RETAIL INDUSTRY LEADERS ASSOCIATION
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The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Schapiro:

The Securities and Exchange Commission has invited comments as the Commission sets out to write rules to implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"). The Retail Industry Leaders Association respectfully submits the following comments with respect to rulemaking under Section 1502 of the Dodd-Frank Act, relating to conflict minerals.

By way of background, RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include the largest and fastest growing companies in the retail industry--retailers, product manufacturers, and service suppliers--which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

At the outset, RILA confirms our strong support for the underlying goal of Section 1502 to prevent money from the sale of conflict minerals from driving the atrocities occurring in the Democratic Republic of the Congo (DRC). RILA members have long supported other initiatives to remove inputs mined under similar circumstances such as the No Dirty Gold and the Burma (Myanmar) Gems programs. RILA notes that international organizations such as the Organization for Economic Cooperation and Development (OECD) are actively working to develop global mechanisms to effectively combat trade in conflict minerals and to create a system for responsible sourcing of raw materials. As another example, the Responsible Jewellery Council has established robust and auditable standards of ethical, social and environmental practices, including provisions on responsible mining. RILA urges the Commission to be mindful of these international efforts and to allow sufficient flexibility for companies to leverage them as they build compliance programs instead of ponder how to meet the requirements of divergent international recommendations and a U.S. law.

Recognizing these separate initiatives, RILA urges the Commission to ensure that the new mandatory requirements under the Dodd-Frank Act to introduce transparency into the trade flows of conflict minerals are narrowly tailored so that they continue to support legitimate trade and enhance, rather than conflict with, other ongoing efforts.

Section 1502 of the Dodd-Frank Act was largely drafted and enacted into law with minimal consultation and outreach to industry to understand how the requirements could be implemented across supply chains, and therefore it is critical that the Commission implement the new law in a manner that is both feasible and effective. It has also been noted by several commentators that Section 1502 was not discussed by Congress to ensure that the provisions are reasonable. To do this, RILA believes the Commission should clarify some key terms in the legislation to better define who is subject to the new reporting requirement, and to clarify the requirements for chain of custody, certification and private sector audits.

RILA also notes that educating supply chains and introducing more transparency from the mine to the finished good is very burdensome and will take significant time. RILA believes that at least 36 months after the regulations are promulgated will be necessary to allow sufficient time for manufacturers to be able to gain the level of visibility necessary to report.

Manufacturers

Under Section 1502 of the Dodd-Frank Act, persons required to file reports with the Commission are those entities that are required to file with the SEC pursuant to the Securities Exchange Act of 1934 and where "conflict minerals are necessary to the functionality or production of a product *manufactured by* such person." (emphasis added) The words "manufactured by" were intentionally inserted during the legislative process to clarify that companies that are simply sellers or that do not exert direct, substantial control over the production of the product will be exempt from the new law's reporting requirements.

Meanwhile, the terms "manufactured by" and "manufacturer" are not defined. RILA proposes the following clarification of what persons should be considered manufacturers and therefore subject to the conflict minerals reporting requirement:

> The persons who are required to file a conflict minerals report with the Commission are those that actually manufacture or that exert direct, substantial control over the production of the product, part or component for which conflict minerals are necessary to the functionality or production of such product, part or component. Companies that are not manufacturers and that do not exercise direct, substantial control over the production or the selection of materials are not required to file a report under Section 1502. The placement of an order for a product, part or component does not constitute the exertion of direct, substantial control over the production of such product, part or component.

When defining who is required to report, the distinction that the Commission needs to make is one based on whether the company actually manufactures or exerts, substantial direct control over the production of the product. The Commission should not define who is subject to the reporting requirement simply by using terms such as retailer, reseller, private labeler or manufacturer because these terms are imprecise and each may encompass a range of supply chain models. Only companies that actually manufacture and that purchase materials and components to be used in such manufacturing have sufficient leverage to exert direct, substantial control over the production of the product. These manufacturers will be able to gather information regarding the materials used in the product or manufacturing of the product and be able to exercise monitoring and oversight over the source of the input materials. In this context, "direct, substantial control" would mean complete or partial ownership of the actual manufacturer, or dictating the source of the mineral as part of the technical specifications and drawings.

RILA also believes it is important for the SEC to distinguish between exerting control over only the design of the product and exerting direct, substantial control over the production of the product, which includes the ability to control the sourcing of raw materials or components that make up a finished good. For instance, a retailer may provide a design for a private label product and insist that the item be made according to certain specifications that include a certain type/grade of inputs. But this specification alone should not be sufficient to be considered to exert direct control over the production of the product. In this example, the retailer would not dictate where the manufacturer would or should obtain its ore or alloys to be used in the product or component.

Due Diligence

Section 1502 requires filers to describe the measures they have taken to exercise due diligence over the source and chain of custody of minerals mined in conflict regions. The term "due diligence" is purposefully not defined, and RILA believes the Commission should also allow the same flexibility in the regulations to allow companies to determine the best means to exercise due diligence. The Commission should not define or set a standard for the specifics of due diligence, except to say that due diligence requires actions that a reasonable person would take under the same or similar circumstances. Because no two supply chains are identical, each filer needs flexibility to develop a process that is appropriate for its supply chain and products. RILA proposes the following clarification of due diligence:

> To fulfill the due diligence requirement, companies should take actions that a reasonable person would take under the same or similar circumstances.

