ORAL ARGUMENT NOT YET SCHEDULED
No. 13-5252

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

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

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee,

AMNESTY INTERNATIONAL USA, AMNESTY INTERNATIONAL LIMITED,

Intervenors for Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE RETAIL LITIGATION CENTER, INC. AND THE NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

A. Parties and *Amici*. All parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Appellants National Association of Manufacturers *et al.*, except that this brief is filed on behalf of the Retail Litigation Center, Inc. and the National Retail Federation.

B. Rulings Under Review. The ruling under review is the final order entered in case 1:13-cv-635 by the district court on July 23, 2013. *Nat'l Ass'n of Mfrs.* v. *SEC*, --- F. Supp. 2d ---, 2013 WL 3803918 (D.D.C. July 23, 2013).

C. Related Cases. Other related cases of which counsel is aware are listed in the Brief for Appellants National Association of Manufacturers *et al.*

Dated: September 18, 2013

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, counsel states and certifies as follows:

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers, many of which will be subject to the agency action at issue even though they are not manufacturers and thus are outside the scope of Congress's intent. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for hundreds of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases. The RLC is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest in the RLC.

The National Retail Federation (NRF) represents retailers of all types and sizes from the United States and more than 45 countries abroad including department stores, specialty, apparel, discount, online, independent, grocery, and chain restaurants, among others. NRF also includes the National Council of Chain

Restaurants as an affiliated member entity. Retailers operate more than 3.6 million U.S. establishments that support one in four U.S. jobs—42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF is a not-for-profit trade association that has no parent companies. No publicly-held company owns a ten percent or greater ownership interest in NRF.

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CERTIFICATE AS TO NECESSITY OF SEPARATE *AMICUS* BRIEF

Pursuant to D.C. Circuit Rule 29(d), counsel certifies that this separate brief is necessary because the agency action at issue burdens the members of the Retail Litigation Center, Inc. (RLC) and the National Retail Federation (NRF) even though Congress did not intend to impose such requirements on them. The RLC and NRF are uniquely situated to assist the Court with this issue because they understand the practical effects the action of the Securities and Exchange Commission (SEC) will have on their members.

The Appellants in this case, by contrast, represent a broad swath of businesses, including those directly engaged in the manufacture of goods targeted by the legislation and regulations in dispute. Accordingly—and understandably—Appellants will not be in a position to devote adequate attention to the question addressed in this brief, which is specific to retailers: How did a law aimed at products "manufactured *by*" certain companies come to cover retailers, which do not typically manufacture anything?

Dated: September 18, 2013

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GLOSSARY

DRC	Democratic Republic of the Congo and adjoining countries
NRF	National Retail Federation
RLC	Retail Litigation Center, Inc.
SEC	Securities and Exchange Commission

STATUTES AND REGULATIONS

All pertinent statutory provisions and regulations are set forth in the Brief for Appellants National Association of Manufacturers *et al.*

STATEMENT OF IDENTITY OF *AMICI CURIAE*, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amici include the Retail Litigation Center (RLC), a public policy organization that identifies and engages in legal proceedings that affect the retail industry, and the National Retail Federation (NRF), which represents retailers of all types and sizes in the United States and more than 45 countries abroad including department stores, specialty, apparel, discount, online, independent, grocery, and chain restaurants, among others. The RLC and the NRF represent the interests of retailers and related businesses, many of which will be subject to the agency action at issue even though they are not manufacturers and thus are outside the scope of Congress's intent.

Pursuant to Fed. R. App. P. 29(a) and D.C. Circuit Rule 29(b), all parties previously consented to the filing of this brief.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTION

No party's counsel authored this brief in whole or in part, and no party, party's counsel, nor other person other than counsel for *amici* contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

Recognizing that the humanitarian crisis in the Democratic Republic of the Congo (DRC) called for action, Congress passed a law intended to curb (through securities-law disclosures in the United States) those widely reported and deeply troubling human-rights abuses. Specifically, Congress enacted section 1502 of the Dodd-Frank Act,[1] which required the SEC to compel manufacturers to disclose the existence and source of "conflict minerals" in their products. "Conflict minerals" include the derivatives of ores commonly mined in the DRC, such as gold, tantalum, tin, and tungsten. J.A. 858 n.2. Congress determined that the mining of these minerals "help[s] to finance conflict characterized by extreme levels of violence." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213. Thus, requiring manufacturers to disclose their use of minerals sourced in or near the DRC was intended to reduce the market for those minerals, in turn reducing the funding that enables the violence.

