ORAL ARGUMENT NOT YET SCHEDULED

NO. 13-5252

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF MANUFACTURERS, *et al.*,
Plaintiffs-Appellants,

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,
Defendant-Appellee,

and

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

On Appeal from a Final Order of the
U.S. District Court for the District of Columbia
(Honorable Robert L. Wilkins)

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

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

(1) Parties and Amici.

The National Association of Manufacturers, the Chamber of Commerce of the United States of America, and Business Roundtable were originally petitioners in this action, *see* Case No. 12-1422 (D.C. Cir.), were plaintiffs in the district court after the case was transferred, and are appellants in this Court.

The U.S. Securities and Exchange Commission was a respondent in Case No. 12-1422, was a defendant in the district court, and is an appellee in this Court.

Amnesty International USA and Amnesty International Limited were intervenors-respondents in Case No. 12-1422, were intervenors-defendants in the district court, and are intervenors-appellees in this Court.

The following parties appeared as amici in Case No. 12-1422 and in the district court, and now appear in this Court on direct appeal:

> Professor Marcia Narine; Ambassador Jendayi Frazer; Dr. J. Peter Pham
>
> American Coatings Association, Inc.; American Chemistry Council; Can Manufacturers Institute; Consumer Specialty Products Association; Precision Machined Products Association; The Society of the Plastics Industry, Inc; and the National Retail Federation
>
> Better Markets, Inc.
>
> Senator Barbara Boxer; Senator Dick Durbin; Former Congressman Howard Berman; Congressman Wm. Lacy Clay; Congressman Keith Ellison; Congressman Raul Grijalva; Congressman John Lewis;

Senator Ed Markey; Congressman Jim McDermott; Congresswoman Gwen Moore; Congresswoman Maxine Waters

Global Witness Limited; Fred Robarts; Gregory Mthembu-Salter

The following parties have appeared for the first time as amici in this case on appeal:

American Petroleum Institute

Retail Litigation Center, Inc.

Congressman Elliot Engel

The following party appeared as an amicus in Case No. 12-1422 and in the district court:

Former Senator Russ Feingold

(2) Ruling Under Review. Reference to the ruling under review in this case appears in the Appellants' Brief.

(3) Related Cases. This case was originally filed as a petition for review of a final agency order. *See Nat'l Ass'n of Mfrs. v. SEC*, No. 12-1422 (D.C. Cir.). After this Court's decision in *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013), which dismissed a similar petition for lack of jurisdiction, this case was transferred to the U.S. District Court for the District of Columbia. The undersigned is not aware of any other related cases as defined by Circuit Rule 28(a)(1)(C).

/s/ Julie A. Murray
Julie A. Murray

CORPORATE DISCLOSURE STATEMENT

Amnesty International USA 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

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GLOSSARY

API	American Petroleum Institute
DRC	Democratic Republic of the Congo
SEC	U.S. Securities and Exchange Commission

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 Appellants' Brief.

STATEMENT OF ISSUES

Amnesty International USA and Amnesty International Limited (collectively, Amnesty International) adopt the statement of issues set forth in the brief of Appellee Securities and Exchange Commission (SEC).

STATEMENT OF FACTS

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

[1] *See, e.g.*, Amnesty International, *Amnesty International Report 2013: The State of the World's Human Rights* 78 (2013), *available at* http://files.amnesty.org/air13/AmnestyInternational_AnnualReport2013_complete_en.pdf; *see also* U.N. Human Rights Office of the High Commissioner, Democratic Republic of the (continued)

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. The 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 ubiquitous 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

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Congo, 1993-2003, at 349-67 (2010), *available at* http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf (discussing link between human rights abuses and natural resource exploitation in the DRC).

[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.

per year in aid and peacekeeping assistance to promote stability there, in effect subsidizing the efforts needed to counteract "the lack of proper controls on international minerals supply chains." Statement of Mike Davis, Global Witness, JA576.

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.[3] Congress 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 required companies filing reports with the SEC to 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 Sen. Feingold). It viewed public disclosure as a tool to reduce "the exploitation and trade of conflict

[3] 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."

