 n.213. As a result, proposed exemptions based on the cost to an issuer of using conflict minerals or on an issuer's market share usage of conflict minerals would nevertheless permit significant financing of armed groups—an untenable outcome. Thus, the SEC reasonably determined not to adopt the exemptions urged by commenters, and its discussion of those exemptions was adequate under *State Farm* and supported by the record.

III. The SEC Reasonably Interpreted Section 1502 to Cover Companies That "Contract to Manufacture."

Petitioners contend that Section 1502 covers only issuers that directly engage in manufacturing and does not extend to those that

outsource their manufacturing by contracting with other companies. Pet. Br. 46-47. However, the statute is, at most, ambiguous on this point. One subsection of Section 1502 "defines a 'person described' [in the statute] as one for which conflict minerals are 'necessary to the functionality or production of a product manufactured by such a person,' while another [sub]section . . . requires issuers to describe 'the products manufactured or *contracted to be manufactured* that are not DRC conflict free' . . . in their Conflict Minerals Reports." Conflict Minerals, Proposed Rule, 75 Fed. Reg. 80,948, 80,952/2 (Dec. 23, 2010) (footnote omitted). The agency's interpretation, which covers issuers that manufacture products or contract with other companies that manufacture the issuers' products, "is 'based on a permissible construction of the statute'" and entitled to deference. *Bluewater Network v. EPA*, 372 F.3d 404, 410 (D.C. Cir. 2004) (quoting *Chevron,* 467 U.S. at 843)).

As the SEC recognized, Petitioners' reading "would significantly undermine the purpose of" Section 1502. Conflict Minerals Rule, JA 736. A segment of companies covered by the final rule engages in manufacturing only indirectly by issuing "requirements for products to

be manufactured for them—including design, quality, product life expectancy, and so on." JA 103. Indeed, "conflict minerals are most commonly used in electronics and other technological products that may be manufactured by a different entity than the one that brands, markets, and profits from the product." JA 641.

Petitioners' reading would permit a company that outsources the actual production of its products while maintaining a primary role in determining the manufacturing process to disavow any responsibility for making corresponding conflict mineral disclosures. And if the issuer in turn relies on supplier-manufacturers that are not themselves issuers—a scenario that is more likely where a company has outsourced manufacturing to foreign countries—*no one* will be required to report to the SEC information about the conflict minerals in that product. As Section 1502's co-sponsors recognized, under Petitioners' reading, "a large, non-transparent use of the black market for DRC conflict minerals would remain, directly subverting the policy intention of the law." JA 103. The SEC reasonably took this statutory purpose into account when interpreting Section 1502's scope.

IV. Neither Section 1502 Nor the Rule Violates the First Amendment.

Under Section 1502 and the rule implementing it, a covered company must state "whether conflict minerals that are necessary" to its products "originate[d] in the [DRC] or an adjoining country." Dodd-Frank Act, § 1502(b), *codified at* § 78m(p)(1). Additionally, if the company is required to submit a Conflict Minerals Report, it must specifically describe those products "that are not DRC conflict free," a term defined by statute. *Id.*, *codified at* § 78m(p)(1)(A)(ii). However, those companies that, despite due diligence, cannot determine the origin of their conflict minerals or whether those minerals finance or benefit armed groups in the DRC or an adjoining country must say only that their products have "not been found to be DRC conflict free" or, during the first two years of reporting, that the products are "DRC conflict undeterminable." Conflict Minerals Rule, JA 767-68. Petitioners' First Amendment challenge to these aspects of the reporting requirement lacks merit.

Section 1502 and the rule direct companies to report factual information. To comply, companies need not make a political statement or express support for Congress's judgment about the conflict and

humanitarian crisis in the DRC. Nor does Section 1502 or the rule limit what companies can otherwise say about the DRC and the reporting requirement. Companies can explain to investors and the public that the disclosures are required by law and that the term "DRC conflict free" is defined by statute. They are also free to criticize Section 1502 and its efficacy or to take issue with the view that the trade in conflict minerals is actually harmful.

What companies cannot do is cloak themselves in the First Amendment to avoid reporting factual information as part of a securities disclosure regime regarding whether their products contain conflict minerals from the DRC. "There are literally thousands of similar regulations on the books—such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the taxpayer." *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005). The proposition that the disclosure challenged here, like "these thousands of routine

regulations[,] require[s] an extensive First Amendment analysis is mistaken." *Id.*

A. The Disclosure Requirement Is a Securities Regulation Subject to Limited Scrutiny.

By adopting Section 1502, Congress made the disclosure challenged by Petitioners an integral part of the securities reporting scheme mandated under the Exchange Act. It intended to provide investors with information that they could use to make more informed investment decisions. 156 Cong. Rec. S3976 (May 19, 2010) (statement of Sen. Feingold). And as numerous commenters described, *see supra* pp.7-8, the reports required by Section 1502 will help investors understand the risks to issuers and their supply chains. Accordingly, any First Amendment concerns raised by Section 1502 must be evaluated in the same manner as those posed by other securities disclosure requirements.

As this Court has recognized, "regulation of the exchange of information regarding securities is subject only to limited First Amendment scrutiny" and "is a form of regulation distinct from the more general category of commercial speech." *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988). Likewise, the Supreme

Court has repeatedly stated that regulation of information about securities does not offend the First Amendment. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973). More recently, in *Full Value Advisors, LLC v. SEC*, this Court reiterated that securities regulation "involves 'a different balance of concerns' and 'calls for different applications of First Amendment principles.'" 633 F.3d 1101, 1109 (D.C. Cir. 2011) (quoting *Nike, Inc. v. Kasky*, 539 U.S. 654, 678 (2003) (Breyer, J., dissenting from the dismissal of certiorari as improvidently granted)).