The nation's retailers, represented here by *amici* RLC and NRF, stand with Congress in condemning these atrocities in the DRC in the strongest possible terms. Indeed, some retailers have adopted policies asking suppliers to use only non-DRC materials or DRC materials that are legitimately sourced (that is, that are confirmed not to have funded armed conflict) in products to be sold at retail. And

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[1] Pub. L. No. 111-203, § 1502, 124 Stat. 1376, 2213-18, codified in relevant part at 15 U.S.C. § 78m(p).

retailers are developing and supporting numerous responsible sourcing programs, each acting on the conditions retailers can most directly affect.

The problem here rests with the SEC. Congress directed that the regulation implementing its law cover *manufacturers*, which source the raw materials that contain conflict minerals to make their products. The SEC, however, unilaterally added those who merely *contract to manufacture* products—which will include some retailers as a result of the private-label products that they hire manufacturers to produce—to the scope of its regulation. Congress did not, however, subject those who contract to manufacture to the law's reporting requirements; to the contrary, it is clear from the face of the statute that Congress appreciated the difference between manufacturers and those that only contract to manufacture goods, and it chose to apply these reporting requirements only to the former.

Compounding that problem, the SEC's regulation makes no practical sense, as it seeks to compel those who do not manufacture to know all about the complex, multi-layered supply chains of many manufacturers. A manufacturer, by definition, must know about the materials and parts that go into its products; that information is not necessarily within a retailer's purview. In fact, retailers frequently do not have access to such information. A retailer, for example, may custom-order products for its inventory with little more ability to learn about and control the source of their components than a consumer who custom-orders furniture. Manu-

facturers and retailers have fundamentally different functions in the commercial world, and they have fundamentally different obligations under the statute at issue here.

Because the SEC exceeded its mandate, its regulation is invalid under the Administrative Procedure Act to the extent it reaches those companies that do not actually manufacture goods. Because this issue is open-and-shut—the statute says one thing; the regulation says another—we urge the Court, at the very least, to invalidate this aspect of the regulation.[2]

SUMMARY OF ARGUMENT

I. Congress directed that the rule at issue should apply only to companies that "manufacture[]" goods. The history, structure, and purpose of its statute all confirm that Congress sought to cover manufacturers and no one else. Hence, the SEC's rule, which applies to certain non-manufacturers, is invalid under step one of *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

II. Even were Congress's direction somehow unclear—thus reaching step two of *Chevron*—the SEC's rule still would be invalid. Its interpretation merits little deference because it involved no administrative expertise or policy judgment. Rather, the SEC attempted only to construe the statute, but its construction is

[2] Appellants have identified numerous, broader defects in the regulation, and *amici* generally share Appellants' concerns.

manifestly unreasonable. Nor would looking beyond the text have helped the agency, as its rule makes little practical sense when applied to non-manufacturers.

ARGUMENT

I. THE SEC'S RULE FAILS UNDER *CHEVRON* STEP ONE

Congress directed the SEC to promulgate a rule that would cover those who "manufacture[]" certain products. But the rule that the SEC promulgated applies not only to manufacturers but also to those who "contract to manufacture" the products. The SEC therefore acted "in excess of [its] statutory . . . authority," and its rule is invalid to that extent. See 5 U.S.C. § 706(2)(C).

To determine whether Congress's intent stands in the way of an agency's regulation, this Court "examine[s] the statute *de novo*, employing traditional tools of statutory construction." *Hearth, Patio & Barbecue Ass'n* v. *U.S. Dep't of Energy*, 706 F.3d 499, 503 (D.C. Cir. 2013) (quotation marks omitted). In particular, it considers "the text, structure, purpose, and history" of the statute, *ibid.* (quotation marks omitted), each of which here shows that Congress intended to cover only manufacturers. That intent "is the end of the matter." *Chevron*, 467 U.S. 837, 842 (1984).

