National Retail Federation®
The Voice of Retail Worldwide

March 2, 2011

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

Re: File Number S7-40-10 – Proposed Rules to Implement the Dodd-Frank Act – Special Disclosures Section 1502 (Conflict Minerals)

Via email: rule-comments@sec.gov

Dear Chairman Schapiro:

Pursuant to the request by the U.S. Securities and Exchange Commission ("SEC") published in the Federal Register (75 Fed. Reg. 80,948) on December 23, 2010, the National Retail Federation ("NRF") is submitting the following comments on behalf of its member companies in the U.S. retail industry on the SEC's proposed rules to implement the conflict minerals provision (section 1502) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[1]

As the world's largest retail trade association and the voice of retail worldwide, the National Retail Federation's global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the U.S. and more than 45 countries abroad. In the U.S., NRF represents the breadth and diversity of an industry with more than 1.6 million American companies that employ nearly 25 million workers and generated 2009 sales of $2.3 trillion.

Introduction and Overview

The conflict minerals provision of the Dodd-Frank Act requires publicly-traded companies[2] ("issuers") to file as part of their annual report to the SEC under section 13(a) or 15(d) of the Exchange Act, a statement whether "conflict minerals" – gold, cassiterite, wolframite, and columbite-tantalite – that are necessary to the functionality or production of a product manufactured or contracted to be manufactured by the issuer originated in the Democratic Republic of Congo

[1] Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

[2] A publicly-traded company is one that offers its securities for sale to the public through a stock exchange or over-the-counter markets and is subject to the reporting requirements under section 13(p)(1)(A) of the Securities Exchange Act of 1934 (15 U.S.C.78a et seq.).

Liberty Place
325 7th Street NW, Suite 1100
Washington, DC 20004
800.NRF.HOW2 (800.673.4692)
202.783.7971 fax 202.737.2849
www.nrf.com

or adjoining countries[3] ("DRC countries"), and to make that disclosure publicly-available on the issuer's website. The subject minerals are smelted into tin, tungsten and coltan, which are widely used in consumer electronic products, and gold, which is used in jewelry, electronics and many other consumer goods such as footwear, pens, eating utensils, china, and liquor. Tin may also be used in a large variety of products, including hardware, jewelry kitchen utensils, spray recipients and shaving foam, ink cans, electronic components, integrated circuits, clips, and pins, to name a few. Alloys of tin are used in articles containing soft solder, pewter, bronze and phosphor bronze. Tin fluoride is even used as an additive in toothpaste.

If the issuer concludes that (1) its conflict minerals originate in a DRC country, or (2) is <u>unable to conclude</u> that its conflict minerals <u>did not</u> originate in a DRC country, then it is also required to furnish a "conflict minerals report" to the SEC as an addendum to its annual report (emphasis added). This report must list the due diligence measures undertaken by the issuer on the minerals' source and chain of custody. The SEC defines "due diligence" in the proposed rules as "performing the investigative measures that a reasonably prudent person would perform in the management of his or her own property." These measures "shall include a private-sector audit" of the conflict minerals report conducted according to standards established by the Comptroller General of the United States. In the conflict minerals report, the proposed rule would also require the issuer to:

1. Describe the products manufactured or contracted to be manufactured that are "not DRC conflict free";
2. Describe the facilities used to process the conflict minerals;
3. Describe the efforts to determine the mine or location of origin with the greatest possible specificity;
4. List the country of origin of the conflict minerals;
5. Identify the independent private-sector auditor;
6. Certify the audit;
7. Make the conflict minerals report publicly-available on the issuer's website.

As a preliminary point, the retail industry strongly supports efforts to address the objectives of this law – to end the violence and exploitation associated with armed groups in the Democratic Republic of Congo (DRC) funded through the illicit mining and sale of minerals. NRF and its members have worked on this and many other corporate social responsibility (CSR) initiatives.

Based upon our considerable experience in this area, we have significant concerns that retailers and other U.S. companies subject to this law are facing a compliance burden that, within the contemplated timeframe for implementation and available resources, will prove to be extraordinarily difficult and costly, if not impossible to meet. This conclusion is buttressed by a recent business survey conducted by IHS and the Greenbiz Group revealing that 93 percent of the company respondents believe that identifying these minerals in their supply chain will not be easy, and with 64 percent responding that it would be very or moderately difficult.