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. Four years before the Dodd-Frank Act and the adoption of Section 1502, Congress passed the Democratic Republic of the Congo Relief, Security, and Democracy Promotion Act of 2006, Pub. L. No. 109-456, 120 Stat. 3384 (DRC Act of 2006), *codified at* 22 U.S.C. § 2151 note. As part of that statute, Congress found that the most recent conflict in the DRC "spawned some of the world's worst human rights

atrocities and drew in six neighboring countries," *id.* § 101(5), and that "at least 40,000 women and girls [had been] systematically raped and tortured," *id.* § 101(8). It also found that war and humanitarian strife in Africa, including in the DRC, "threaten[ed] a core value of the United States[:] preserving human dignity." *Id.* § 101(1). Congress set a policy toward the DRC, identifying a need to "make all efforts to ensure that the [DRC] government . . . is committed to responsible and transparent management of natural resources across the country," *id.* § 102(8), and "to help halt the high prevalence of sexual abuse and violence perpetrated against women and children" there, *id.* § 102(11).

The DRC Act of 2006 did not, however, allay concerns about conflict in the DRC, particularly with respect to the role of the minerals trade in fueling conflict. Subsequent bills in the House and Senate thus 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 includes more than 220 quarterly lobbying reports between 2009 and 2010 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* John Prendergast & Sasha Lezhnev, *From Mine to Mobile Phone: The Conflict Minerals Supply Chain*, JA87 (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, JA722-23. 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 Oct. 19, 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." 2011 Letter of Boston Common Asset Management, et al., JA407. Dozens of investor groups told the SEC that the "conflict minerals disclosures [would be] material." *Id.* Trillium Asset Management, a socially-responsible-investment company, 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," Statement of Susan Baker, JA566. 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." 2010 Letter of Boston Common Asset Management, et al., JA126.

Despite the looming April 2011 deadline to adopt a rule, the SEC extended the time for comment from January 31, 2011, to March 2, 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 (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.*, Letter of International Corporate Accountability Roundtable, et al., JA666; Letter of Senator Leahy, et al., JA678. 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, JA719.

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. *See, e.g.*, Conflict Minerals Rule, JA788 (rejecting proposed rule's standard for determining when due diligence is

necessary because it "would arguably have been more burdensome than necessary to accomplish" the statutory purpose); *id.*, JA789 (seeking to "benefit issuers" and "reduc[e] their compliance costs" by rejecting earlier proposal to require five years of compliance recordkeeping); *id.*, JA792 (rejecting alternative objectives for corporate audits as "very costly and burdensome to undertake"); *id.*, JA793 (excluding from coverage conflict minerals that were outside of the 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.*, JA794 (interpreting the phrase "necessary to the functionality or production" of a product in a way that "reduces costs to issuers").

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

SUMMARY OF ARGUMENT

Appellants' challenge in this litigation 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). Appellants 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, Appellants ask this Court to sweep away Congress's directive and the SEC's compliance with it.

Appellants' challenge should be rejected. To begin with, 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." Indeed, it is Appellants' contrary reading of the statute that would be unreasonable, creating—as it would—an unworkable process for investigating and disclosing the use of conflict minerals by issuers that all parties agree *are* covered: companies that both manufacture and contract to manufacture products for which conflict minerals are necessary.

Moreover, the reading urged by Appellants would render Section 1502 largely ineffective at preventing companies—including those that both directly manufacture and contract to manufacture products—from avoiding the reporting requirements.

The SEC also had no obligation to engage in the type of cost-benefit analysis urged by Appellants and their amici. The agency was not required to reassess the humanitarian benefits stemming from Section 1502. Congress determined those benefits and left no room for agency second-guessing. In addition, 15 U.S.C. § 78c(f)—one of the Exchange Act provisions on which Appellants and their amici rely—does not even apply to the rule. In any event, the agency's analysis did not fall short of that required by the Exchange Act.

Finally, Appellants' 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. Under this Court's decisions in *SEC v. Wall Street Publishing Institute, Inc.*, 851 F.2d 365 (D.C. Cir. 1988), and *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101 (D.C. Cir. 2011), securities disclosures of this kind do not offend the First Amendment. Appellants' argument

to the contrary has radical and untenable implications for a slew of longstanding government regulations.[4]

ARGUMENT

I. The SEC Appropriately Declined to Adopt the "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 (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 *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

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

[4] Amnesty International does not address each of the Appellants' merits arguments, but instead joins generally in the SEC's response. Amnesty International writes separately to emphasize or raise other key points or facts.