A. The analysis begins, "[a]s always," with the text of the statute. See *Limtiaco* v. *Camacho*, 549 U.S. 483, 488 (2007). Congress established a simple framework for the conflict minerals rule. As relevant here, Congress first defined

who would be subject to the rule; then it defined *what* those persons should disclose. The *who* is "any person described in paragraph (2)" of the law. 15 U.S.C. § 78m(p)(1)(A). And paragraph (2) says that "[a] person is described in this paragraph if" "conflict minerals are necessary to the functionality or production of a product *manufactured by* such person." *Id.* § 78m(p)(2), (p)(2)(B) (emphasis added). In other words, a company is subject to the rule if and only if conflict minerals are necessary to a product it "manufacture[s]." Conversely, a company that does not "manufacture[]" a product is not subject to the rule.

Congress next defined *what* those subject to the rule must disclose. Namely, the statute required (in relevant part) "a description of the products manufactured *or contracted to be manufactured* that are not DRC conflict free." *Id.* § 78m(p)(1)(A)(ii) (emphasis added). Thus, if a company is subject to the rule—that is, it manufactures products necessarily involving conflict minerals—it must disclose the products that are not "DRC conflict free" that it either manufactures or contracts to manufacture. Congress thus took pains to define the "who" and the "what" differently.

The SEC's rule obliterated that distinction. The SEC defined the "who" to require disclosures from Exchange Act registrants "having conflict minerals that are necessary to the functionality or production of a product manufactured *or contracted by that registrant to be manufactured.*" 17 C.F.R. § 240.13p-1 (empha-

sis added). The SEC thereby imposed the disclosure requirement on persons who contract to manufacture products but do not actually manufacture products. Simply put, Congress did not include these persons in its "who," but the SEC did.

This text is so plain that even the SEC previously acknowledged that, by its terms, the statute "was intended to apply *only* to issuers that manufacture products." Conflict Minerals, 75 Fed. Reg. 80,948, 80,952 (Dec. 23, 2010) (emphasis added). And the SEC has agreed that, because Congress did not define "manufacture," that term must be given its "generally understood meaning" (Conflict Minerals, 77 Fed. Reg. 56,274, 56,290 (Sept. 12, 2012)). The Court need venture no further, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

B. That Congress sought to include only manufacturers "is confirmed by an examination of [the statute's] history." See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). The first draft of the statute would have applied whenever the specified minerals were "necessary to . . . a product *of* such person." 156 Cong. Rec. S3103 (daily ed. May 4, 2010) (amendment by Sen. Brownback) (emphasis added). This language is broad; "product of such person" would encompass many relationships between the product and the person.

In a subsequent draft, however, Congress expressly narrowed its focus to manufacturers—it changed the key language to "a product *manufactured by* such

person." 156 Cong. Rec. S3866 (daily ed. May 18, 2010) (amendment by Sen. Brownback) (emphasis added). This change is telling; courts "ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language." *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93 (2001) (quotation marks omitted). Indeed, the language of the later draft is the language Congress actually passed, and "the plain language of the enacted text is the best indicator of [Congress's] intent." *Nixon* v. *United States*, 506 U.S. 224, 232 (1993). This history confirms that Congress aimed to reach only those who manufacture certain products, not persons who are connected in other ways to those products.

C. The intent manifested in the text and history of section 78m(p)(2)(B) is in full accord with the structure and purpose of the statute as a whole. As enacted, the statute covers those who manufacture any products involving conflict minerals (the "who"). It then requires such issuers to disclose information about all of their products involving conflict minerals, whether they manufacture the products themselves or not (the "what"). Thus, products "contracted to be manufactured" are included, but only for those who otherwise manufacture products.

This structure confirms two basic points about Congress's understanding when enacting this provision. First, Congress was fully cognizant for the purposes of this statute of the distinction between those who manufacture and those who

contract with others to manufacture. "Distinctions among descriptions juxtaposed against each other are naturally understood to be significant." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 357-58 (1993) (citing *Melkonyan* v. *Sullivan*, 501 U.S. 89, 94-95 (1991)). Here, Congress chose to apply the statute only to those who actually "manufacture[]" goods, even as it required those persons to disclose information about goods "contracted to be manufactured." Treating the "who" and the "what" separately and defining them differently is compelling evidence that Congress did not intend to conflate them, as the SEC's rule does.