The reason for this conclusion is that the Dodd-Frank conflict minerals provision imposes a unique set of mandates on U.S. business that will require an unprecedented degree of supply chain visibility on retailers and other companies subject to its requirements. To this point, it must first be recognized that retailers do not source the ores and metals in question from either mines or smelters. As

[3] An "adjoining country" is defined as one that shares an internationally recognized border with the DRC.

such, retailers have no direct relationship, contractual or otherwise, with those entities who are many points removed down the supply chain from the final product as sold at retail.

Second, the conflict minerals law forces companies to reach back in their supply chain, not to the component parts of their products, or to the base metals contained in those components that most would consider as the raw materials in those products, but rather much further back – to the ores from which those base metals are smelted. Both the metals and the ores from which they are derived are fungible commodities that are part of a complex and convoluted global production and trading system, through which they are blended, combined, and substantially transformed into a multitude of other products that are sold world-wide, and over which U.S. retailers and consumer brand companies have no control.

Indeed, supporters of the conflict minerals initiative presume a level of market power by retailers and brands that evidence shows simply does not exist. For example, widespread action by U.S. apparel retailers and brands, including retail giant Wal-Mart, directing their suppliers not to use cotton from Uzbekistan, a major supplier of the world's cotton, has failed to convince that country to end widespread forced child labor in the cotton harvest. This problem is made even more difficult in the face of record-high prices for cotton and other commodities, which provide incentives for brokers and others in the supply chain closest to the source of the raw material to thwart retail company sourcing policies by falsifying the information they pass up the supply chain as to its origin. Because cotton, like conflict minerals, is a fungible commodity that is blended and substantially transformed, it is virtually impossible for retailers to detect such fraud, especially when dealing with corrupt or uncooperative parties at the base of the supply chain. The core of the problem is that while retailers and brands can maintain reasonably effective control over their immediate suppliers and subcontractors, they are simply too far removed in the supply chain from the raw-material producers to exert any effective influence on their behavior. Comparing the two supply chains, conflict minerals are much further removed from the final product sold at retail and have a much more extended chain of custody than cotton. Like cotton, gold and the other subject minerals are traded on international exchanges and are currently at record-high prices.

Given these supply chain complexities and the fact that there are many points along the chain of custody before the final product containing the metals in question reaches the retailer, we expect the vast majority, if not all of the retail companies filing with the SEC will conclude that they are unable to determine the source of any conflict minerals that may be in their products. As such, the law will require that they file a conflict minerals report in which they will be forced to undertake and explain their due diligence measures, including an independent private-sector audit of their supply chain. As a result, we expect the total cost to U.S. business of compliance with the conflict minerals law will be substantially higher than the SEC's estimate in the proposed rules of $71 million per annum.

However, given the lack of any infrastructure or mechanism within the DRC countries to track the origin of minerals from the mine, and no viable certification and validation system at the mine or smelter level, we believe that it will be nearly impossible to determine with any degree of reliability or accuracy the origin of the subject minerals. The end result of this inability to get accurate information will be two-fold. First, the law will impose substantial costs on retailers while failing to facilitate enforcement and compliance in a way that would advance its policy goals. Second, it will also force retailers to protect their brand reputations in the face of uncertainty by directing their suppliers (to the extent they are able) to avoid the DRC countries or Africa entirely, as we have seen happen in similar circumstances. This predictable response will also not advance the policy goals of the law nor improve the accuracy of the information available.