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. § 78*l*(h) to create an exemption from the section of the Exchange Act mandating the Conflict Minerals Rule if, in addition to making certain statutorily-required findings, the agency determines that the exemption is "not inconsistent with the public interest or the protection of investors." *See also id.* § 78mm(a)(1) (providing similar exemptive authority where an exemption "is necessary or appropriate in the public interest" and "consistent with the protection of investors"). Where not precluded by statute, the SEC 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 Appellants—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 Appellants 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 the "Revisions and Waivers" provision in its discussion of the de minimis exceptions, *but see* Conflict Minerals Rule, JA732 (discussing provision in separate context), the Court may nevertheless consider the provision here without running afoul of the *Chenery* rule. Under the *Chenery* 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).

Consistent with the SEC's view, the legislative history of the "Revisions and Waivers" provision indicates that adopting the categorical exemptions urged by Appellants would have thwarted the purpose of Section 1502. 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. Thus, in its original form, the bill would have tied the SEC's ability to revise or temporarily waive the statutory requirements to a standard similar to those set out in the Exchange Act. *See* 15 U.S.C. §§ 78*l*(h), 78mm(a)(1). 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 Congress expressly considered and wished to limit narrowly the circumstances in which an exemption would be appropriate. 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 deem consistent with the statutory purpose a

categorical exemption to the reporting requirement in a broader range of circumstances based on an SEC 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.

Appellants 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. Appellants' Br. at 30-31. They contend that the SEC acted arbitrarily and capriciously by not considering a de minimis exception based on the amounts or value of conflict minerals used by an issuer overall, rather than in a particular product. *Id.* at 31-32, 34-35. Appellants' 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 declining to adopt an exception, meets this standard. *See* Conflict Minerals Rule, JA740, JA743.

Appellants contend that the SEC should at least have created a de minimis exception based on the total amount or fair market value of minerals that an issuer uses each year. Appellants' Br. at 31. However, 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. Statement of Mike Davis, JA578. 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," Letter of Calvert Investments, JA581, *cited at* Conflict Minerals Rule, JA740 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 or total usage of conflict minerals would permit significant financing of armed groups—an untenable outcome. The SEC reasonably determined not to adopt the exemptions urged by commenters. Its discussion of those exemptions was adequate under *State Farm* and supported by the record.

II. The SEC Reasonably Interpreted Section 1502 to Cover Companies That Exclusively "Contract to Manufacture" Products.

The SEC interpreted Section 1502 to extend to issuers that do not engage in any direct manufacturing but instead contract with other companies to manufacture their products. That interpretation "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).

Amnesty International writes to emphasize that the reading of the statute urged by Appellants would create an utterly unworkable process for investigating and disclosing the use of conflict minerals by issuers that all parties agree *are* covered: companies that both manufacture and contract to manufacture products for which conflict minerals are necessary. Moreover, Appellants' reading would render Section 1502 largely ineffectual at preventing companies—including those that both directly manufacture and contract to manufacture—from skirting the statute's reporting requirements. As a result, Appellants' reading of Section 1502, far from required by the statute's "plain" language, is not even a reasonable interpretation of any ambiguity.

Specifically, Appellants contend that 15 U.S.C. § 78m(p)(2), entitled "Person Described," covers only issuers that engage in at least some direct manufacturing. The "Person Described" provision states:

> A person is described in this paragraph if—
>
> (A) the person is required to file reports with the Commission pursuant to paragraph (1)(A); and
>
> (B) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

15 U.S.C. § 78m(p)(2). Appellants concede that if an issuer engages in some direct manufacturing for which conflict minerals are necessary, the issuer must, as required elsewhere by Section 1502, "descri[be] . . . [its] products manufactured o*r contracted to be manufactured* that are not DRC conflict free." *Id.* § 78m(p)(1)(A)(ii) (emphasis added).