One underlying rationale for unique, less stringent First Amendment treatment of securities regulation rests on the "federal government's broad powers to regulate the securities industry." *Wall St. Publ'g*, 851 F.2d at 372. In *Wall Street Publishing*, this Court relied on that rationale to hold that a magazine could be constitutionally required, with some limitation, to disclose to the public *quid pro quo* agreements that it had with securities issuers about which the magazine printed articles. *Id.* at 374. Likewise, in *Full Value*, this Court applied rational-basis review to uphold a securities provision that

required an institutional investment manager to submit to the SEC "among other things, the names, shares, and fair market value of the securities over which the institutional manager[] exercise[d] control." 633 F.3d at 1104, 1109.

Under the deferential standard set forth in *Wall Street Publishing* and *Full Value*, the mandatory disclosure requirement challenged by Petitioners easily passes muster. Congress's conclusion that the disclosure requirement was an appropriate way to promote corporate transparency and inform investors, in service of reducing conflict and humanitarian crisis in the DRC, was undoubtedly reasonable.

Petitioners contend that *Wall Street Publishing* is inapposite because the disclosure here does not relate to the purchase and sale of securities. Pet. Br. 52 n.6. But the relationship between the required disclosure and the purchase and sale of securities in this case is in fact far more direct than in *Wall Street Publishing*, in which the government regulated magazine articles as opposed to direct disclosures from issuers. 851 F.2d at 367, 372. Here, the required disclosure is specific to a company's products and its sourcing operations and is revealed in a mandatory securities disclosure. It will provide investors and the public

with additional information about the company, including risks to the company's supply chain. It is, in short, a communication about securities.

B. The Disclosure Requirement Also Withstands Scrutiny Under the Commercial Speech Doctrine and *Zauderer*.

Even if a more extensive First Amendment analysis is required, the disclosure requirement challenged by Petitioners should be analyzed under the commercial speech doctrine. "[B]urdens imposed on [commercial speech] receive a lower level of scrutiny from the courts" than do burdens on political speech, *United States v. Philip Morris*, 566 F.3d 1095, 1142-43 (D.C. Cir. 2009), which are subject to strict scrutiny. Petitioners state without support that the disclosure is "not commercial in nature," Pet. Br. 52, and that strict scrutiny therefore applies. But Petitioners "misunderstand the commercial speech doctrine." *Philip Morris*, 566 F.3d at 1143. "[T]he level of scrutiny depends on the nature of the speech that the [disclosure] burden[s]," not the disclosure itself. *Id.* (citing *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988)). Here, the disclosure requirement, to the extent that it imposes any kind of burden, affects what companies say about their sourcing practices and

operations and their products in securities disclosures. This speech is commercial in nature.

Because Section 1502 constitutes a disclosure requirement, not a speech prohibition, application of commercial-speech analysis to the requirement would be governed by *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and its progeny. *Zauderer* holds that disclosure and other mandatory informational requirements applicable to commercial speech are permissible if "reasonably related" to a permissible state interest. *Id.* at 651. Here, the disclosure requirement is reasonably related to the government's interest in reducing the conflict and humanitarian crisis in the DRC by more fully informing investors and consumers about the extent to which companies' products are DRC conflict free.

Petitioners argue that *Zauderer* does not apply because the disclosures are not needed to prevent misleading speech. Although a panel of this Court recently circumscribed *Zauderer*'s rational-basis standard to a state interest in the prevention of deceptive or misleading speech, *see R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213-14 (D.C. Cir. 2012), Amnesty International respectfully disagrees with that

decision, for which the government's time to petition the Supreme Court for certiorari has not yet expired. *Zauderer* concluded that a state interest in protecting consumers from deception is sufficient to uphold a disclosure requirement; it did not conclude that such an interest is the only one permissible. Rather, *Zauderer*'s rational-basis standard applies broadly to disclosure requirements that are intended to inform consumers, in this case including investors. *See, e.g.*, *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (applying *Zauderer* to disclosures intended "to better inform consumers about the [light bulbs] they purchase" with the ultimate goal of "reduc[ing] the amount of mercury released into the environment" through those products).

Petitioners separately err by contending that *Zauderer* does not apply because the disclosures are "unduly burdensome" in economic terms. Petitioners confuse the burden associated with investigating and auditing sourcing practices with the burden of making a statement about whether their products have been found to be DRC conflict free. The former involves regulation of non-expressive conduct unchallenged by Petitioners on First Amendment grounds; the latter is not burdensome, and certainly not unduly so. The challenged disclosure

does not limit companies' "ability to convey their message," *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 643 (6th Cir. 2010), for example, by monopolizing limited reporting space, *see, e.g.*, *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146-47 (1994).

C. The Disclosure Requirement Is Constitutional Even Under Intermediate or Strict Scrutiny.

If this Court determines that rational-basis review does not apply, the disclosure requirement is in any event permissible under either an intermediate or strict scrutiny standard.

