IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE, Plaintiffs, vs. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant, AMNESTY INTERNATIONAL OF THE USA, AMNESTY INTERNATIONAL LTD., Intervenors-Defendants.	No. 1:13-cv-00635-RLW

RESPONSE TO SEC NOTICE OF SUPPLEMENTAL AUTHORITY

On June 28, 2013, the SEC filed a notice of supplemental authority, drawing the Court's attention to the D.C. Circuit's recent decision in *ICI v. CFTC*, No. 12-5413, 2013 WL 3185090 (June 25, 2013). The SEC contends that *ICI* supports its position that its "decision not to quantify the benefits of the conflict minerals rule was reasonable." SEC Notice of Supplemental Authority at 1. But the SEC did not simply fail to *quantify* the benefits of the conflict minerals rule. It failed to provide *any* analysis of the benefits whatsoever, either qualitative or quantitative, and admitted it could not determine whether there would be benefits *at all*. *ICI* is therefore not on point.

In *ICI*, the agency provided a qualitative analysis of the benefits of the challenged rule, and concluded that the rule would be beneficial because it would both "fill gaps in current regulations," Slip Op. at 12 (2013 WL 3185090, at *6), and provide information that "would be useful to CFTC

and FSOC in performing their statutory mandates of regulating commodities trading and identifying systemic financial risks," *id.* at 7 (2013 WL 3185090, at *4); *see id.* at 14 n.1 (2013 WL 3185090, at *8 n.1) ("[T]he benefits upon which the Commission relies are not hypothetical."). It was of no moment that the agency had "failed to put a precise number on the benefit," because agencies are not required to "measure the immeasurable." *Id.* at 15 (2013 WL 3185090, at *8).

Here, by contrast, the SEC did not merely "fail[] to put a precise number on the benefit." *Id.* As explained in plaintiffs' reply brief, "the Commission not only failed to *quantify* the benefits, it failed to assess whether there would *be* any benefits, including from its regulatory choices." Reply Br. at 4. Moreover, plaintiffs do not fault the SEC for failing to "measure the immeasurable." Slip Op. at 15 (2013 WL 3185090, at *8). To the contrary, as the SEC concedes, there was evidence in the record concerning benefits: The SEC "received a number of comments fiercely debating whether the disclosure regime would actually yield ... a benefit" to the DRC, SEC Br. at 24, or would instead "exacerbat[e] conditions," *id.* at 22 n.3. Yet the SEC did not analyze this information and reach a conclusion as to whether the regulatory regime—and, in particular, its own choices among regulatory alternatives—would further Congress's purpose of promoting peace and security in the DRC, or would instead worsen the humanitarian situation by perpetuating a *de facto* embargo. Instead, the agency simply asserted that it was "not able to assess how effective Section 1502 will be in achieving those benefits." 77 F.R. 56,335, 56,350. The SEC's failure to analyze whether its costly regulatory choices will lead to any benefits renders the rule arbitrary and capricious, in violation of the agency's heightened obligations under the Securities Exchange Act to consider the economic impact of its actions and to avoid unnecessary burdens on competition. *Bus. Roundtable v. SEC*, 590 F.3d 1144, 1148 (D.C. Cir. 2011); 15 U.S.C. §§ 78c(f), 78w(a)(2).

Dated: June 28, 2013

Respectfully submitted,

s/ Peter D. Keisler

Peter D. Keisler, Bar No. 417204
Counsel of Record
Jonathan F. Cohn, Bar No. 476551
Sidley Austin LLP
1501 K St., NW
Washington, DC 20005
202.736.8027
Counsel for Plaintiffs the National Association of Manufacturers, the Chamber of Commerce of the United States of America, and Business Roundtable

Of Counsel:
Rachel L. Brand
Steven Lehotsky
National Chamber Litigation Center, Inc.
1615 H St., NW
Washington, DC 20062
202.463.5337
Counsel for Plaintiff the Chamber of Commerce of the United States of America

Of Counsel:
Quentin Riegel
National Association of Manufacturers
733 10th St., NW
Suite 700
Washington, DC 20001
202.637.3000
Counsel for Plaintiff the National Association of Manufacturers

Of Counsel:
Maria Ghazal
Business Roundtable
300 New Jersey Ave., NW
Suite 800
Washington, DC 20001
202.496.3268
Counsel for Plaintiff Business Roundtable

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of June, 2013, I caused the foregoing Response to SEC Notice of Supplemental Authority to be filed with the Clerk of Court for the United States District Court for the District of Columbia using the CM/ECF system. Service was accomplished on all parties via the Court's CM/ECF system.

s/ Peter D. Keisler

Peter D. Keisler