Second, the structure serves an important statutory objective by preventing covered persons—*i.e.*, manufacturers—from effecting a simple end-run around the disclosure rule. Congress itself announced its goal to discourage the violence in the DRC by eliminating a major source of revenue for armed rebel groups—the mining and sale of tin, tantalum, tungsten, and gold. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1502(a), 124 Stat. 1376, 2213. As the SEC has pointed out, without the "contract to manufacture" proviso, manufacturers would be able to circumvent the law by outsourcing work to companies that are not covered by the rule (*e.g.*, privately held companies) or that are located in countries where the rule lacks force. SEC Br. at 51 (Dist. Ct. Dkt. 16) (May 16, 2013). The "contracted to be manufactured" provision in the context of "what" must be disclosed closes this potential loophole by ensuring that

the category of persons to whom the rule applies—*i.e.*, manufacturers—cannot avoid certain adverse disclosures by contracting out the manufacture of some of their products.

Just as importantly, Congress often acts incrementally when it "[d]efin[es] the class of persons subject to a regulatory requirement." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). Here, Congress could have banned conflict minerals outright, but it did not. Or it could have expressly imposed disclosure requirements on both manufacturers and retailers or all issuers subject to SEC disclosure obligations, but it did not. Instead, it authorized a narrower disclosure rule, targeting those who are best positioned to reduce their use of conflict minerals. Manufacturers are far better situated than non-manufacturers to make the required disclosures, regardless of whether they manufacture the products themselves. See *infra* section II.B. And, because manufacturers already would absorb the fixed cost of compliance, it was a slight burden to add the marginal cost of compliance for products made by contract. Adding non-manufacturers to the mix, by contrast, would impose a much greater burden. This kind of line-drawing is uniquely within the province of Congress. See *Beach Commc'ns*, 508 U.S. at 316 (citing *Williamson* v. *Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955)). The SEC's regulation, however, fundamentally changes the reach of the

statute by sweeping in a category of persons Congress plainly did not intend to reach.

D. None of the district court's efforts to find ambiguity in the statute is persuasive.

First, the district court noted that, in the *Chevron* context, it is not dispositive that Congress used a term in one part of a statute but omitted it in another. J.A. 898 (citing *Catawba County* v. *EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009)). But that attacks a straw man. The point is not only that Congress used "contract to manufacture" in one subsection but not in another. Rather, the point is that Congress used only "manufacture"—not "contract to manufacture"—in defining who must make disclosures. Moreover, that it used "contract to manufacture" in a separate section laying out what the disclosures must include shows, as explained above, that Congress deliberately distinguished *who* must comply from *what* constitutes compliance. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("The most natural reading . . . is that Congress implicitly excluded a general . . . rule by explicitly including a more limited one.").

Second, the district court held that the statute's evolution from "product of such person" to "product manufactured by such person" indicates that Congress "sought to exclude *pure* retailers from the Rule's coverage." J.A. 899 (emphasis added). But that mistakes the part for the whole. By including only "manufactur-

ers," Congress indeed sought to exclude "pure" retailers—along with other types of companies that are neither manufacturers nor "pure" retailers.[3] Congress gave no hint that the whole category of "non-manufacturers" should be reduced to "pure retailers."

Third—as if to confirm how weak the SEC's arguments are—the district court invented a rationale for its holding that no party advanced and, indeed, deemed it the "[m]ost fundamental[]." J.A. 899. To wit, it held that the "ambiguity inherent in the term 'manufacture' itself" authorized the SEC to include those who merely contract to manufacture. *Ibid.* But the SEC disagrees—it claimed that it was not necessary to define the term "manufacture" because, in its view, "the term is generally understood"; it then went on to include "contract to manufacture" as a separate term. Conflict Minerals, 77 Fed. Reg. 56,274, 56,290 (Sept. 12, 2012). More importantly, the statute belies the district court's rationale: If "manufacture" encompassed "contract to manufacture," that would render superfluous part of Congress's separate phrase "manufactured or contracted to be manufactured." 15 U.S.C. § 78m(p)(1)(A)(ii); see *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (explaining the "rule against superfluities").

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[3] Indeed, the SEC's rule does a poor job of distinguishing "pure retailers" from retailers who exercise enough influence over their private-label products to become "contract manufacturers" in the eyes of the SEC. Importantly, the SEC never suggested in any of its regulatory or pre-regulatory documents that retailers engaging in private-label activity are "manufacturers."