A good example illustrating this last point is the situation involving wool from Australia, which accounts for 40 percent of the world's wool production. Due to activist pressure, many apparel retailers and brands have instituted policies directing their suppliers to avoid using Australian wool shorn from sheep that have been subjected to an animal-husbandry practice known as "mulesing." Due to the current inability to trace non-mulesed wool through supply chain with any degree of accuracy, many retailers and brands are directing their suppliers to avoid Australia entirely and source wool from New Zealand and South Africa, which claim to be "mulesed-free." However, it is evident that the amount of wool claiming to originate in those countries exceeds their production. Like the situation with Uzbek cotton, retail and consumer brand directives to their suppliers and efforts to ensure compliance have failed to convince Australian wool producers who mules their sheep to abandon the practice. A fundamental problem is that wool producers and other raw material producers view the brokers and others who directly buy their production as their customers, not U.S. retailers and brands who are too far removed up the supply chain.

With these considerations in mind, it is crucial to craft the rules implementing the Dodd-Frank conflict minerals law in a way that will facilitate enforcement and compliance without imposing unreasonable and insurmountable burdens on U.S. business, and will best achieve the objectives of the law. To these ends, we believe the following clarifications and modifications are essential.

Definition of "Manufacturer" and "Contracted to be Manufactured"

As stated above, the conflict minerals law applies to publicly-traded U.S. companies who (1) <u>manufacture</u> or (2) <u>contract to manufacture</u> a product containing conflict minerals that are necessary to the functionality or production of that product. There has been considerable debate over how the terms "manufacture" and "contracted to be manufactured" should apply to retailers who sell consumer products containing conflict minerals. Some have suggested that retailers are not manufacturers and should be entirely exempt from the law. Others, including the sponsors of the original legislation, have argued that while "pure retailers" who have no influence over a product's manufacture should be exempt, the law should apply to retailers who "issue [unique] requirements for products to be manufactured for them – including design, quality, product life-expectancy, and so on."[4]

In its proposed rules, the SEC has essentially adopted an even more draconian approach in defining these terms. The SEC has stated that the law would apply only to publicly-traded companies in the retail sector that "contract for the manufacturing of products over which they have <u>any influence</u> regarding the manufacturing of those products (emphasis added).)" Under the SEC's proposal, those products would include both branded-label consumer products and generic merchandise sold at retail:

> "regardless of whether those issuers have any influence over the manufacturing specifications of those products, as long as an issuer has contracted with another party to have the product manufactured specifically for that issuer."

However, in question 11 of the proposed rules, the SEC does ask whether it should require a minimum level of influence, involvement, or control over the manufacturing process before it would require compliance by an issuer.

---

[4] *See*, Letter from Senator Richard J. Durbin and Congressman Jim McDermott to SEC Chairman Mary L. Schapiro, Oct. 4, 2010.

We believe the answer to that question is clearly yes. In our view, for a company to fall within the scope of the conflict minerals law as a manufacturer of products containing conflict minerals or a party contracting to manufacture goods containing conflict minerals, that party must maintain substantial control over the manufacturing process. Substantial control should be limited to instances where the issuer has direct, close and active involvement in the sourcing of materials, parts, ingredients, or components to be included in that product that may contain metals smelted from conflict minerals. Thus, the mere act of placing an order for a finished product to be affixed with a private label of the party placing the order, or that specifies only certain capabilities, appearance, configurations, or performance would not constitute manufacturing or contracted to be manufactured within the meaning of the statute.

For example, many jewelry retailers order products from a supplier's catalogue of existing product lines and styles, much as a shopper would do when making a purchase from a retail catalogue or website – e.g., specifying a certain color or configuration. While the product may eventually carry the retailer's private label, the retailer in this instance has no involvement in the product's manufacturing, including the sourcing or use of material inputs that may contain metals smelted from conflict minerals. As such, the retailer in this example should not fall under the definition of "contracted to manufacture" for purposes of the reporting requirement under the statute. To the extent that any obligation to report arises under this scenario, it should fall on the manufacturer, rather than the retailer.

In addition, some jewelry retailers may play a small part in the design of an item of jewelry that they order from a vendor by adding an extra detail or two, such an additional leaf, flower, or other adornment. While this activity may involve "design" in the strictest sense of the word, such minor design modifications would not constitute substantial control over the manufacturing process sufficient to meet the definition of "contracted to manufacture" and trigger the reporting requirement under the statute. In this example, the retailer is not specifying a source for the material, but only how the piece should appear from an aesthetic standpoint.

