Personal Care Products Council
Committed to Safety, Quality & Innovation

March 1, 2011

VIA ELECTRONIC MAIL

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100F Street, N.E.
Washington, D.C. 20549
rule-comments@sec.gov

Re: Proposed Rules on Conflict Minerals Release No. 34-63547; File No. S7-40-10, RIN 3235-AK84

Dear Secretary Murphy:

The Personal Care Products Council ("Council")[1] is pleased to submit comments on the proposed regulations regarding conflict minerals.[2] Our member companies are involved in the manufacture and distribution of over-the-counter (OTC) drug products, cosmetics, toiletries, fragrances, and ingredients throughout the United States and abroad, and our products, processes or packaging may contain minerals covered by these regulations.

[1] Based in Washington, D.C., the Council is the leading national trade association representing the $250 billion global cosmetic and personal care products industry. Founded in 1894, the Council's more than 600 member companies manufacture, distribute, and supply the vast majority of finished personal care products marketed in the United States. As the makers of a diverse range of products that millions of consumers rely on every day, from sunscreens, toothpaste, and shampoo to moisturizer, lipstick, and fragrance, member companies are global leaders committed to product safety, quality, and innovation. The Council was previously known as the Cosmetic, Toiletry, and Fragrance Association (CTFA).

[2] *See* SEC Rel. No. 34-63547 (Dec. 15, 2010), accessible at http://sec.gov/rules/proposed/2010/34-63547.pdf; SEC Rel. No. 33-9164 (Dec. 15, 2010), accessible at http://sec.gov/rules/proposed/2010/33-9164.pdf; SEC Rel. No. 34-63549 (Dec. 15, 2010), accessible at http://sec.gov/rules/proposed/2010/34-63549.pdf.

The rules being proposed by the Securities and Exchange Commission (Commission) govern specialized disclosure obligations relating to (1) conflict minerals, (2) mine safety and (3) payments to governments by companies engaged in resource extraction.[3] Although the mine safety and resource extraction payments provisions are generally applicable only to companies in those industries, the conflict minerals provision will have much broader applicability, and many of our member companies could be impacted. As such, these comments are limited to the proposed rules regarding conflict minerals, implementing section 1502 of the Dodd-Frank Act.

The Council supports the fundamental goal of these regulations to prevent the exploitation of conflict minerals for the purpose of financing armed conflict and human rights violations within the Democratic Republic of the Congo (DRC). Nevertheless, it is similarly important that the regulations be narrowly tailored to avoid burdening companies with unnecessary disclosure obligations, while failing to advance the laudable goals of the regulations.

Discussion

The proposed regulations reflect an effort by the Commission to develop a workable disclosure framework for companies, consider comments submitted in advance of the proposed rules, and seek further input on some complex questions. Recognizing that the Commission is constrained by certain statutory mandates, the Council will restrict its comments to the open questions posed in the rulemaking notice. These are addressed in turn below:

Question 1:

Should our reporting standards, as proposed, apply to all conflict minerals equally?

Answer:

No. The Council believes that the reporting standards should apply only to the specific minerals identified by the Commission in the proposed rule; namely, cassiterite, columbite-tantalite,

[3] The proposed rules implement Sections 1502, 1503 and 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203), which added disclosure provisions to Section 13 of the Securities Exchange Act of 1934.

gold and wolframite. It should also apply only to the derivatives of these minerals, identified by the Commission in the proposed rule; namely, tin, tantalum, gold and tungsten.

To avoid any ambiguity, the agency should remove language stating that "any other mineral" identified by the Secretary of State to be financing conflict in the DRC is deemed a conflict mineral. Instead, there should be a separate provision within the proposed rule – apart from the definition of "conflict mineral" – allowing the Secretary of State to amend the list and add additional minerals, provided such actions comport with the Administrative Procedure Act and allow for public notice and comment. Any such additions should allow for a sufficient transition of at least one fiscal year for affected companies to have time to analyze their supply chains to determine whether any changes need to be made.

Question 6:

Should we require that all individuals and entities, regardless of whether they are reporting issuers, private companies, or individuals who manufacture products for which conflict minerals are necessary to the functionality or production of the products, provide the conflict minerals disclosure and, if necessary, a Conflict Minerals Report?

Answer:

The proposed rules currently apply to any issuer that files reports with the Commission under the Securities Exchange Act, provided that the issuer is a ''person described'' under the Conflict Minerals Provision. The Conflict Minerals Provision defines a ''person described'' as one for whom conflict minerals are "necessary to the functionality or production of a product manufactured by such person."

This provision, however, can be read potentially to apply to any company, including companies that are not subject to Commission reporting requirements, or individuals, so long as conflict minerals are necessary to the functionality or production of a product manufactured by that entity or individual. It should not apply to private companies or individuals.