To regulate commercial speech under the *Central Hudson* intermediate scrutiny standard, *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-64 (1980), the government must have a "substantial" interest in the regulation, the regulation must "advance[] [that] interest[] in a direct and material way," and "the extent of the restriction on protected speech [must be] in reasonable proportion to the interest[] served." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *Nat'l Cable & Telecomms. Ass'n v. FCC*, 555 F.3d 996, 1000 (D.C. Cir. 2009). On the other hand, if a regulation instead applies to fully protected political speech, the government must have a "compelling" interest, the regulation must "effectively advance" that

interest, and the regulation must be "narrowly tailored." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 11 (D.C. Cir. 2009) (internal quotation marks and alteration omitted).

As Petitioners concede, the government's interest in peace and stability in the DRC is compelling, Pet. Br. 53, and thus satisfies any level of First Amendment scrutiny. The government's related interest in providing investors with information that is critical to their investment choices is likewise compelling. *Cf. Taylor*, 582 F.3d at 14-16 (recognizing as compelling the public's interest in lobbying information that helps the public "understand the constituencies behind legislative or regulatory proposals").

In addition, the disclosure requirement directly and materially advances the government's interest. As Congress determined in passing Section 1502, the disclosure will provide important information to investors and help reduce the conflict and humanitarian crisis in the DRC. Petitioners contend otherwise, emphasizing that the SEC "admitted that it did not determine whether the rule will benefit the DRC." Pet. Br. 54. But the First Amendment does not require the SEC

to make that determination, especially where Congress has already done so.

Moreover, although "Congress must base its conclusions upon substantial evidence" with respect to "First Amendment questions," *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997), that evidence need not be empirical. Rather, "'substantiality is to be measured' by a 'deferential' standard" that applies to Congress's findings with respect "'to the remedial measures adopted'" in service of the state's interest. *Taylor*, 582 F.3d at 15 (quoting *Turner*, 520 U.S. at 195-96). In some cases, "unprovable assumptions" may be sufficient to support the constitutionality of a law. *Id.* at 16 (internal quotation marks omitted).

This case is not one in which the statute and implementing rule rest on "'economic' analysis that [is] susceptible to empirical evidence." *Id.* Congress determined that increased corporate transparency would help inform investors about the extent to which products rely on DRC conflict minerals and in turn help reduce the conflict and humanitarian crisis there. Its conclusion that increased information was necessary for investors and to help stanch the flow of funding to armed groups fueling the conflict and humanitarian crisis is a commonsense judgment

entitled to deference by this Court. *See id.*; *Nat'l Cable & Telecomms. Ass'n*, 555 F.3d at 1002.

To attack the fit of the statute, Petitioners contend only that "the government could pursue political or diplomatic means" to promote peace and stability in the DRC. Pet. Br. 54. But slowing the economic engines financing conflict in the DRC is no less likely to be successful than other means. Moreover, Petitioners' remarkable suggestion that Congress should have opted to "tak[e] the fight directly to the warlords" instead of requiring issuers to make factual disclosures about their products, *id.* (internal quotation marks omitted), reveals a fundamental misunderstanding of conflict in the DRC, as well as a lack of seriousness. Indeed, avoiding armed conflict through the use of other means to achieve foreign policy objectives is itself a compelling interest.

Petitioners also ignore other congressional and international efforts to address conflict in the DRC by political or diplomatic means. *See* SEC Br. 8 (discussing Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act of 2006, Pub. L. No. 109-456, 120 Stat. 3384); H.R. 4128, 111th Cong. §2(8) (proposed finding regarding a 2008 U.N. Security Council Resolution that broadened

sanctions relating to the DRC). Indeed, in Section 1502—in addition to requiring disclosures to the SEC—Congress required the State Department to develop a "plan to promote peace and security" in the DRC by supporting efforts of the DRC government, its neighbors, and the international community. Dodd-Frank Act, § 1502(c)(1)(B)(i). In short, Congress was aware of and made use of political and diplomatic means to deal with conflict and the humanitarian crisis in the DRC but nevertheless concluded that the disclosure requirement challenged by Petitioners was necessary, in part because of the failure of other means to resolve the problem.

CONCLUSION

For the foregoing reasons, this Court should deny the petition to review the rule.

March 28, 2013

Respectfully submitted,

/s/ Julie A. Murray

Julie A. Murray
Adina H. Rosenbaum
Scott L. Nelson
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

Attorneys for Amnesty International of the USA, Inc. and Amnesty International Ltd.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as follows: The type face is fourteen-point Century Schoolbook font, and the word count is 8,682.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on March 28, 2013, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Julie A. Murray
Julie A. Murray

ADDENDUM PURSUANT TO CIRCUIT RULE 28(a)(7)

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, v. AMNESTY INTERNATIONAL OF THE USA, INC. and AMNESTY INTERNATIONAL LIMITED, Proposed Respondents-Intervenors.	Case No. 12-1422

DECLARATION OF SUZANNE NOSSEL

I, Suzanne Nossel, declare as follows:

1. I am the Executive Director of Amnesty International of the USA, Inc. (AIUSA), a national section of Amnesty International. I make this declaration based on personal knowledge and, on information and belief, information provided to me by my staff.

2. Amnesty International is an organization based on worldwide voluntary membership and consists of national branches, international networks, affiliated groups, and international members. Amnesty International's mission is to conduct research and take action to prevent and end grave abuses of all human rights.

3. As the Executive Director of AIUSA, I am responsible for working with AIUSA's Board of Directors to determine overarching goals as part of a regularly evolving strategic plan; leading the overall fundraising strategy and working closely with the Board of Directors and the

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development staff to identify, solicit, and acquire new sources of funding and to build long-term, sustainable sources of income for the organization; serving as AIUSA's liaison and primary spokesperson to the public, non-governmental funders, the media, and other constituents and allies; building and nurturing coalitions and collaborative initiatives with other social justice and human rights organizations; overseeing the recruitment and retention of a robust and active membership for the organization; exercising overall responsibility and accountability for the annual budget; ensuring proper fiscal accounting and controls, as well as legal and fiduciary compliance; ensuring that AIUSA has the financial and human resources necessary to implement its strategic plan and operational goals; and liaising with the international movement.