Furthermore, when the Supreme Court has confronted "manufacture" in statutes, it has used a common-sense definition that would exclude "contract to manufacture." *E.g.*, *Diamond* v. *Chakrabarty*, 447 U.S. 303, 308 (1980) ("the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery"). And even the decision on which the district court relied as suggesting some ambiguity merely defined manufacturing to include "design and development"—that is a far cry from saying that "manufacture" could reasonably include "contracting to manufacture." See *United States* v. *W. Elec. Co.*, 894 F.2d 1387, 1390-91 (D.C. Cir. 1990). The district court also cited *Charles Peckat Manufacturing Co.* v. *Jarecki*, 196 F.2d 849 (7th Cir. 1952), which merely applied a Treasury regulation defining "manufacture" in the tax context and is thus inapposite.

Finally, the district court found persuasive the SEC's guidance that purports to "effectively exclud[e] 'pure retailers' from the scope of the Rule." J.A. 901 (citing Conflict Minerals, 77 Fed. Reg. 56,274, 56,291 (Sept. 12, 2012)). But how the SEC *interpreted* "contract to manufacture" cannot save its unauthorized insertion into section 78m(p)(2) of the statute; Congress put only manufacturers in the law's scope. And mere agency guidance is little comfort to retailers—unlike a rule, it is easy to change (see *Am. Mining Cong.* v. *MSHA*, 995 F.2d 1106 (D.C. Cir.

1993)) and warrants little deference (see *United States* v. *Mead Corp.*, 533 U.S. 218 (2001)).

II. THE SEC'S RULE FAILS UNDER *CHEVRON* STEP TWO

For all of the above reasons, "Congress has directly spoken to the precise question at issue," which leaves no room for the SEC's interpretation. *Chevron*, 467 U.S. at 842. But, should the Court disagree with *amici* that the statute is clear and instead conclude that the statute is ambiguous, that would not end the inquiry. Even then, the rule is valid only if it is "based on a permissible construction of the statute"—that is, if the rule is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843, 844. The SEC's effort to alchemize "manufacture" into "contract to manufacture" cannot clear even this low hurdle.

A. For starters, the SEC exercised no discretion to which this court could defer. In explaining how it decided to subject those who only "contract to manufacture" to the disclosure requirements, the SEC did nothing more than claim to have divined the intent of Congress. See 77 Fed. Reg. at 56,291 ("[W]e believe the statutory intent to include issuers that contract to manufacture their products is clear . . . . [T]he inclusion of products that are 'contracted to be manufactured' in [a separate] requirement indicates that Congress intended [the statute] to apply to such products . . . . [O]ur reading is more consistent with the statute than the alternative reading . . . ."). In other words, the SEC weighed no costs, considered

no empirical evidence, and applied no expertise about markets or disclosure. It just offered an erroneous reading of the statute.

Where, as here, the agency does nothing more than interpret a statute, *Chevron* deference drops to its nadir. This sort of agency action "involves no special administrative expertise that a court does not possess." *FedEx Home Delivery* v. *NLRB*, 563 F.3d 492, 496 (D.C. Cir. 2009) (quotation marks omitted); see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("[C]ourts will defer more when the agency has special expertise that it can bring to bear."). To the contrary, it has long been "the province and duty of the judicial department" to construe the governing law. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Deference is reserved for challenges to agency action that "really center[] on the wisdom of the agency's policy." *Chevron*, 467 U.S. at 866. This is not such a challenge.

And courts have not hesitated to strike down agency rules on purely interpretive grounds even after determining that the statute is ambiguous. For example, in *Whitman* v. *American Trucking Associations*, the EPA enacted a rule claiming to interpret one section of a statute when another, narrower section also applied. 531 U.S. 457, 481-83 (2001). The Supreme Court held that the two sections of the statute were ambiguous. *Id.* at 484. Nonetheless, it rejected the EPA's reading, as agencies "may not construe the statute in a way that completely nullifies textually

applicable provisions." *Id.* at 485. This case is on all fours. The operative section (78m(p)(2)(B)) is narrower; it applies only to manufacturers. Yet the SEC has helped itself to the vastly broader "manufactured or contracted to be manufactured" language in section 78m(p)(1)(A)(ii). No amount of deference can countenance such a construction, especially where the agency has done nothing more than read the statute.

