❖AAEI American Association of Exporters and Importers
The Voice of the International Trade Community Since 1921

January 21, 2011

Mary L. Shapiro
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: SEC Initiatives under the Dodd- Frank Act – Special Disclosures Section 1502 (Conflict Minerals)

Via email: rule-comments@sec.gov

Dear Chairman Shapiro :

AAEI writes to support the attached coalition letter recently submitted on the SEC Initiatives under the Dodd- Frank Act – Special Disclosures Section 1502 (Conflict Minerals). AAEI has been a national voice for the international trade community in the United States since 1921. Our association represents the entire spectrum of the international trade community across all industry sectors, including manufacturers, importers, exporters, wholesalers, retailers and service providers to the industry. AAEI is the premier trade organization representing those immediately engaged in and directly impacted by developments pertaining to international trade. We are recognized as technical experts regarding the day-to-day facilitation of international trade.

We would especially like to emphasize that our member companies need time to adjust their supply chains to accommodate changes in regulations and suppliers to remain compliant with US law. The vast majority of international traders are companies who seek to comply with both the letter and spirit of all regulations governing them, and we wish to assist the SEC in promulgating regulations that allow our members adequate lead times to ensure compliance.

AAEI stands ready to assist you and your agency in any way possible, and we look forward to working with you to finalize the implementing regulations for the Dodd – Frank Act, particularly the Special Disclosures in Section 1502 that relate to Conflict Minerals.

Sincerely,

Marianne Rowden
President and CEO

CC: Yuko Hanada, Trade Policy Committee co-chair
Jessica Libby, Trade Policy Committee co-chair

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Mary L Shapiro, Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: SEC Initiatives under the Dodd-Frank Act – Special Disclosures Section 1502 (Conflict Minerals)

Via email: rule-comments@sec.gov

Dear Chairman Shapiro:

We are writing on behalf of a coalition of industry groups regarding Sec. 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The associations listed at the end of this letter represent a significant portion of the companies that will be subject to the Securities and Exchange Commission's (SEC) regulation on conflict minerals. We have worked together to develop the following recommendations for the SEC.

We support the underlying goal of Sec. 1502 to prevent the atrocities occurring in the Democratic Republic of Congo (DRC) and the adjoining countries and are working with other stakeholders to address the problem. Many of our companies are currently participating in domestic and international initiatives to create greater supply transparency. We encourage the SEC to implement the requirements of Sec. 1502 in a manner consistent with the realities of global supply chains, and that acknowledges the facts on the ground in the DRC and the limited control downstream users have on the refiners/smelters and mines. A successful outcome is one which achieves the goals of the statute without unduly burdening legitimate trade.

We look forward to working with the SEC as the agency moves forward with the rule-making. As the SEC embarks on drafting regulations it is imperative that a thorough understanding of the number of products containing tin, tantalum, tungsten, and gold be developed, along with the number of industries affected. Nearly every manufacturing sector and part of the supply chain will be affected by the legislation and proposed regulations surrounding conflict minerals. Some sectors have more simplified supply chains, while most have extremely complex ones. The regulations drafted must account for all sectors and companies subject to the legislation. While much attention has been paid to the electronics sector, the issue is much broader with industries from automotive, medical devices, consumer products, defense, capital goods, retail, to aerospace all affected.

We encourage the SEC to move forward first with a proposed rule to allow for comments from affected stakeholders prior to issuing a final rule. We believe the rule-making should recognize that all downstream users are not similarly situated and thus the requirements should take into account a company's place in the supply chain and control over the final product. At the very least, the SEC should consider a phased approach that understands that activities and initiatives currently under exploration may not offer deliverables for an extended period of time.

There are three major challenges for downstream users attempting to establish a chain of custody for the specified ores from the mine to the product: 1) identifying which mines are conflict mines—that is, mines whose output is controlled by or taxed by warring factions; 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. Both the State Department and the Enough Project have highlighted these limiting factors as well. Implementation of the legislative language must take account of these on-the-ground realities.

The significant challenges associated with tracking minerals originate significantly upstream from the companies that are subject to the new legislation. Fundamentally, more must be done on the ground to: 1) accurately identify good versus bad mines; and 2) work with refiners and smelters to create a process for validating the source of their minerals to downstream users. Without such assurances from upstream users, it is nearly impossible for downstream users to know the origin of the minerals used in their products or certify with any level of credibility that the products are conflict free.

Most of the companies who purchase the products that may contain conflict minerals only have contact with the first tier supplier or company immediately upstream from themselves. The actual name of the company that represents each tier of the supply chain is often unknown or unavailable to the ultimate downstream user. The assumption that downstream users are able to trace the metals in their products back to the mine assumes a supply chain is a transparent, linear process, when, in fact, it is a complex, multi-layered network of trading companies and suppliers where products are sourced and consolidated from multiple countries and multiple manufacturers.