4. AIUSA supported the adoption of Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010), as a key first step toward disrupting the supply chains that connect minerals used in consumer products, such as cell phones, to the violence, insecurity, and abuses that have claimed millions of lives in the eastern part of the Democratic Republic of Congo (DRC). The legislation will greatly advance the goals of regulating and stemming the flow of conflict minerals and limiting the ability of armed groups to benefit from conflict minerals to perpetuate the conflict in the DRC.

5. AIUSA, alongside Amnesty International's International Secretariat and other nongovernmental organizations, played a role in the Conflict Minerals Rule adopted by the U.S. Securities and Exchange Commission (SEC), which Petitioners challenge in this case. Amnesty International and other groups submitted comments to the SEC on March 1, 2011, which were signed by AIUSA staff.[1] AIUSA also participated in a meeting with SEC Commissioner Paredes

[1] *See* Letter from Amnesty International, A Thousand Sisters, Enough Project, Global Witness, Human Rights Watch, Jewish World Watch, Open Society Policy Center, Religious Action of

regarding the proposed rule.[2] In addition, AIUSA sent an action alert urging its members to write to the SEC in support of the rapid adoption of a strong rule.

AIUSA's Investment Activities and Interests

6. AIUSA believes that well-run companies can play an important role in building more open and transparent societies. It also believes that companies that uphold human rights principles in their business operations may be good investments. For these reasons, AIUSA is committed to an investment philosophy that respects and enhances the organization's efforts on behalf of human rights.

7. AIUSA maintains reserve accounts, including investment portfolios with Trillium Asset Management, LLC, and Zevin Asset Management, LLC, which are investment advisors that specialize in socially responsible investing. AIUSA's goal is to work in partnership with these money managers to design practical and profitable investment strategies that also demonstrate AIUSA's commitment to human rights.

8. AIUSA's portfolios with Trillium Asset Management and Zevin Asset Management include holdings in common stock.

9. AIUSA has an Investment Policy Statement that is sanctioned and monitored by AIUSA's Investment Committee and approved by AIUSA's Board. The Policy Statement sets criteria for the management of AIUSA's financial assets. AIUSA provides this Policy Statement to AIUSA's investment managers, who use the Policy Statement to guide their investments with respect to AIUSA's portfolios. In addition to applying other criteria, AIUSA's Policy Statement

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Reform Judaism, and World Vision to the SEC (Mar. 1, 2011), *available at* http://www.sec.gov/comments/ s7-40-10/s74010-104.pdf.

[2] *See* Memorandum, Scott H. Kimpel, Office of Commissioner Troy A. Paredes (July 5, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-274.pdf.

seeks to screen out investments in companies with operations that may be perpetrating or complicit in grave human rights abuses.

10. Both Trillium Asset Management and Zevin Asset Management also apply their own screens with regard to the environmental, social, and governance performance of companies in which they consider investing on AIUSA's behalf.

11. In addition to the accounts described above, AIUSA owns approximately $67,000 in securities that it relies on to engage in shareholder advocacy efforts. This portfolio, which is not governed by AIUSA's Policy Statement, currently includes, but is not limited to, stock in Chevron Corporation, Coca-Cola Company, ConocoPhillips, Dow Chemical Company, ExxonMobil Corporation, Facebook Inc., Freeport McMoran Copper & Gold, Hess Corporation, Newmont Mining Corporation, Occidental Petroleum Corporation, Wal-Mart Stores Inc., and Yahoo Inc. AIUSA maintains at least $2,000 in company-specific holdings in nearly all of these stocks, so it has the option of filing shareholder resolutions with the companies. AIUSA conducts an annual assessment of these investments to determine whether to sell existing shares or to buy stocks from companies new to AIUSA's portfolio.

12. AIUSA is an active shareholder. For example, it used its status as a shareholder in Chevron and ExxonMobil to file resolutions asking each company to adopt a human rights policy. After subsequent dialogue between the companies, AIUSA, and other shareholders, both ExxonMobil and Chevron adopted their first human rights policies. AIUSA also filed resolutions with Chevron regarding the company's obligation to clean up its serious environmental pollution in the Ecuadorian Amazon. In addition, AIUSA used its right as a shareholder to attend the annual shareholder meetings of Google, Microsoft, and Yahoo to ask

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questions of those companies' CEOs regarding Internet freedom in China. AIUSA also routinely votes its shares in favor of shareholder resolutions that support human rights.

13. As an investor, AIUSA will use the information provided by disclosures required under the Conflict Minerals Rule to make more informed and socially responsible investment decisions and to engage more effectively in shareholder advocacy.

14. AIUSA intends to review and rely on the disclosures to determine whether and to what extent any of the companies in which it invests manufacture or contract to manufacture products that necessarily rely on conflict minerals from the DRC or an adjoining country and whether the trade in those minerals helps finance armed groups. AIUSA will also rely on the disclosures to assess the extent to which companies have conducted appropriate due diligence inquiries with respect to conflict minerals. By relying on the disclosures, AIUSA will be able to evaluate more clearly any risks to a company's reputation and supply chain operations based on the company's reliance on conflict minerals.