Including retailers who do not exercise substantial control over the manufacturing process, especially smaller companies, would not advance the goals of the legislation. Subjecting these retailers to the reporting requirements of the law will merely impose a substantial cost on those companies, without yielding any useful or accurate information.

Definition of "Necessary to the Functionality or Production of a Product"

Under the conflict minerals statute, the reporting requirements apply only to those subject minerals that are "necessary to the functionality or production of a product." In the proposed rule, the SEC requests comment in questions 16-20 on whether the final rules should define the phrase, and if so, how.

We would argue that a definition of the phrase is necessary and appropriate to guide companies in determining whether a subject metal does or does not fall under the reporting requirements of the statute. In other words, if a metal produced from the subject minerals is a part of, or contained in a product, but is not necessary to the functionality or production of that product, then the issuer should not be subject to the reporting obligation. In such situations, the issuer, at most, should only be obligated to state that the subject mineral is not necessary to the functionality or production of a product, and to retain information supporting that claim.

As a preliminary point, the only part of this phrase that would impact retailers is a definition of the term "necessary to the functionality" as retailers do not as a rule produce a product. In considering an appropriate definition of that term, we would strongly oppose the adoption of a sweepingly-broad construction that would deem a mineral to be necessary to a product's functionality if it is included in a product for any reason merely because it arguably contributes to the product's economic utility. The use of the term "necessary to the functionality" in the statute is limiting language suggesting that Congress did not intend that all subject minerals should fall within the scope of the statute. A broader reading of the term as suggested in question 18 of the proposed rule would have that effect, and would not be consistent with the general understanding of what the word "functionality" encompasses – *viz*. of or pertaining to performance or a particular need.

As such, it is our view that a metal produced from a subject mineral should only be considered necessary to the functionality of a product if it is (1) intentionally added to the product, and (2) it is essential to the product's basic function, use or purpose. This definition would necessarily exclude minerals that are naturally occurring, are an unintentional by-product, or do not appear in the final product.

Under our proposed definition, if, for example, gold is used in an article as an ancillary feature strictly for purposes of ornamentation, then it is unrelated to the functionality of the product and would be exempt from the reporting requirements of the statute.

Finally, we believe that companies should be able to get advanced rulings on the question of functionality as it applies to particular products that would be similar to the procedures available through Customs and Border Protection (CBP) on the classification and valuation of imported products.

Phased Implementation

The conflict minerals law requires the SEC to promulgate regulations within 270 days after the date of enactment (*i.e.*, April 15, 2011). Issuers would then be required to file information on conflict minerals with the SEC in their next annual filing under section 13(a) or 15(d) of the Exchange Act, which, in some cases, may be as early as June 2012. This is an extraordinarily short period of time considering that a number of necessary elements must be in place in order for companies to comply with the reporting requirements of the law.

First, there is currently no infrastructure in the DRC countries or system in place that would allow companies to identify and track the origin of the subject minerals through the supply chain with any degree of reliability or accuracy. In particular, the smelters, as the point in the supply chain where the ores are refined, currently present an insurmountable obstacle to obtaining information about the origin of the subject ores for parties further up the supply chain. Therefore, company compliance will be virtually impossible unless and until the mining and smelter industries develop a certification and validation system for conflict minerals. Currently there are neither incentives in place, nor any real mechanism to require the mines and smelters to do so. Given the dynamic nature of the situation in the DRC, a corporation trying to identify the chain of custody, conduct an independent audit, and issue a report, with timely information will face an immense burden in trying to achieve accurate due diligence.

Second, the law specifies that independent audits of conflict minerals reports be "conducted in accordance with standards established by the Comptroller General of the United States." Promulgation of these standards, with public notice and comment, will likely take some time to complete, and will have to be finished before issuers can be expected to file a conflict minerals report with the SEC.