Question 10:

Should our rules, as proposed, apply both to issuers that manufacture and issuers that contract to manufacture products in which conflict minerals are necessary to the functionality or production of those products?

Answer:

In order to achieve the goal of the conflict minerals provision, every entity expressly calling for the use of conflict minerals, which are "necessary to the functionality or production of a product", should be covered by this rule. This includes not just issuers that manufacturer but also issuers that contract to manufacture such products.

Nevertheless, entities that contract to manufacture a product containing a conflict mineral(s), should be able to reasonably rely on certifications from their supply chain that such a mineral or derivative does not originate from the DRC. Such certifications should be sufficient to satisfy an entity's obligation to identify a mineral or derivative's country-of-origin.

Question 11:

Should we require a minimum level of influence, involvement, or control over the manufacturing process before an issuer must comply with our proposed rules?

Answer:

Yes. The only reasonable construction of the rule would be to make reporting issuers obtain conflict mineral information from direct suppliers, over whom a reporting issuer might have at least some minimum influence.

A reporting issuer that does not explicitly call for direct suppliers to utilize conflict minerals or derivatives should not be required to report. If a reporting issuer does require a direct supplier to utilize conflict minerals, then the issuer should be required to report *only as to that direct supplier.* To make the reporting issuer responsible for the entire supply, over which it may have little or no control, would be highly untenable and overly burdensome. Given the logistical impracticalities and patent unfairness inherent in such an approach, the Council urges the Commission to limit the reporting issuer's obligation to report to direct suppliers over which it has some minimum level of control.

Question 16:

Should our rules define the phrase ''necessary to the functionality or production of a product,'' or is that phrase sufficiently clear without a definition? If our rules should define the phrase, how should it be defined?

Answer:

Yes, the phrase "necessary to the functionality or production of a product" should be defined in the rules, and limited to cover only conflict minerals which are intentionally added. This would be consistent with the congressional intent behind this provision of the Dodd-Frank Act, which was to exclude naturally occurring or unintentionally added conflict minerals or derivatives:

> *Since it is the policy of Section 1502 to require transparency of all sourcing of conflict minerals from the DRC and its adjoining countries, we used the phrase ["necessary to the functionality or production of a product"] to include all uses of conflict minerals coming from DRC – except those that are "naturally occurring" or "unintentionally included" in the product.*[4] *(Emphasis added).*

By clarifying the phrase in this way, there will be less chance for confusion. It also avoids the needless complexities of assessing the "financial success" or "marketability" of a product – both highly subjective concepts – when determining whether a mineral is "necessary" to that product.

In short, an issuer that intentionally adds conflict minerals to a manufacturing or production process should be responsible for disclosing whether those conflict minerals originated in the DRC countries.

Question 20:

Should we delineate the phrase ''necessary to the production'' to mean that a conflict mineral would be necessary to a product's production only if the conflict mineral is intentionally included in a product's production process even if that conflict mineral is not ultimately included in the final product because it was removed or washed away prior to the completion of the production process?

[4] Letter from U.S. Senator Richard J. Durbin and U.S. Congressman Jim McDermott, to Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission (October 4, 2010).

Answer:

Yes. This is reasonable construction of the phrase, provided the Commission limits it to the reporting issuer. As noted in Answer 16 above, the test should be whether a reporting issuer has intentionally added a conflict mineral or derivative to a product or process.

By doing so, the onus for disclosing to the Commission is squarely on the reporting issuer that specifies the use of conflict minerals in its products or processes.

Question 33:

Is a reasonable country of origin inquiry standard an appropriate standard for determining whether an issuer's conflict minerals originated in the DRC countries for purposes of our rules implementing the Conflict Minerals Provision? If not, what other standard would be appropriate? Rather than requiring a reasonable country of origin inquiry as proposed, should our rules mandate that the standard for making the supply chain determinations, as set forth in Exchange Act Sections 13(p)(1)(A)(i) and (ii) (and described below), also applies to the determination as to whether an issuer's conflict minerals originated in the DRC countries? Should we provide additional guidance about what would constitute a reasonable country of origin inquiry in determining whether conflict minerals originated in the DRC countries?

Answer:

The Council strongly believes that the Commission should provide additional guidance as to what constitutes a "reasonable country of origin inquiry". In doing so, the Commission should, as noted above, allow reporting issuers that contract to manufacture a product containing a conflict mineral to reasonably rely on certifications from supply chain entities that such a mineral or derivative does not originate from the DRC. These certifications should be sufficient to satisfy an issuer's obligation to identify a mineral or derivative's country-of-origin under the terms of the rule.

The guidance should note that direct suppliers must notify reporting issuers of the country of origin of any conflict mineral explicitly called for in a product or process. To the extent that a direct supplier is unable to determine the country-of-origin of a conflict mineral or derivative, this should be disclosed, but no additional action should be required by the reporting issuer.