15. Information from the disclosures will help AIUSA and its investment managers, Trillium Asset Management and Zevin Asset Management, apply AIUSA's existing Investment Policy to screen out investments of AIUSA's reserve accounts in companies with operations that may be perpetrating or complicit in grave human rights abuses. In addition, AIUSA intends to devise and incorporate more specific criteria into its Investment Policy Statement that correspond to key information contained in disclosures under the Conflict Minerals Rule. As a result of the disclosures, AIUSA and its investment managers will thus be better able to apply AIUSA's socially responsible priorities to investments.

16. AIUSA also intends to use the disclosures to inform its activities with respect to shareholder advocacy and corporate governance. The disclosures will provide AIUSA, as an

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investor, with necessary and relevant information with which to engage issuers in dialogue, vote on shareholder resolutions, and, if need be, file a shareholder resolution on the subject of conflict minerals.

17. Without the Conflict Minerals Rule, AIUSA will not have access to the disclosures now required by law, which will harm AIUSA's interest in investing in a financially sound and socially responsible way. The unavailability of these disclosures will also reduce AIUSA's ability to participate fully as a shareholder.

AIUSA's Fundraising Activities

18. AIUSA has a policy of screening corporate donations to exclude gifts from companies that are complicit in human rights abuses or that pose other risks to the reputation of AIUSA. In the past, AIUSA has sought to determine whether potential corporate donors relied on conflict minerals originating in the DRC for their products. AIUSA intends to use information in the disclosures required by the Conflict Minerals Rule to guide its decisions over whether to accept cash or in-kind donations from companies that manufacture products that contain conflict minerals originating in the DRC and that may finance armed groups there. This information will be more reliable and robust than existing information from other sources.

19. Without the Conflict Minerals Rule, AIUSA will not have access to the useful information provided in the mandatory disclosures to make its decisions regarding whether to accept donations from certain companies. It will, therefore, be less able to make informed choices regarding potential reputational risk to AIUSA from acceptance of such corporate donations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, to the best of my knowledge, information, and belief. Executed on

this 19th day of November, 2012, in London, England.

Suzanne Nossel

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, v. AMNESTY INTERNATIONAL OF THE USA, INC. and AMNESTY INTERNATIONAL LIMITED, Proposed Respondents-Intervenors.	Case No. 12-1422

DECLARATION OF MICHAEL BOCHENEK

I, Michael Bochenek, declare as follows:

1. I am the Director of Law and Policy for Amnesty International's International Secretariat and an attorney admitted to practice law in New York and the District of Columbia.

2. Amnesty International's mission is to conduct research and take action to prevent and end grave abuses of all human rights. The International Secretariat is the coordinating body for Amnesty International's worldwide membership and its national sections. It conducts in-depth research on human rights violations and the causes and consequences of those violations; it also makes recommendations to address those violations. International Secretariat staff work closely with staff at Amnesty International USA and other national sections to prepare and carry out campaigns, human rights education, and advocacy activities to address the human rights violations identified through the International Secretariat's research.

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3. The staff who conduct the research, campaigning, advocacy, and human rights education activities of the International Secretariat are employees of Amnesty International Limited, a not-for-profit company registered in England and Wales. The International Secretariat has an office in New York, registered in that state as a branch office of Amnesty International Limited.

4. As Director of Law and Policy, I am responsible for overseeing and ensuring global consistency in the legal analysis and policy recommendations that underpin Amnesty International's research, campaigning, advocacy, and other human rights activities, including Amnesty International's country-based work on the Democratic Republic of Congo (DRC) and adjacent countries and its thematic work on corporate accountability. In addition, as a member of the International Secretariat's management team, I share responsibility for the overall management of the International Secretariat and am familiar with its legal structure, its budget and expenditures, and other aspects of its operations.

5. Among the priority areas of work that the International Secretariat has identified are abuses in areas of armed conflict and crisis, including in the DRC and adjacent countries, and corporate accountability, with a particular focus on the extractive sector.

Participation in the Rulemaking Proceeding

6. Amnesty International worked with other human rights groups to participate in the rulemaking for the Conflict Minerals Rule, *Conflict Minerals*, 77 Fed. Reg. 56,274 (Sept. 12, 2012), which is at issue in this case. Our participation in the rulemaking process involved contributions from the International Secretariat as well as Amnesty International USA. The International Secretariat and Amnesty International USA reviewed written comments submitted to the Securities and Exchange Commission (SEC) on March 1, 2011, by Amnesty International

and other human rights groups.[1] Through its Head of Business and Human Rights, the International Secretariat of Amnesty International submitted a joint letter with other human rights groups to the SEC on July 29, 2011, urging the adoption of the Conflict Minerals Rule no later than the following month.[2] Amnesty International USA also participated in a meeting with an SEC Commissioner regarding the proposed rule. A memorandum memorializing that meeting is part of the SEC's rulemaking docket.[3]

7. In its written comments, Amnesty International supported Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010), as a crucial step towards bringing about the greater transparency and accountability in minerals supply chains that is urgently needed to combat the trade in conflict minerals. We emphasized that any delay in the implementation of Section 1502 risked exacerbating the humanitarian crisis in eastern DRC and would reduce incentives for companies to carry out immediate due diligence efforts. We also urged that the final rule incorporate specific due diligence standards.