Third, the law also requires the Secretary of State within 180 days of enactment of the law to produce a "Conflict Minerals Map" that identifies mines located in areas under the control of armed groups in the DRC countries. That map has not yet been developed. Moreover, the State Department acknowledges that the fluidity of the situation on the ground in the DRC and the fact that control of mines changes regularly, pose serious challenges to the proper identification of those mines that are controlled by armed rebel groups. Given these challenges, it will likely to take a considerable period of time for the State Department to complete an accurate and up-to-date map, upon with issuers can rely. Since this map is designed to assist issuers in identifying the source of conflict minerals, its availability to the public is essential for complete and informed compliance by companies having to file a conflict minerals report with the SEC.

Fourth, companies will need a reasonable period of time to review and make adjustments in the management of their supply chains that will be necessary to comply with the reporting requirements of the law. Given the complexity of global supply chains and the implementation challenges posed by this law, it is unreasonable to expect companies to comply fully with the reporting requirements within the next year.

Finally, there is the question of how to deal with minerals, metals, and products already in the supply chain. Retailers typically place orders 6 months to a year before a product reaches a store shelf. In addition, there is also a significant lapse of time from the point that minerals are extracted from a mine to the point that they are smelted into base metals and then incorporated into finished products destined for the U.S. market.

Given these considerations and the substantial compliance challenges that the Dodd-Frank conflict minerals law poses for covered issuers within a short implementation timeframe, NRF urges the SEC to adopt a transitional rule with phased implementation of the enforcement requirements on issuers. There is precedent for taking this approach under very similar circumstances.

In its implementation of the import declaration requirements imposed on businesses under the amended Lacey Act,[5] the U.S. Department of Agriculture Animal and Plant Health Inspection Service (APHIS) also faced the challenge of a very short date for issuing rules following passage of the law, and a requirement that businesses collect and disclose detailed information regarding the raw materials (in this case wood and plant material) contained in the products they import. APHIS ended up adopting a phased implementation, which focused immediate attention on those products that were of greatest concern – less processed and closest to the source of the raw material inputs. Enforcement was delayed on more highly-processed products that are furthest removed from the source in the supply chain, in some cases until full compliance is "feasible and practicable" given current limitations on the ability to collect the required information.

In developing a phase-in schedule for implementation of the conflict minerals law, NRF recommends that the SEC adopt several principles based upon the points discussed above. First, a smelter validation and certification program must be developed and in operation as a prerequisite for imposing the full reporting requirements under the conflict minerals law. Under this principle, implementation would be delayed with respect to any mineral unless and until a validation and

[5] 16 U.S.C. 3371 *et seq.*

certification program is operational for a significant number of smelters processing that particular mineral.

Second, a phased implementation timetable should also recognize that not all downstream users are similarly situated. Accordingly, the initial implementation phase should focus on those parties in the supply chain closest to the source of the raw material. The implementation timetable should be delayed as to those parties farther up the supply chain who exercise little or no control over the product, and should be enforced only when full compliance by those parties is feasible and practicable given the limitations on the ability to collect the required information.

Third, a phased implementation timetable should also take into consideration the type of product in question. In particular, it would be appropriate to institute a shorter enforcement phase-in period for those products that are closest in the chain of custody to the mine and smelter and contain significant quantities of the subject metals. Enforcement for products that are more highly-processed and are farther removed in the chain of custody from the mine and smelter would be phased in when available technology and infrastructure make it feasible and practicable to do.

Fourth, an implementation phase-in schedule should recognize that the date of extraction is the key point in time for determining compliance with the regulation. As such, products that are currently in the pipeline, from ore to final product should be exempt from the reporting requirement. The reporting requirement would apply only to those minerals mined on or after the date on which they become subject to full implementation under the phase-in schedule. The SEC should also adopt a "no transubstantiation" rule, under which a mineral obtained from a conflict-free mine, is considered conflict free at the time it is extracted, and may not be designated otherwise merely because the mine is later found not to be conflict-free.

Due Diligence Principles

Under the conflict minerals statute and proposed rules, an issuer who cannot show that the subject minerals in its products do not originate from DRC countries must furnish to the SEC a conflict minerals report listing the due diligence measures undertaken by the issuer on the minerals' source and chain of custody. Other than the requirement that the issuer conduct and certify an audit of its report conducted by an independent, private-sector auditor, the statute and the proposed rules to not elaborate on what measures must be undertaken by an issuer to meet the "due diligence" standard.