Question 35:

Should issuers be able to rely on reasonably reliable representations from their processing facilities, either directly or indirectly through their suppliers, to satisfy the reasonable country of origin inquiry standard? If so, should we provide additional guidance regarding what would constitute reasonably reliable representations and what type of guidance should we provide? If not, what would be a more appropriate requirement?

Answer:

Yes. See Answer 10 and 33 above. Reporting issuers should be allowed to rely on the reasonable certifications of direct suppliers as to a conflict minerals country-of-origin.

Question 56:

Should our rules, as proposed, require that a complete fiscal year begin and end before issuers are required to provide their initial disclosure or Conflict Minerals Report regarding their conflict minerals?"

Answer:

During the first full fiscal year that the rule is applicable, reporting issuers should be able to take actions to eliminate the use of conflict minerals sourced from the DRC, and if they do so, should not be obligated to report under Step 2 or Step 3. This would be the most equitable approach as it allows companies a reasonable time to end their use, if any, of conflict minerals, while further the ultimate goal of the rules.

Question 61:

We note it is possible issuers may have stockpiles of existing conflict minerals that they previously obtained. Do we adequately address issuers' disclosure and reporting obligations regarding their existing stockpiles of conflict minerals? If not, how can we address existing stockpiles of conflict minerals? Should our rules permit a transition period so that issuers would not have to provide any conflict minerals disclosure or report regarding any conflict mineral extracted before the date on which our rules are adopted? Alternatively, would the reasonable country of origin inquiry standard for determining the origin of the conflict minerals and the due diligence standard or guidance for determining the source and chain of

custody of the conflict minerals that originated in the DRC countries accomplish the same goal? For example, should issuers be required to inquire about the origin of their conflict minerals extracted before the date on which our rules are adopted? As another example, should issuers file a Conflict Minerals Report regarding conflict minerals that originated in the DRC countries before the date on which our rules are adopted?

Answer:

The Council strongly recommends that existing stockpiles of conflict minerals be exempt for these rules. Many companies maintain stockpiles of materials used in their products, including conflict minerals. Applying these rules retroactively to materials purchased before the final rules are promulgated would be unduly onerous to reporting issuers while doing nothing to further the stated goal of this rulemaking, namely deterring the financing of armed conflict in the DRC.

Should the Commission decide *not* to exempt existing stockpiles of conflict minerals, then the Council strongly recommends limiting application to the second full fiscal year after the final rule is adopted.

Question 62:

Should there be a de minimis threshold in our rules based on the amount of conflict minerals used by issuers in a particular product or in their overall enterprise? If so, what would be a proper threshold amount? Would this be consistent with the Conflict Minerals Provision?

Answer:

The Council believes there should be a *de minimis* threshold, and it should apply to materials intentionally added to a product or process.

If, however, the Commission decides not to limit these rules to those conflict minerals or derivatives intentionally added, the need for a *de minimis* threshold is even greater and should therefore be set high since the reporting issuer would be responsible for identifying materials it does not necessarily know are present.

Question 63:

Should our rules, as proposed, include an alternative approach for conflict minerals from recycled or scrap sources as proposed?

Answer:

The Council strongly recommends that recycled and scrap materials be exempt from these rules. Consider a reporting issuer that extracts metals from waste streams for use as a new feed-stock; or that recycles old products (manufactured or designed by another entity). Such sources or products could easily contain conflict minerals or mineral derivatives, but determining whether these came from the DRC would be close to impossible.

Recycling is both environmentally-friendly and a key component in sustainability. The Council believes that applying these rules to recycled and scrap materials would have a chilling effect on future recycling efforts by industry, and needlessly burden this important activity.

Additional Concerns

In its cost-benefit analysis, the Commission has estimated compliance costs to be upward of $71,243,000, and notes that the rule could impact as many as 6,000 companies, *even if they never use conflict minerals*. The cost-benefit analysis fails to show any real benefits to companies, their investors, the marketplace, or capital formation.

More importantly, the cost estimate seems absurdly low given the complexities of the issues involved and the proposed scope of the rules. Realistically, these costs could well be over $100 million – which would make the proposed rules "economically significant" and subject to review by the Office of Information and Regulatory Affairs. Accordingly, the Council recommends (1) re-assessing the costs involved in this rulemaking, or (2) voluntarily submitting the proposed rule to OIRA's regulatory review process.

Conclusion

The Council thanks the Commission for the opportunity to submit these comments and applauds this effort to address the conflict in the DRC. Nevertheless, we strongly urge the Commission to ensure that any final rules it promulgates take into account the concerns we have set forth above.

We look forward to working with the Commission throughout this process.

Very truly yours,

Thomas Myers
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