The International Secretariat's Purchasing Decisions

8. The International Secretariat intends to rely on the disclosures required by the Conflict Minerals Rule in its choices about the goods that it purchases. Our procurement policies require ethical and due diligence checks to ensure that our suppliers comply with human rights, labor, and environmental standards and that they take reasonable steps to ensure that those with

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[1] *See* Letter from Amnesty International, A Thousand Sisters, Enough Project, Global Witness, Human Rights Watch, Jewish World Watch, Open Society Policy Center, Religious Action of Reform Judaism, and World Vision to the SEC (Mar. 1, 2011), http://www.sec.gov/comments/s7-40-10/s74010-104.pdf.

[2] *See* Letter from ICAR to SEC (July 29, 2011), http://www.sec.gov/comments/s7-40-10/s74010-281.pdf.

[3] *See* Memorandum, Scott H. Kimpel, Office of Commissioner Troy A. Paredes (July 5, 2011), *available at* http://www.sec.gov/comments/s7-40-10/s74010-274.pdf.

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whom they have a business relationship do likewise. Compliance with human rights standards includes requirements that our suppliers take reasonable steps to ensure that they do not profit directly or indirectly from child labor or that of other vulnerable groups, or from bonded labor, indentured labor, or any other form of servitude; that they take reasonable steps to ensure that any goods that they produce, trade, or deal in are not and have not been implicated in human rights abuses by military, security, or police forces or other state agents or by non-state actors; and that they do not cause or contribute to the commission of serious human rights abuses, whether by state agents or non-state actors.

9. The International Secretariat will rely on the information in specialized disclosure forms and the Conflict Minerals Reports required by the Conflict Minerals Rule to determine whether issuers and products rely on conflict minerals from the DRC and adjoining countries and the extent to which such reliance may fund armed groups in the DRC responsible for human rights abuses. It will use that information when choosing between products that it intends to purchase or lease, including computers, landline and mobile telephones, cameras and video equipment, and other electronic devices.

10. If the SEC cannot enforce the Rule or the statute authorizing it, the International Secretariat will be unable except in the most exceptional of circumstances to determine which companies and products rely on conflict minerals from the DRC and adjoining countries and the extent to which such reliance may fund armed groups in the DRC responsible for human rights abuses. As a result, the International Secretariat's ability to make informed purchasing decisions, consistent with its socially responsible interests, will be impaired.

The International Secretariat's Organizational Mission and Activities

11. The Conflict Minerals Rule is an important step toward preventing the kinds of widespread and serious human rights abuses that are the direct consequences of the conflict in the DRC. The rule is an important human rights safeguard, and its successful implementation is crucial to two areas of work, armed conflict and corporate accountability in the extractive sector, that are central to Amnesty International's mission.

12. In recent years, the International Secretariat has invested a substantial amount of staff time and money in activities to expose human rights abuses connected with the conflict and resulting humanitarian crisis in eastern DRC, the consequence of years of fighting by Congolese and foreign armed groups and armies fighting for control of the region's mineral wealth, land, and other resources. For example, in June 2012, we published a report documenting arms proliferation in the DRC and the scale of crimes under international law committed by Congolese security forces and armed groups.[4] In August 2011, we documented the urgent need for reform of the DRC national justice system to address crimes under international law—crimes against humanity, war crimes, torture, sexual violence, the recruitment and use of children in armed conflict, enforced disappearance, and unlawful killing—committed in the east and northeast of the country.[5] In December 2010, we reported on the rape of more than 300 women, girls, men,

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[4] *See* Amnesty International, *"If You Resist, We'll Shoot You": The Democratic Republic of the Congo and the Case for an Effective Arms Trade Treaty* (2012), *available at* http://www.amnesty.org/en/library/asset/AFR62/007/2012/en/cdd8cdd9-913f-4dc5-8418-71d2eedbdde0/afr620072012en.pdf.

[5] *See* Amnesty International, *The Time for Justice Is Now: New Strategy Needed in the Democratic Republic of the Congo* (2011), *available at* http://www.amnesty.org/en/library/asset/AFR62/006/2011/en/6cd862df-be60-418e-b70d-7d2d53a0a2d4/afr62006201 1en.pdf.

and boys by armed groups in Walikale Territory, North Kivu, in eastern DRC.[6]

13. The International Secretariat's reporting on DRC has reflected the role that trade in conflict minerals has in financing the activities of armed groups and the role of such trade more generally in fuelling armed conflict in the eastern part of the country. For example, the *Amnesty International Report* for 2012, our annual review of the state of human rights in the world, stated that "[d]isputes between the army and armed groups about control over mining areas . . . worsened the security situation and prompted more abuses."[7] Our 2010 report on mass rapes in North Kivu observed that the armed group operating in both North and South Kivu, the Democratic Forces for the Liberation of Rwanda (*Forces Démocratiques pour la Liberation du Rwanda*, FDLR), "relies on the exploitation of mineral resources to finance its activities," as do most other parties to the conflict in the region.[8]

14. Our work on DRC has also addressed cross-border regional concerns. For example, in December 2011, we sent a legal memorandum to the DRC government to address the possible cessation of refugee status for Rwandans who had sought protection in the DRC.[9] Earlier reports have addressed the role of Rwandan military aid and Ugandan military

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[6] *See* Amnesty International, *Mass Rapes in Walikale: Still a Need for Protection and Justice in Eastern Congo* (2010), *available at* http://www.amnesty.org/en/library/asset/AFR62/011/2010/en/6394b6fc-226b-49db-b009-36d04b178a1b/afr620112010en.pdf.

[7] Amnesty International, *Amnesty International Report 2012: The State of the World's Human Rights* 127 (2012).

