U.S. Chamber of Commerce

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July 11, 2012

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Proposed Rules on Conflict Minerals Release No. 34-063547; File No. S7-40-10, RIN 3235-AK84

Dear Ms. Murphy:

The U.S. Chamber of Commerce ("Chamber") is the World's largest business federation representing the interests of over three million companies of every size, sector and region.

On July 2, 2012 the Securities and Exchange Commission ("SEC") issued a Sunshine Act Notice of an open meeting on August 22, 2012 to adopt rules to implement section 1502 ("proposed Conflict Minerals Rule"). While the Chamber supports the fundamental goal, as embodied in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), of preventing the exploitation of conflict minerals for the purpose of financing human rights violations within the Democratic Republic of the Congo ("DRC"), the Chamber believes that important questions raised during the comment period remain unresolved.

For this reason the Chamber respectfully requests that the SEC re-propose this rule and reopen the comment period to address these important questions. Adoption of a final rule without resolving these fundamental deficiencies would result in a flawed rule that has a substantial adverse impact on small businesses and on capital formation. Furthermore, a rule adopted through a flawed process that does not comply with the requirements of the Regulatory Flexibility Act and the Small Business Regulatory Enforcement and Fairness Act ("SBREFA") is unlikely to withstand judicial scrutiny.

The Chamber's concerns are listed in detail below.

Discussion

In passing the Dodd-Frank Act, legislation designed to enact financial regulatory reform, Congress included Section 1502 which creates a reporting mechanism for companies to disclose if they are using cassiterite, columbite-tantalite, gold, wolframite, or their derivatives and the origin of those materials. The SEC released the proposed Conflict Minerals Rule on December 15, 2010 with the comment period originally ending on January 31, 2011 and finally extended until March 2, 2012.

The Chamber and others provided comments that outlined serious concerns, flaws and potential procedural errors with the proposed rule.[1] Among those concerns are the following:

1. Impact upon Small Businesses and Other Private Companies

The SEC estimated that the proposed Conflict Minerals Rule would impact between 1,199 and 5,551 companies. However, as the Chamber has noted this estimate is limited to those public companies directly subject to the proposed Conflict Minerals Rule. However the impact and cost of this rule extends far beyond reporting companies. As proposed this rule will impose significant costs on vendors and suppliers to public companies. An individual manufacturing company may have as many as 60,000 or 100,000 separate vendors, including small private businesses.

The SEC estimate fails to reflect the costs to private companies that serve as suppliers and vendors to reporting companies, as well as the costs to other reporting companies and service as suppliers and vendors to companies that are directly impacted by the proposed Rule.

The SEC's estimate only reflects the tip of the iceberg and is therefore fundamentally deficient.

The release of the proposed Conflict Minerals Rule failed to take into account the costs and burdens upon these small businesses that are not reporting companies. This deficiency was highlighted by the Small Business Administration ("SBA"), which wrote to

[1] The Chamber filed three separate comment letters with the SEC on the proposed Conflict Minerals Rules on February 28, 2011, July 18, 2011 and November 29, 2011.

the SEC on October 25, 2011. As the SBA letter explained, because of this fundamental flaw in the proposing release, the proposed Conflict Minerals rule fails to comply with the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). For this reason the SBA requested that the SEC publish in the *Federal Register* an amended initial regulatory flexibility analysis for the proposed rule to reflect the costs of the proposed rule and the number of small businesses impacted.

Compliance with the Regulatory Flexibility Act requires more than an estimation of the costs of the rule on small businesses (not merely those public companies that will have a public disclosure reporting obligation). The proposal in its present form may have a direct negative impact on the ability of smaller private companies to compete for business. In some cases smaller companies that are unable to absorb the potentially substantial costs of building an internal tracking mechanism may lose business to larger competitors. Beyond these legal requirements, at a time when the economic health of the United States is in jeopardy, government agencies should not adopt rules that unfairly disadvantage small businesses, a primary creator of new jobs.

To date, it is our understanding that no such analysis has been conducted or published in the *Federal Register*.

2. Cost-Benefit Analysis

In releasing the proposed Conflict Minerals Rule, the SEC estimated the compliance costs at $71,243,000.

Because of the supply chain complexities, as well as the scientific and metallurgical issues involved, the Chamber stated that this analysis was not realistic and that the SEC should disclose its rationale for this estimate, provide a new cost-benefit analysis and withdraw the proposed rule. The Chamber also requested that the SEC voluntarily submitted the proposed Conflict Minerals Rule to the Office of Information and Regulatory Affairs ("OIRA") for an enhanced regulatory review.

The failure of the SEC to consider the true impact of the proposed rule on all businesses materially undermines its analysis and resulting estimate of the actual cost of the proposed rule. In its comment letter the National Association of Manufacturers ("NAM") considered the costs for vendors and suppliers and estimated the compliance costs at

between $9 billion and $16 billion dollars.[2] Similarly, professors at the Payson Center for International Development at the Tulane University School of Law also prepared a cost analysis of the proposed rule that similarly concluded that the true cost of the rule is far greater than the estimate in the proposing release ("Payson Center Study"). The Payson Center Study estimated total costs of 7.93 billion dollars. This estimate found that "the bulk of the total costs—$5.1 billion or 65%—would be incurred by the suppliers (the group not included in SEC's analysis), while the smaller portion of the total—$2.8 billion dollars or 35%—would be carried by the issuers."[3] This disparity between the SEC estimates and those provided as part of the rulemaking record is of such note and import that the SEC should review its proposal and conduct a new cost-benefit analysis.[4]

We believe that a properly structured SEC cost-benefit analysis will in all likelihood have important consequences for the rule's status as a "major rule". Under SBREFA, any rule with a total impact of more than 100 million dollars is a major rule and becomes subject to the possibility of Congressional review.