While companies need guidance regarding due diligence measures they can employ to comply fully with the law, the SEC should not set out a single standard applicable to all issuers and circumstances. Rather, what constitutes due diligence on the part of an issuer should be more flexible and based upon the availability of information to the issuer given the nature of and its position in the supply chain. Specifically, the due diligence burden should be less for issuers farther removed in the supply chain from the source of the raw material, and greater for those closest to the source who have access to the best information regarding source and chain of custody.

Retailers are the last link in the supply chain to the consumer, and thus are furthest removed from the mines and smelters producing the raw materials. Any due diligence standard should recognize that a retailer's information on the origin of any subject minerals contained in the products they sell will rarely if ever be based on actual knowledge, but rather will be based on information and representations provided from other parties along the supply chain. Accordingly, those retailers who fall within the scope of the law because they are deemed to be issuers who contract for the manufacture of private-label or generically-branded merchandise, should be subject to a much lower due-diligence standard than, for example, a party buying base metal directly from a smelter.

For retailers and similarly-situated issuers, we recommend that the SEC include the following elements as examples of actions that would meet the due diligence standard:

- Publication on an issuer's website of its policy and procedures with respect to the use of conflict minerals in its supply chain, including verification and a description of remedial actions that will be taken in the event of non-conformance with the policy;
- Reliance on information made available through an industry-wide process such as a smelter certification and validation program;
- Reliance on the State Department's Conflict Minerals Map and other official government information regarding the source of conflict minerals;
- The inclusion of terms in contracts obligating direct suppliers to exclude conflict minerals from goods they supply to the issuer;
- Reliance on information provided by direct suppliers based on contractual terms obligating suppliers to provide information necessary to implement an issuer's conflict minerals policy; and
- Reliance on any independent private-sector audit of a conflict minerals report.

These measures would define a safe harbor for issuers with respect to their due-diligence obligations. In addition, the SEC should also clarify that issuers will be held to a reasonable care standard in determining whether they have met those obligations.

Chain of Custody

With respect to information that an issuer must include in a conflict minerals report furnished to the SEC, neither the statute nor the proposed rules explain the term "chain of custody." There are three significant challenges for retailers and other downstream users in collecting accurate chain-of-custody information from the mine to the final product: 1) identifying which mines are conflict mines (*i.e.*, mines whose output is controlled by or taxed by armed groups in DRC countries); 2) tracing ores from the mine to the smelter; and 3) tracing conflict minerals from the smelter through complicated supply chains to the finished product. As stated above, it is the smelter that processes the mined ore into metal, at which point it is impossible to segregate individual ore lots. Therefore, the smelter represents a potentially insurmountable roadblock of information to parties further down the supply chain.

Moreover, the supply chain for the base metal after it emerges from the smelter is a complex and multilayered, rather than linear system, involving a network of trading companies and suppliers sourcing, consolidating and substantially transforming products through multiple countries and manufacturers. Therefore, the assumption that a retailer or other similarly-situated issuer can accurately identify chain of custody back to the mine is fundamentally flawed. Accordingly, we recommend that the term chain of custody be construed to cover only that portion of the supply chain from the mine to the smelter.

In addition, retailers and similarly-situated issuers should be able to discharge any obligation they may be required to meet with respect to disclosing chain-of-custody by reporting the identity of their first-tier suppliers and measures those suppliers have in place to identify the source of conflict minerals in their products.

De Minimis

One of the glaring omissions in the conflict minerals law is the lack of a *de minimis* provision that would exempt products containing minute or trace amounts of conflict minerals from the filing requirements under the law. This omission should be rectified by including a *de minimis* standard in the final rule. This clarification would eliminate the reporting requirement in a specific situation when the obligation to furnish the required information would be particularly burdensome and unreasonable.

A *de minimis* exemption is particularly appropriate in this instance given the unprecedented scope of the conflict minerals law, the lack of infrastructure necessary to gather and transmit the required information, and the substantial hurdles facing U.S. companies in complying with the law. Indeed, these issues raise the same questions about the regulatory burden on U.S. industry that President Obama flagged as a concern in his last State of the Union speech.