[8] Amnesty International, *Mass Rapes in Walikale*, at 6; *see also id.* at 10 (reviewing the possible economic interests of government forces in maintaining control over mining sites instead of redeploying to protect the civilian population from attack).

[9] *See* Amnesty International, Memorandum to the Government of the Democratic Republic of Congo about the Cessation of Refugee Protection for Rwandans (Dec. 2011), *available at* http://www.amnesty.org/en/library/asset/AFR62/013/2011/en/2a42853b-9123-4d2f-8d56-6c0bc5148bc4/afr620132011en.pdf.

involvement and other support to armed groups operating in the eastern DRC.[10]

15. Amnesty International has also regularly reported on human rights abuses committed by armed actors operating in adjacent countries, notably the Central African Republic, South Sudan, Uganda, Rwanda, Burundi, and Angola. To cite some recent examples, a 2011 Amnesty International report on the Central African Republic called for systematic measures to address the root causes of the conflict in that country and to put an end to and secure accountability for the numerous grave human rights abuses, including possible war crimes and crimes against humanity, committed by various armed actors.[11] Four Amnesty International reports on South Sudan published between December 2011 and October 2012 documented human rights abuses committed by security forces and other armed groups in the context of escalating violence and localized conflict in that country, as well as conflict between Sudan and South Sudan in the disputed region around Abyei.[12] We documented the widespread abuses

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[10] *See, e.g.*, Amnesty International, *Democratic Republic of Congo: Arming the East* (2005), *available at* http://www.amnesty.org/en/library/asset/AFR62/006/2005/en/08df105c-d4d2-11dd-8a23-d58a49c0d652/afr620062005en.pdf; Amnesty International, *North Kivu: Civilians Pay the Price for Political and Military Rivalry* (2005), *available at* http://www.amnesty.org/en/library/asset/AFR62/013/2005/en/2e6b0c54-d4b1-11dd-8a23-d58a49c0d652/afr620132005en.pdf.

[11] *See* Amnesty International, *Central African Republic: Action Needed to End Decades of Abuse* (2011), *available at* http://www.amnesty.org/en/library/asset/AFR19/001/2011/en/3a61a8a4-cf37-4d59-a09e-39b77c70957f/afr190012011en.pdf.

[12] *See* Amnesty International, *South Sudan: Lethal Disarmament: Abuses Related to Civilian Disarmament in Pibor County, Jonglei State* (2012), *available at* http://www.amnesty.org/en/library/asset/AFR65/005/2012/en/a60e1cf6-168b-4fa2-a7abbd8167e964e7/afr650052012en.pdf; Amnesty International, *South Sudan: Overshadowed Conflict: Arms Supplies Fuel Violations in Mayom County, Unity State* (2012), *available at* http://www.amnesty.org/en/library/asset/AFR65/002/2012/en/67d8e84c-e990-42de-9a991486aab18b1d/afr650022012en.pdf; Amnesty International, *"We Can Run Away from Bombs, But Not from Hunger": Sudan's Refugees in Southern Sudan* (2012), *available at* http://www.amnesty.org/en/library/asset/AFR65/001/2012/en/107d41a7-50c9-4eb9-9fe7-59afb3ec63ff/afr650012012en.pdf; Amnesty International, *Sudan-South Sudan: Destruction and Desolation in Abyei* (2011), *available at* http://www.amnesty.org/en/library/asset/AFR54/041/2011/en/d701f194-b1c6-4f7c-9920-fc2dd30ce0ca/afr540412011en.pdf .

committed in the conflict in northern Uganda during the two decades after fighting began in 1986, and we have called on the government of Uganda to ensure effective reparations for victims and survivors of those abuses.[13]

16. The International Secretariat has also devoted considerable resources to its work on extractive industries. In recent years, for example, we have researched and published detailed findings on and recommendations to address human rights abuses in the context of bauxite mining and alumina refining in India,[14] gold mining in Papua New Guinea,[15] oil extraction in the Niger Delta,[16] and oil and gas drilling in Canada.[17]

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[13] *See, e.g.*, Amnesty International, *Left to Their Own Devices: The Continued Suffering of Victims of Conflict in Northern Uganda and the Need for Reparations* (2008), *available at* http://www.amnesty.org/en/library/asset/AFR59/009/2008/en/55689934-af47-11dd-a845-0749a6f015c0/afr590092008en.pdf.

[14] *See* Amnesty International, *Don't Mine Us Out of Existence: Bauxite Mine and Refinery Devastate Lives in India* (2010), *available at* http://www.amnesty.org/en/library/asset/ASA20/001/2010/en/0a81a1bc-f50c-4426-9505-7fde6b3382ed/asa200012010en.pdf; *see also* Amnesty International UK, *Vedanta's Perspective Uncovered: Policies Cannot Mask Practices in Orissa* (2012), *available at* http://www.amnesty.org/en/library/asset/ASA20/029/2012/en/2140b017-434e-4383-b07a-fc655693c72a/asa200292012en.pdf (report published by Amnesty International UK with International Secretariat review); Amnesty International UK, *Generalisations, Omissions, Assumptions: The Failings of Vedanta's Environmental Impact Assessments for Its Bauxite Mine and Alumina Refinery in India's State of Orissa* (2011), *available at* http://www.amnesty.org/en/library/asset/ASA20/036/2011/en/07a6e7a0-5022-4c00-abad-911837242487/asa200362011en.pdf (report published by Amnesty International UK with International Secretariat review).