To date, no newly revised cost-benefit analysis has been provided though there is ample evidence on record demonstrating the failure of the SEC to determine the scope, burdens and costs of the proposed Conflict Minerals Rules.

3. Safe Harbor and de minimis Standard

The challenges inherent in tracking a mineral supply chain primarily arise upstream from the company's operations and are often outside of a company's control. A company should only be subject to the proposed Conflict Minerals Rules to the extent that it exercises a significant level of direct control over the manufacturing of its branded goods, including directly sourcing or procuring raw materials for the manufacture of those goods.

The reporting burden could be improved by including safe harbor and de minimis standards. Safe harbor standards could enable companies distant in the supply chain that have little or no view of, or control over the acquisition of conflict minerals to comply by adopting defined contractual procurement practices, without also being subject to undue and

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[2] It should also be noted that Claigan filed with the SEC comment record for the proposed Conflict Minerals Rule an estimate that the compliance costs would be over $387 million dollars. While the Chamber disagrees with the Claigan analysis and methodology used and agrees with the NAM estimates, it should be noted that even the Claigan estimates are over five times higher than the SEC's estimate and also put the proposed Conflict Minerals Rule above the level needed for the rulemaking to be considered economically significant and a "major rule".

[3] *See* Tulane University Law School Payson Center for International Development, *A Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a 3rd Model, in view of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act*, at page 35. This study was also filed in the comment record of the proposed Conflict Minerals Rule on October 25, 2011.

[4] *See* ***Business Roundtable and U.S. Chamber of Commerce v. Securities and Exchange Commission,*** 647 F. 3rd. 1144 (2011).

impractical audit or reporting requirements. Additionally, the failure to provide a *de minimis* standard would trigger meaningless disclosure requirements even if only trace amounts of a mineral or its derivative are used in a product.

Shareholders may also be harmed when some companies are forced to make difficult judgments concerning how to report inconclusive data. Because of the inherent problems many companies will face in tracking their supply chain, they may not be able to reach a definitive conclusion as to whether their minerals were derived from a tainted source. Unable to provide unequivocal proof of the negative, many companies would have to report potentially unjustifiably negative information that may not be accurate to the detriment of investors.

4. Recycled Material

Many manufacturers use scrap as their starting material to produce virtually pure material and minerals. This provides materials at a lower cost and it is almost impossible to determine the origin of the material derived from scrap.

The proposed Conflict Minerals Rule would appear to require users to trace recycled material back to the mines, thus limiting the market for all secondary smelters to customers outside the United States. This would have a negative impact on US manufacturers:

- Supply from secondary smelters would not be available to U.S. manufacturers, thus requiring U.S. companies to buy more expensive primary smelted minerals; and

- Mineral supplies for US manufacturers would be reduced leading to a negative impact on availability, pricing, and competitiveness of U.S. companies.

By forcing U.S. manufacturers to use primarily smelted materials, the proposed rule will incentivize mining, obviating Congressional intent, while preventing companies from following policies that can lessen environmental concerns.

Issuers that purchase metals as raw material should be able to determine based on a reasonable inquiry if the metals are recycled or scrap. The same standard of "reasonable inquiry" for determining that the minerals did not originate from conflict mines in the DRC or adjoining countries should apply to recycled materials. Should the minerals be determined to be recycled or scrap minerals, the issuer should be permitted to end the inquiry at that point—without submitting a Conflict Minerals Report and undertaking the

associated audit. Under such a system, issuers would remain accountable to the SEC for providing fraudulent information and thus cannot simply state that their metals are recycled without inquiring of the origin.

Conclusion

The Conflict Mineral Rules were first proposed over 18 months ago and the SEC has received many comment letters, several raising substantive concerns with the proposal and the procedures for its considerations. The Chamber believes that these issues must be addressed for the Conflict Minerals Rule to be finalized. A failure to comply fully with the legal requirements for agency rulemaking will directly undermine the quality and efficacy of the rule. Accordingly, the Chamber respectfully requests that the SEC re-propose the Conflict Minerals Rule to address the substantive issues raised during the consideration of the proposal.

Thank you for your consideration of this matter and we are happy to address any questions that you may have regarding this request.

Sincerely,

David Hirschmann
President and CEO
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

Myron Brilliant
Senior Vice President
International Division
U.S. Chamber of Commerce

cc: The Honorable Mary Schapiro, Securities and Exchange Commission
The Honorable Elisse Walter, Securities and Exchange Commission
The Honorable Luis Aguilar, Securities and Exchange Commission
The Honorable Troy Paredes, Securities and Exchange Commission
The Honorable Daniel Gallagher, Securities and Exchange Commission