A fatal flaw in Appellants' interpretation of the statute is that an issuer that engages in both direct manufacturing and contracting to manufacture would not be required to undertake investigatory steps—specifically, a reasonable country of origin inquiry or due diligence—for those products that it *contracts* to manufacture. That is so because provisions underlying the reasonable country of origin inquiry and due diligence requirements, *see id.* §§ 78m(p)(1)(A), 78m(p)(1)(A)(i), define the scope of covered minerals to be coextensive with those minerals set out in the "Person Described" provision. That is, a covered issuer need undertake a reasonable country of origin inquiry only to determine "whether conflict minerals that are necessary as described in [the "Person Described" provision] . . . originated in the DRC or an adjoining country." *Id.* § 78m(p)(1)(A). And under Appellants' reading, the "Person Described" provision covers only minerals that "are necessary to the functionality or production of a product [directly] manufactured by" that issuer, *id.* § 78m(p)(2), not minerals that are necessary to a product the manufacturer contracted to manufacture. Likewise, a

covered issuer must undertake due diligence only with respect to "such minerals" as are set out in the "Person Described" provision. *See id.* § 78m(p)(1)(A)(i) (referring to minerals described in § 78m(p)(1)(A), which in turn refers to § 78m(p)(2)). Again, Appellants' reading of that provision limits "such minerals" to those in products that an issuer directly manufactures. In sum, Appellants' reading of the statute would require direct manufacturers of products with conflict minerals to make disclosures regarding products that they contract to manufacture, but it would eviscerate the investigatory requirements that would ensure such issuers make these disclosures in an informed way.

In the district court, Appellants attempted to avoid the logical implication of their argument by contending that § 78m(p)(1)(A), which requires companies to disclose whether their products contain conflict minerals, "does not cross-reference § 78m(p)(2)(B) [that is, a portion of the "Person Described" provision] in its entirety." Pls.' Dist. Ct. Reply at 19. In Appellants' view, cross-references to the "Person Described" section refer only to "minerals that 'are necessary to the functionality or production of a product,'" *id.* (quoting 15 U.S.C. § 78m(p)(2)), not—as the "Person Described" provision actually states—to "minerals that are necessary to the functionality or production of a product *manufactured by such person*," 15 U.S.C. § 78m(p)(2) (emphasis added). It makes no sense, however, to incorporate the word "product"—which is being modified in the "Person

Described" provision—without that word's limiting modifier ("manufactured by such person"), which is essential to define the universe of products covered.

Further, Appellants' reading of the "Person Described" section would render Section 1502 largely ineffective at preventing an end-run around the statute's disclosure requirement. Some companies covered by the final rule engage in manufacturing only indirectly by issuing "requirements for products to be manufactured for them—including design, quality, product life expectancy, and so on." Letter from Senator Durbin & Representative Jim McDermott, JA103. 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." Statement of Darren Fenwick, Enough Project, JA 641. Appellants' reading would permit a company that outsources the production of its products while maintaining a primary role in determining the manufacturing process to disavow any responsibility for making disclosures. And if the issuer in turn relied on supplier-manufacturers that were not themselves issuers, *no one* would be required to report to the SEC information about the conflict minerals in the resulting product. As Section 1502's congressional supporters recognized, under Appellants' reading, "a large, non-transparent use of the black market for DRC conflict minerals would remain, directly subverting the policy intention of the law." Durbin & McDermott Letter, JA103.

Nor would Appellants' reading fare any better with respect to preventing an end-run around the disclosure rule by companies that both engage in some direct manufacturing and also contract to manufacture products. Under Appellants' reading of the "Person Described" section, a covered issuer is not simply one that engages in some direct manufacturing; rather, conflict minerals must be "necessary to the functionality or production of a product [directly] manufactured by" that issuer. As a result, an issuer would not need—as Appellants claim—to "cease manufacturing altogether" to avoid the disclosure requirement. Pls.' Dist. Ct. Opening Br. at 48-49. Rather, an issuer could simply contract to manufacture any products for which conflict minerals might be necessary, reserving its direct manufacturing for those products that the issuer knows do not contain conflict minerals.