[15] Amnesty International, *Undermining Rights: Forced Evictions and Police Brutality around the Porgera Gold Mine, Papua New Guinea* (2010), *available at* http://www.amnesty.org/en/library/asset/ASA34/001/2010/en/2a498f9d-39f7-47df-b5eb-5eaf586fc472/asa340012010eng.pdf.

[16] Amnesty International and the Center for Environment, Human Rights, and Development, *Nigeria: Another Bodo Oil Spill, Another Flawed Oil Spill Investigation in the Niger Delta* (2012), *available at* http://www.amnesty.org/en/library/asset/AFR44/037/2012/en/eb98d9e1-116a-4f18-ac09-ea1c73d8aba1/afr440372012en.pdf; Amnesty International and 12 Nigerian NGOs, Joint Memorandum on Petroleum Industry Bill, March 2012, *available at* http://www.amnesty.org/en/library/asset/AFR44/031/2012/en/57cf4140-1419-4f97-a237-3c8c21961ad7/afr440312012en.pdf; Amnesty International and the Center for Environment, Human Rights, and Development, *The True "Tragedy": Delays and Failures in Tackling Oil Spills in the Niger Delta* (2011), *available at* http://www.amnesty.org/en/library/asset/AFR44/

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17. To follow up on each of these reports, the International Secretariat has worked with Amnesty International USA and other national Amnesty sections to conduct public education and awareness campaigns, media work, and advocacy with government and United Nations officials as well as with corporate actors.

18. The International Secretariat has conducted similar activities in other areas of its corporate accountability work. For example, we issued media statements and worked with our Canadian national sections to conduct public education and awareness-raising campaigns in support of Congolese claimants who attempted to bring legal action against a Canadian extractive company operating in the DRC that was alleged to have provided logistical support to the DRC security forces during a massacre in Kilwa.[18] The International Secretariat also worked to strengthen the Kimberley Process Certification Scheme, a process developed with the aim of eliminating the trade in rough diamonds used to fund armed conflict.[19]

19. The International Secretariat's work on corporate accountability has also included demands for disclosure of information. Calls for disclosure of information and for robust due diligence processes are among our standing calls when we engage with United Nations and

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018/2011/en/ee69139f-5e19-4760-af62-b3cf0b0a8595/afr440182011en.pdf; Amnesty International, *Nigeria: Petroleum, Pollution and Poverty in the Niger Delta* (2009), *available at* http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/afr440172009en.pdf.

[17] Amnesty International, *From Homeland to Oil Sands: the Impact of Oil and Gas Development on the Lubicon Cree of Canada* (2010), *available at* http://www.amnesty.org/en/library/asset/AMR20/002/2010/en/9c1af4f4-6b1b-4327-a17b-77065b3cca2a/amr200022010en.pdf.

[18] *See, e.g.*, Public Statement, Amnesty International, *Court Decision in Kilwa Massacre Denies Right to Remedy for Victims of Corporate Human Rights Abuses* (Feb. 1, 2012), *available at* http://www.amnesty.org/en/library/info/AMR20/002/2012/en.

[19] *See, e.g.*, Global Witness and Amnesty International, *Déjà Vu: Diamond Industry Still Failing to Deliver on Promises* (2004), *available at* http://www.amnesty.org/en/library/asset/POL34/008/2004/en/2a036928-d571-11dd-bb24-1fb85fe8fa05/pol340082004en.pdf.

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regional bodies.[20] In addition, we have called repeatedly on oil companies operating in the Niger Delta to disclose complete and accurate information on the extent and causes of oil spills in the region, as well as on efforts made toward cleanup and remediation. We have made these calls in individual meetings with oil company representatives, in the regular civil society dialogues some of these companies hold, and in formal complaints.

20. The International Secretariat intends to use the information contained in the disclosures required by the Conflict Minerals Rule to engage in new activities relating to public education and advocacy efforts that bring greater attention to the connection between conflict minerals and human rights abuses in the DRC. These activities—and the resources that the International Secretariat plans to expend to conduct them—will further Amnesty International's core mission and its focus on human rights abuses in the DRC and corporate accountability.

21. If the Conflict Minerals Rule is invalidated, the International Secretariat will not be able to engage in the public education and advocacy activities that it plans to undertake using information gleaned from the disclosures required by the Conflict Minerals Rule. It will instead redirect staff time and other financial resources that would be used for those public education and advocacy activities to determine how and to what extent it can investigate and report on cases in which the exploitation and trade of conflict minerals from the DRC helps to finance conflict in eastern DRC. The staff and other financial resources required for this undertaking would be substantial. Conducting research on extractive operations and on related human rights

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[20] *See, e.g.*, Amnesty International, *Amnesty International's Proposals for a Human Rights Chapter for the Revised OECD Guidelines for Multinational Enterprises* (MNE) (2010), *available at* http://www.amnesty.org/en/library/asset/IOR30/004/2010/en/0aceb6b7-4c2a-4dbe-b94f-fffb1d7e0710/ior300042010en.pdf (calling for enterprises to "disclose and report on the risks posed to human rights by their own activities or those of other parties with which they are associated" and to "disclose the outcomes of human rights impact assessments as well as the proposed measures to prevent, minimise and address adverse human rights impacts").

violations is always a difficult undertaking because of the specialized knowledge required for such work and because of the practical hurdles of working in areas that are often remote and to which access may be strictly controlled. These difficulties would be compounded by the hazards of working in a conflict setting.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on this 17th day of November, 2012, in Toronto, Ontario, Canada.

Michael Bochenek