The Lacey Act again provides precedent for creating a *de minimis* exemption. In its implementation of that law, APHIS is developing a *de minimis* rule, even though the Lacey Act, like the Dodd-Frank conflict minerals law, does not contain explicit *de minimis* language. While not yet defined, this standard as it applies to the Lacey Act would exempt products containing trace or nominal amounts of covered raw material from the import declaration importers are otherwise required to file under that law. The objective is not only to ease the compliance burden on businesses, but also to facilitate enforcement by allowing the agency to target higher-risk products.

Therefore, NRF urges the SEC also to adopt a *de minimis* standard that would exempt issuers from furnishing a conflict minerals report on their annual filing with respect to products that contain trace or nominal amounts of conflict minerals in the same way that it proposes to exempt products containing naturally-occurring amounts of conflict minerals. The SEC should also delay implementation until it is able to promulgate a rule defining specific *de minimis* levels following public notice and comment.

Recycled Material

Another omission in the conflict minerals law that should be addressed through regulation is the treatment of recycled or reclaimed metals. Accordingly, NRF urges the SEC for several reasons to exclude recycled materials from the definition of "conflict minerals," thereby exempting products containing the subject metals that have been recycled or reclaimed from the reporting requirements under the law.[6] First, it is not possible for downstream users to trace the origin of the original of recycled or reclaimed metals due to the great number of recycling programs in a multitude of countries involving thousands of consolidators, reclaimers, and scrap dealers.

---

[6] Again, implementation by APHIS of the Lacey Act provides a precedent for exempting recycled materials through regulation. While the Lacey Act amendments provided a specific exemption for recycled paper, it failed to mention recycled wood. APHIS has agreed that recycled wood should be exempt for the same reasons that Congress stated for exempting recycled paper.

Second, exempting recycled and reclaimed metals is consistent with Congressional intent, which is to regulate minerals mined from the DRC countries and cut off trade in these ores as a funding source for armed rebel groups in those countries. These groups do not generate any revenue from trade in recycled and reclaimed metal.

Third, because tracing the origin of recycled metal as opposed to primary metal would be virtually impossible, subjecting the former to the reporting requirements under the conflict minerals law will likely drive the trade to shift sourcing away from recycled toward primary metal. The result of this increased demand will be two-fold. It will deflate the price of recycled metal and inflate the price of primary metal. Moreover, the policy goals of the legislation would be frustrated if industry is discouraged from using recycled metal, which would help deprive armed groups in the DRC of revenue. On the other hand, artificially raising demand and prices for primary metals could result in increased revenue to armed groups controlling mines in DRC countries to the extend they are able to sell their ores.

Additional Considerations

As a concluding observation, we note that the conflict minerals law exempts many U.S. companies that manufacture or contract to manufacture products containing conflict minerals, for the sole reason that they are privately-held. We question the fairness of imposing such a considerable burden on an arbitrarily-defined class of companies – those that are publicly-traded – for reasons that have nothing to do with the efficient functioning of securities markets or providing material information affecting stock price to shareholders, but which have the consequence of adversely impacting the competiveness of those companies vis-à-vis their exempted competitors. In addition, if an issuer cannot determine the origin of the conflict minerals in its products, the issuer must demonstrate that the minerals do not originate from a DRC country. If the issuer is unable prove that negative, the law essentially presumes, with no evidence in support,[7] that the minerals do originate in a DRC country and, by implication, that the issuer's products therefore support human rights violations. In such situations, the information provided to shareholders in such situations would be inconclusive and inaccurate.

NRF appreciates the opportunity to comment on the SEC's proposed rules for implementation of the conflict minerals law. Any questions should be directed to me at (202) 626-8104 or by email at autore@nrf.com.

Respectfully submitted,

Erik O. Autor

Erik O. Autor
Vice President, Int'l Trade Counsel
National Retail Federation

[7] Since the DRC accounts for only 15-20 percent of the world's tantalum, 6-8 percent of the world's tin, and less that 5 percent of the other subject minerals, statistically, there is only a small likelihood that the conflict minerals in any given product originate in the DRC.