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

Appellants and their amici contend that the SEC failed to determine whether the rule or its alternatives would create humanitarian benefits that justify the costs of the agency's discretionary choices. Appellants' Br. at 47-51; *e.g.*, American Petroleum Institute (API) Br. at 3. In particular, they argue that the SEC has a heightened burden to conduct cost-benefit analysis under the Exchange Act, 15 U.S.C. §§ 78c(f) and 78w(a)(2). But the SEC was not required to reassess humanitarian benefits that Congress itself determined would flow from Section

1502 and the mandatory rule. Moreover, § 78c(f) does not even apply to this rulemaking, and, in any event, neither § 78c(f) nor § 78w(a)(2) required the SEC to engage in a formal cost-benefit analysis under which the agency's discretionary decisions must have been justified by corresponding and demonstrable humanitarian benefits.

A. The SEC Was Not Required to Reevaluate the Humanitarian Benefits of Section 1502.

The gravamen of Appellants' cost-benefit challenge is that the SEC failed to determine whether the rule or its alternatives would provide compelling social benefits identified in Section 1502. Appellants' Br. at 47. Appellants 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.* at 48-49. The fundamental problem with Appellants' argument, however, 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.

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, JA787-95. 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, such as whether a discretionary choice would make Conflict Minerals Reports "easier to compare." *Id.*, JA791. The Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, requires no more.

Other provisions of the statute demonstrate that Congress did not intend the SEC to reevaluate Section 1502's effectiveness in achieving humanitarian benefits in the DRC before adopting the mandatory rule. 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 not required to undertake its own assessment of any humanitarian benefits to the DRC.

The implication of the contrary contention urged by Appellants is quite far-reaching. Appellants assert that the SEC should have resolved a dispute among commenters regarding whether Section 1502, and the anticipation of an implementing rule, had improved or exacerbated eastern DRC's conflict and humanitarian crisis. Appellants' Br. at 48-49. 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. Section 78c(f) Does Not Apply to the Rule, and, in Any Event, the SEC's Analysis Complies with the Exchange Act.

Appellants and their amici contend that 15 U.S.C. § 78c(f) obligates the SEC to conduct a heightened assessment of costs and benefits and that the SEC failed to meet this obligation. Appellants' Br. at 50; *e.g.*, API Br. at 4. But regardless of the standard imposed by § 78c(f), reliance on that provision here is misplaced because it does not apply. 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." 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 some kind of heightened cost-benefit analysis, the SEC's failure to apply that feature of the statute would not render the agency's analysis arbitrary or capricious.

The district court likewise suggested that § 78c(f) does not apply to the Conflict Minerals Rule. JA878 n.15. However, in reliance on *American Equity Investment Life Insurance Co. v. SEC*, 613 F.3d 166 (D.C. Cir. 2010), the court evaluated the agency's rulemaking under the standard set forth in § 78c(f) because the SEC conducted its analysis "without any suggestion" that § 78c(f) did not apply. JA878 n.15. In this regard, the district court erred because *American Equity* is inapposite. That case held that the SEC must defend its analysis under the standard it employed in a rulemaking because the SEC had justified its discretionary rule based on an unreasoned conclusion that the rule would increase competition, efficiency, and capital formation. *Am. Equity*, 613 F.3d at 177-79. Under those circumstances, this Court held that the SEC's conclusion was arbitrary regardless of whether the statute required the agency to analyze these factors. Here, in contrast, although the SEC considered the § 78c(f) factors, its conclusions with respect to these factors did not form its justification for adopting the mandatory rule or the specific features that Appellants challenge.

In any event, to the extent that the SEC was required by § 78c(f) to consider the rule's impact on efficiency, competition, and capital formation, it reasonably did so. *See* Conflict Minerals Rule, JA780, JA795-796; *see also* SEC Br. 54-58. Likewise, in adopting the rule, the SEC complied with § 78w(a)(2) by considering the impact of the rule on competition and determining that the rule would not impose an unnecessary or inappropriate burden on competition. *See* SEC Br. at 50-52.

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

Under Section 1502 and the rule implementing it, a covered company must report "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 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 report 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, JA767-68.

Appellants' 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 conflict-mineral disclosure an integral part of the securities reporting scheme mandated under the Exchange Act. Although Section 1502 is intended to promote peace and security in the DRC, it is also intended to provide investors with information that they can use to make more informed investment decisions. 156 Cong. Rec. S3976 (May 19, 2010) (statement of Sen. Feingold). And as numerous commenters have described, *see supra* p.7, 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) (internal quotation marks omitted).