Recommendations for the Rule-Making:

We submit that the SEC has the discretion to develop regulations which account for the current lack of information and transparency associated with the tracking of conflict minerals. Given the reality of the trade in minerals, we have identified nine areas we believe the SEC should address through the rule-making process to provide clarity to the companies required to submit reports to the SEC.

By adopting the recommendations set forth below, the SEC will sharpen the regulation, target the requirements, and minimize the burden on legitimate trade.

a. **Due Diligence:** The statute requires filers to report on the due diligence they have exercised over the source and chain of custody of minerals mined in conflict regions, but the statute does not define, set a specific standard, or ask the SEC to create a standard for such due diligence. We encourage the SEC to avoid defining "due diligence" in a manner that prescribes every detail of what is required from each filer because no two supply chains are identical. Instead we encourage the SEC to provide guidance to filers on what would constitute reliable due diligence. Each filer needs the flexibility to develop a process appropriate for its supply chain and products. Given the diversity of companies and products impacted, companies should be permitted to determine due diligence plans that are consistent with their supply chains and information available from recognized government sources. This is consistent with work with the international community to develop global supply chain solutions. Such flexibility is also consistent with other areas of law regarding supply chains and human rights issues.

- **Reliable Due Diligence**: We support setting out certain elements of due diligence that will be presumed to constitute a reliable due diligence process in order to give filers guidance that they need in order to design compliance programs. A presumption of reliability should exist if a company implements a corporate due diligence plan with the following characteristics:

  - Use of information gained through an industry-wide process;
  - Creation of a conflict minerals policy and contractual obligations based on the government produced maps required by the legislation;
  - Supply chain risk assessment;
  - Obligations on suppliers to push the new policies upstream and transmit information downstream through contract provisions;
  - Inclusion of a description of policies and procedures to remediate instances of non-conformance with the policy;
  - Use of independent third party audits of the due diligence report if sourcing from the DRC or adjoining countries; and,
  - Publication of annual reports on the corporate website.

- **Standard of Care:** We also believe it is important to provide guidance on the standard of care companies must meet and what due diligence does not mean. In particular, it is critical for the regulation to recognize that due diligence does not require perfection recognizing that certainty is not possible given the situation on the ground and the fluid nature of supply chains. In light of these challenges, we believe filers should be held to a "reasonable care standard" for executing due diligence.

  Examples of reasonable care include but are not limited to:
  - Contractual obligations on direct suppliers to exclude conflict minerals from the DRC and adjoining countries from goods supplied to the company subject to the SEC; or
  - Implementation of a risk-based program that uses company control processes to verify that suppliers are providing credible information and pushing contractual obligations upstream; or
  - Participation in or reliance on information gained from an industry-wide or smelter validation process.

  Evidence that conflict minerals from the DRC and adjoining countries may have entered a supply chain despite the exercise of due diligence shall not render a due diligence plan unreliable if the reporting person has exercised reasonable care in conducting its due diligence.

  Equally important, due diligence over the source and chain of custody should not mean: (1) that a filer must identify all parties between the mine and Tier 1 supplier and (2) determine the materials used for every manufactured item. Rather, the filer should work with its direct suppliers to push requirements to use conflict-free minerals/metals upstream. We believe the SEC should acknowledge that a supply chain audit approach of entities throughout the supply chain is acceptable in place of a product-based or materials declaration approach.

2. **Create A Safe Harbor/Presumption of Due Diligence based on Reliance upon the Maps from the State and Commerce Departments on the Mines and Smelters.** The legislation assigns responsibilities to the Departments of State and Commerce to map conflict regions and to identify conflict mineral processing facilities. In addition, the governments of the DRC and adjoining counties are engaging in an evolving set of measures to suppress trade in minerals from conflict mines. Reliance on U.S. government-produced information should be presumed to satisfy the requirement that due diligence be reliable for those elements of due diligence that require working with suppliers to prevent sourcing from conflict mines or refiners using conflict minerals.

3. **Scope and Definitions:** The SEC needs to articulate clearly who is covered by the regulation and define several critical terms. Below we suggest definitions that we believe achieve the intended goal of the legislation while recognizing the practical issues facing prospective filers.

   - **Necessary:** In cases where a filer does specify the use of a conflict mineral, or directly incorporates the conflict mineral into a finished product, the conflict mineral is necessary to functionality or production when:

     - The conflict mineral is intentionally added to the product; and
     - The conflict mineral is essential to the product's use or purpose.

   - **Manufacturing:** The SEC should rely upon the commonly accepted government definition of manufacturing. Based upon the U.S. Census Bureau and North American Industry Classification System (NAICS), we suggest defining manufacturing as establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products.