Flexibility in the definition of due diligence allows continued work with the international community to develop global supply chain solutions. It also provides for redefinition of the

standard when and if the situation in the DRC changes and hopefully allows for cooperative measures with other government agencies and non-governmental organizations. For example, as noted above, the OECD is currently drafting guidance to clarify how companies can identify and better manage risks throughout the entire mineral supply chain. This process will include a pilot program to ensure feasibility and will conclude long after the Commission is required to promulgate regulations. Therefore, RILA urges the Commission to allow flexibility so companies can eventually look to the OECD guidance for determining reliable due diligence measures.

Chain of Custody

Section 1502 requires manufacturers to report to the Commission the measures they have taken to exercise due diligence on the source and chain of custody of minerals. A chain of custody requirement can be exceptionally costly and burdensome, and the Commission should narrowly define the requirement for due diligence over "chain of custody."

RILA recognizes that the core of the problem of conflict minerals is in conflict mines. At the same time, the mine of origin is almost without fail very far removed in global supply chains from the manufacturer required to report under the law. Moreover, global supply chains are not transparent and linear; rather, they are complex, multi-layered networks of entities, such as trading companies, consolidators, OEM manufacturers, finishers, and numerous input providers. In a global economy, products are sourced and consolidated from multiple countries, multiple entities, and through many channels of distribution.

RILA proposes the following clarification of the chain of custody requirement:

> The requirement for companies to report to the Commission the measures they have taken to exercise due diligence on the source and chain of custody of minerals should mean that persons covered by the Act will report on the measures they have taken to ensure that the mineral processors involved in their supply chains do not source minerals from conflict mines. The requirement to report on due diligence on the source and chain of custody of the minerals does not require a chain of custody over the processed products (such as metals and products/components thereof) that are derived from the minerals and that flow through the filer's entire supply chain. The Commission recognizes that once minerals have been processed into metals, individual lots of minerals can no longer be isolated.

RILA also notes that manufacturers will need U.S. Government help in identifying mineral processors that can be certified as not using conflict minerals. It is imperative that the State and Commerce Departments make publicly available the respective maps their agencies are tasked to create by the legislation. Specifically, the State Department should publish its map identifying

conflict mines and the Commerce Department should publish its maps of smelters for manufacturers subject to the regulation to rely upon when developing their due diligence plans.

The Phrase "or contracted to be manufactured"

Section 13(p)(2) of the Securities Exchange Act of 1934, as amended by Section 1502 of the Dodd-Frank Act is specific in describing the persons that are required to file reports to the Commission on conflict minerals. Such persons are those where "conflict minerals are necessary to the functionality or production of a product *manufactured by* such person." (emphasis added). As noted above, the words "manufactured by" were intentionally added by Congress to narrow the scope of persons who are required to report to the Commission. See, for example, an earlier version of Senator Brownback's amendment on conflict minerals (at page 4, lines 3-4) that says ". . . is necessary to the functionality or production of a product *of* such person" (emphasis added). The word "of" in the earlier version was replaced with the words "manufactured by" in the final text to clarify the scope of the reporting requirement should include only manufacturers and not other parties in the supply chain such as retailers.

Meanwhile, Section 13(p)(1) of the Securities Exchange Act of 1934, as amended by Section 1502 of the Dodd-Frank Act, separately describes the required content of the reports and includes the term "contracted to be manufactured." The Commission should maintain the separation of these terms in the law and ensure that the phrase "or contracted to be manufactured" in Section 13(p)(1) is not used to expand the scope of persons required to report on conflict minerals as defined in Section 13(p)(2). As noted above, RILA believes the persons subject to the reporting requirement should be only those persons who actually manufacture or exert direct, substantial control over the production of the product, part or component.

Certification

Section 1502 requires persons subject to the reporting requirement to certify the audit that is included in the report. RILA proposes the following interpretation of the certification requirement:

> The certification requirement is intended to be a representation, by a senior officer of the filer, that the report accurately represented the manner in which the filer exercised due diligence regarding their use of conflict metals.

Independent Private Sector Audit

Section 1502 requires that the report on due diligence measures includes a requirement for "an independent private sector audit of such report." RILA proposes the following interpretation of the independent private sector audit requirement:

The independent private sector audit referred to in this provision is an audit of the accuracy of the filer's report on its own due diligence process, not an independent audit of the filer's supply chain.

Conclusion

RILA appreciates this opportunity to provide comments on implementation of the conflict mineral provisions in Section 1502 of the Dodd-Frank Act. RILA supports efforts to combat trade in conflict minerals and to stop the atrocities in the DRC. We believe those goals can be achieved without unduly burdening companies and undermining legitimate commerce. Please do not hesitate to contact me if you have any questions at (703) 600-2046 or by email at stephanie.lester@rila.org.

Sincerely,

Stephanie Lester
Vice President, International Trade