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 Appellants easily passes muster. Congress's conclusion that the disclosure requirement is an appropriate way to promote corporate transparency and inform investors, in service

of promoting peace and security in the DRC, is undoubtedly reasonable. Appellants conceded as much during oral argument before the district court. *See* JA846 (counsel for Appellants stating that "if this were rational basis review," Congress's judgment in passing Section 1502 "would be enough").

Appellants instead contend that a relaxed standard of review does not apply because the disclosure here does not relate to the purchase and sale of securities. Appellants' Br. at 54 n.5. 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 this Court upheld in part the constitutionality of an injunction that would regulate 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.

Appellants separately contend that *Wall Street Publishing*'s relaxed standard of review does not apply because companies must make the conflict minerals disclosures not only to the SEC, but also to the public using the company's own resources. Appellants' Br. at 54 n.5; *see also* Dist. Ct. Op., JA909 (appearing to distinguish *Wall Street Publishing* on this ground). But the same was true in *Wall*

Street Publishing, which involved an injunction against a violation of an anti-fraud provision under federal securities law. Just as the companies here would be required to publish securities disclosures on their own websites, the magazine in *Wall Street Publishing* would have been required to use its own publication to make the requisite disclosure to avoid misleading readers. *See* 851 F.2d at 370 n.7.[5]

B. The Disclosure Requirement Is Constitutional Even Under Intermediate Scrutiny.

If this Court determines, despite *Wall Street Publishing* and *Full Value*, that scrutiny akin to rational-basis review does not apply, the disclosure requirement would at most be subject to intermediate scrutiny as commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *See* Dist. Ct. Op., JA910. The requirement unquestionably meets this standard.

1. Appellants contend that the disclosure is "not commercial" but instead "pregnant with political judgments and connotations" and, therefore,

[5] Amnesty International also believes that rational-basis review, as described in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), applies to Section 1502 and the Conflict Minerals Rule. *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. However, Amnesty International recognizes that this panel is bound by *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), which circumscribed *Zauderer*'s rational-basis standard. *Id.* at 1213-14.

subject to strict scrutiny. Appellants' Br. at 53 (internal quotation marks omitted). That assertion should be rejected. As an initial matter, Section 1502 requires only the disclosure of factual information, such as what a company does to investigate its sourcing practices, and whether—based on a neutral definition provided by statute—the company's products have been found to be DRC conflict free. That conflict in the DRC is a matter of public interest does not transform such a factual disclosure into political speech subject to strict scrutiny. *See, e.g.*, *Spirit Airlines, Inc. v. DOT*, 687 F.3d 403, 412 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1723 (2013) (rejecting claim that a rule requiring airlines to provide the total, final price of a ticket to customers was subject to strict scrutiny because the disclosure related to a public debate over the size of taxes imposed on airfare).

Rather, 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—intended to inform investors and other consumers—falls comfortably in the realm of commercial speech. *See United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) (recognizing that commercial speech can "include material representations about the efficacy, safety, and quality of the advertiser's product, and other information asserted for the purpose of persuading the public to purchase [a] product"); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City*

Council of Balt., 721 F.3d 264, 285 (4th Cir. 2013) (en banc) (setting forth a broad definition of commercial speech and recognizing that "the viewpoint of the listener" is an important factor to consider when assessing whether a compelled disclosure is commercial).

Appellants' contention that the disclosure is not commercial because it appears on companies' websites, "which typically contain non-commercial as well as commercial speech," Appellants' Br. at 53, is nonsensical. Appellants concede that companies' websites often contain commercial speech. Section 1502 and the Conflict Minerals Rule require companies to post—in what the SEC terms a "Form SD" or in a Conflict Minerals Report—the same disclosure that the companies make to the SEC. Appellants cite no authority for the proposition that the presence of non-commercial speech *somewhere* on a company's website renders the conflict minerals disclosure non-commercial by association, nor does logic support such a theory. And Section 1502 does not require a company to intermingle the requisite disclosure with the company's non-commercial statements online.