   - **Chain of Custody:** We recognize that this problem has resulted from the lack of governance and security around the mines under the control of rebel groups in the DRC. At the same time, we also recognize that the mine of origin is often very far removed in global supply chains from the manufacturer required to report under the law. In such scenarios, a chain of custody requirement is exceedingly difficult. We expect the requirement for companies to report to the SEC the measures they have taken to exercise due diligence on the source and chain of custody of minerals to 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 identify the sources of conflict minerals in their products. Once minerals have been processed into metals, individual lots of minerals can no longer be isolated and thus the minerals chain of custody from the mine to the smelter must end at the smelter.

4. **Transition Rules:** To assist companies in creating compliance programs, we request that the SEC establish transition rules for implementation of the upcoming regulation. Specifically, we identify three areas where we believe a transition is necessary:

- **For Inventory Already at Smelter:** The regulation should specify that inventory at smelters or processing centers obtained prior to a specific date that is sufficiently advanced is not covered by the regulation to allow the institution of reliable smelter audit programs. Efforts to institute smelter verification programs vary greatly for each mineral—some are more advanced than others. If there is no transition rule for materials present at smelters prior to a validation program, all smelted metals for the initial reporting will have to be reported as being of unknown origin, for manufacturers will be unable to obtain the information as all minerals are comingled without respect to country of origin.

- **For Products Made from Existing Inventories:** Based on the same rationale for the requested transition rule for inventory already at smelters, we ask for a transition rule for products manufactured with the refined metals already incorporated in finished goods or from conflict minerals already in the suppliers' inventories prior to a date sufficient to allow for the design and implementation of filers' programs to impose identification requirements on their upstream supply chains. Again, absent a transition rule, filers will be forced to identify all products as containing conflict minerals of unknown origin in the initial reporting period.

- **Identification of Conflict Mines in the DRC and Adjoining Countries:** The conditions on the ground in the DRC region are extremely fluid. Control of mines regularly changes. The State Department identified this matter as a challenge to proper identification of which mines are controlled by armed rebel groups. A significant period of time elapses from the extraction of the minerals from the mines to the incorporation of the refined metals into products manufactured in the United States. Therefore it is imperative for the SEC to create a transition rule that recognizes the date of extraction as paramount for determining compliance with the regulation. Moreover, we encourage the SEC to adopt a no transubstantiation rule stating that if a mineral is "clean" when it is bought, the mineral cannot become "dirty" over time if the situation on the ground changes while the mineral/refined metal moves through the supply chain.

  The ever-changing conditions on the ground support our position that companies should be able to rely upon government-issued maps. In order to enable consistency, companies need a source of information that is authoritative. Without such, suppliers will be relying on various sources of information that may or may not be reliable.

5. **Exemption for Recycled Minerals:** The regulations should specifically exempt recycled or reclaimed metals, as downstream users have no ability to trace the origin of the original minerals. The traceability of the reclaimed metals is impossible to track due to the various forms of recycling and thousands of consolidators, reclaims, and scrap dealers both domestic and foreign.

   We believe Congress intended to regulate ore and metal made directly from minerals mined from the DRC and adjoining countries. Exempting recycled or reclaimed metals does not contradict the congressional intent. Sec. 1502 was intended to stop funding the atrocities in the DRC. The DRC rebel groups are funded by operating mines to extract and sell ore, and by extracting tariffs from those transporting ore. The DRC rebel groups do not extract their revenue from trading in "reclaim." By the time metal becomes reclaim, the rebel groups have already extracted their revenue and do not stand to gain with the use or sale of reclaim. To the contrary, the DRC rebel groups would prefer that industry avoid using reclaim material since that would reduce the demand for ore and primary metal. Accordingly, reclaimed metal

was not intended to be covered by the statute and should be excluded with the SEC's regulations.

There are additional concerns. If reclaim is subject to the statute, this will create industry favoritism towards primary metals. When faced with the extreme uncertainties of determining the source of reclaim metal, manufacturers will opt to work with "pristine" or primary metal, since that is comparatively easier to track and trace (and therefore remain compliant). This will create an unnatural demand for primary metal and artificially inflate prices for that metal. And, to the extent that the DRC rebel groups are successful at selling their ore, this will result in increased revenue on a per pound basis.

Thank you for the opportunity to provide comments in advance of the rule-making.

Sincerely,

Advanced Medical Technology Association (AdvaMed)
Aerospace Industries Association (AIA)
American Association of Exporters and Importers (AAEI)
Association of Home Appliance Manufacturers (AHAM)
Consumer Electronics Association (CEA)
The Association of Equipment Manufacturers (AEM)
IPC-Association Connecting Electronics Industries
National Association of Manufacturers (NAM)
National Foreign Trade Council (NFTC)
National Retail Federation (NRF)
Retail Industry Leaders Association (RILA)
Semiconductor Equipment and Materials International (SEMI)
TechAmerica
USA* ENGAGE