B. Had the SEC looked beyond its faulty reading of Congress's words—that is, had it "consider[ed] the relevant factors" and exercised its judgment, see *Judulang* v. *Holder*, 132 S. Ct. 476, 484 (2011) (quotation marks omitted)—it would have recognized that the rule's extension to those who contract to manufacture is untenable.

It is no accident that the statute's disclosure obligation falls exclusively on manufacturers. Manufacturers are far better poised to shed light on the parts and components that go into their products than are others in the supply chain, including wholesalers, distributors, and retailers.

By contrast, retailers are much less equipped to disclose information about raw materials in the products that they sell, particularly with respect to minerals that their suppliers (or their suppliers' suppliers) select for technical or other reasons. In its ordinary business, a retailer does not—and has no reason to—know all of the production and sourcing decisions that manufacturers make in fulfilling

requirements for a particular product. Instead, retailers typically rely on manufacturers to address technical, legal, and other such specifics.

Nor does a retailer's business put it in proximate communication with any entity from which it might learn information about the minerals in a product on a first-hand basis. A handful of retailers might be able to impose on their direct, first-tier suppliers certain requirements such as product safety and quality assurance. But most retailers will lack even this limited influence, which is constrained by many factors, including their size, their market power, and how far removed they are from the ultimate sources of their products' components, not to mention a lack of contractual privity to enforce requirements on entities further down the supply chain.

Finished-product testing is really the only reliable tool for retailers to hold private-label manufacturers accountable. For example, this enables retailers to comply with various laws about the product itself: Retailers can test (or, more likely, use a third-party firm to test) a product to ensure that it complies with FCC Part 15 emission regulations, or that the lead content of a toy complies with 16 C.F.R. Part 1303. But the finished product is of little help in complying with the SEC's rule, which requires companies to disclose the origin of chemically indistinguishable minerals. No amount of testing can tell a retailer where the gold or tin in a product came from, or whether the production process involved gold or tin from

a particular source, or whether the sale of the raw material furthered armed conflict in the DRC.

None of this changes when a retailer custom-orders a product to sell under its own label. Such contracts are, in essence, sales contracts. To be sure, a retailer buying goods to sell under its own name might require certain specifications, to ensure that the end product is of a certain quality or possesses particular characteristics.[4] But, in so doing, the retailer no more assumes the traits of a manufacturer than ordinary people do when they custom-order furniture or a new car. Retailers contracting for the manufacture of private-label goods are simply doing the same thing on a larger scale. That does not endow them with the otherwise-absent capacity to ascertain the source of the raw materials. And that is particularly true for large retailers, which may have thousands of different private-label products, many of which change frequently with trends or seasonality. Congress did not assign such an impossible burden.

To make matters worse, the SEC imposed these considerable costs without identifying any concomitant benefits, such as showing that the extension of the rule to non-manufacturers would further hinder armed groups. Because it did not analyze the costs and benefits, the SEC "fail[ed] to apprise itself . . . of the economic consequences of a proposed regulation," which "makes promulgation of the

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[4] For this reason, a private-label contract might go beyond terms such as price and insurance. See 77 Fed. Reg. at 56,291.

rule arbitrary and capricious and not in accordance with law." *Bus. Roundtable* v. *SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quotation marks omitted).

Thus, even if the statute is deemed ambiguous, the SEC's inclusion of those who only "contract to manufacture" must go. It fails at *Chevron* step two because it does not "accomplish[] Congress's objectives," which are evident in the statute itself. *Coal. for Common Sense in Gov't Procurement* v. *United States*, 707 F.3d 311, 317 (D.C. Cir. 2013). And, as just described, it does not even purport to "account[] for market realities," *ibid.*, nor is there any way that it could.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court to the extent that it validated the inclusion of products "contracted . . . to be manufactured" in 17 C.F.R. § 240.13p-1.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with the type-volume requirement of Fed. R. App. P. 29(d) because this brief contains 4,368 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1); and

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CERTIFICATE OF SERVICE

I hereby certify that, on September 18, 2013, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF, and caused additional copies to be served upon counsel for all parties by CM/ECF and by email.

Dated: September 18, 2013

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