2. To regulate commercial speech under the *Central Hudson* intermediate scrutiny standard, 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). The disclosure requirement easily satisfies this standard.

As Appellants concede, the government's interest in peace and stability in the DRC is substantial, even compelling, Appellants' Br. at 54, and thus satisfies intermediate scrutiny. The government's related interest in providing investors with information that is critical to their investment choices is likewise substantial. *Cf. Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 14-16 (D.C. Cir. 2009) (recognizing as compelling the public's interest in lobbying information that helps the public "understand the constituencies behind legislative or regulatory proposals").

The disclosure requirement also directly and materially advances the government's interest, thus satisfying the second prong of the *Central Hudson* standard. As Congress determined in passing Section 1502, the public disclosure required by the statute will 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. Likewise, the law will "enhance transparency" and "help American consumers and investors make more informed decisions." 156 Cong. Rec. S3976 (May 19, 2010) (statement of Sen. Feingold). It is but the next step in a U.S. policy to "make all efforts to ensure that the [DRC] government . . . is committed to responsible and

transparent management of natural resources across the country," DRC Act of 2006, § 102(8)(A), and "to help halt the high prevalence of sexual abuse and violence perpetrated against women and children" there, *id.* § 102(11).

Appellants contend that Section 1502 does not advance the government's interest in the DRC, emphasizing that Congress did not hold hearings on Section 1502 before adopting it, and that post-enactment hearings raise concerns that the law is ineffective. Appellants' Br. at 54-55. Appellants cite no authority, however, for the proposition that Congress must hold hearings before legislating, even where First Amendment interests may be involved. 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). Appellants similarly fault Congress for not explicitly considering First Amendment accommodations when adopting Section 1502. Appellants' Br. at 56. This argument likewise fails. Congress cannot be faulted for not anticipating Appellants' novel theory that a securities disclosure impinges on

companies' purported right not to tell investors and the public whether minerals in their products have been found to support armed groups in the DRC.

Here, 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 promote peace and stability in the DRC. Its conclusion that increased information is 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 Taylor*, 582 F.3d at 16; *Nat'l Cable & Telecomms. Ass'n*, 555 F.3d at 1002.

To attack the fit of the statute, Appellants now contend that the SEC instead could "have allowed companies to describe the results of their due diligence in language they consider accurate" and could have "compiled and published a list of products it considers to have problematic ties to the DRC conflict." Appellants' Br. at 56-57. As the district court recognized, however, it is sufficient for the purpose of intermediate scrutiny that the statute "'be proportionate to the interests sought to be advanced.'" JA 916 (quoting *Nat'l Cable & Telecomm'ns Ass'n*, 555 F.3d at 1002). The statute need not be "the best conceivable option" for addressing the problem. *Nat'l Cable & Telecomm'ns Ass'n*, 555 F.3d at 1002. Congress's modest requirement that companies post the same, factual disclosures they submit to the SEC on their own websites constitutes a reasonable fit satisfying *Central Hudson*.

Moreover, Appellants' post hoc alternatives to that requirement would not be nearly as effective as the scheme created by Congress. Allowing companies to make disclosures in any language *they* consider accurate would undercut disclosure uniformity, which facilitates review and comparison by investors and the public. *See* Conflict Minerals Rule, JA793 (requiring issuers to "present the information in a standardized manner," so that users "will benefit from the standardization and simplification of the disclosure"). Nor is such an alternative necessary where the Appellants, despite ample opportunity to do so, still have not identified any "inaccuracy" in the current disclosures. Likewise, although Appellants suggest that the SEC undertake a time-consuming review of issuers' due diligence inquiries and compile its own list of products that have not been found to be DRC conflict free, that scheme would be far less effective at informing investors about companies' risk exposure and management of risks with regard to conflict minerals. It would also be far less efficient and is indeed a transparent attempt by Appellants to bury the SEC in paper and bring the conflict minerals reporting regime to a halt.

Accordingly, even if this Court holds that rational-basis review does not apply to the public disclosure requirement, the requirement unquestionably survives intermediate scrutiny as a compelled commercial disclosure.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

October 30, 2013

Respectfully submitted,

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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 Times New Roman font, and the word count is 8,720.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

I certify that on October 30, 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