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March 2, 2011

The Honorable Mary L. Schapiro
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) File Number S7-40-10

Dear Chairman Schapiro:

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Its membership includes both large multinational corporations and small and medium-sized manufacturers. Our members depend heavily on the global supply chain to compete within the U.S. marketplace and abroad. NAM members have a strong track record of working with the U.S. government to improve supply chain transparency and compliance practices.

On behalf of America's manufacturers, the NAM is writing to provide comments in response to the Proposed Rule published by the Securities and Exchange Commission (SEC) to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act).

I. Introduction

We support the underlying goal of Sec. 1502 to address the atrocities occurring in the Democratic Republic of Congo (DRC) and adjoining countries and are actively working with other stakeholders to help address the problem. NAM members are participating in numerous industry-led initiatives to drive change abroad and stop the trade in conflict minerals from the DRC and adjoining countries, including industry-wide smelter certification programs and working to create the needed infrastructure on the ground and around the world to facilitate compliance with the proposed rule.

The NAM is also working very closely with our member companies to increase supply chain transparency. In addition, NAM staff have participated in many forums sponsored by sector-specific efforts and international organizations in order to raise awareness of the issue as well as to support efforts designed to influence a positive outcome for the region. The NAM and

our members recognize the importance of preventing the use of conflict minerals from the DRC and adjoining countries and look forward to working with the SEC.

We appreciate the opportunity to work with the SEC to create a final rule that implements Sec. 1502 in a manner consistent with the realities of global supply chains, and that acknowledges the practical limitations on issuers in monitoring and influencing the behavior of other parties in the supply chain, through downstream users to refiners/smelters and mines. We believe the regulations should implement the law in a manner consistent with the goals of the legislation without unduly burdening industry and harming American competitiveness. As noted below in our responses to the questions posed by the SEC, we believe that modifications to the proposed rule are needed to accomplish that end.

We appreciate the SEC's willingness to consider additional approaches or standards for implementing Sec. 1502 of the Dodd-Frank Act. The proposed rule acknowledges many of the realities facing companies developing compliance programs to increase supply chain transparency and to source responsibly. We are particularly encouraged that the SEC did not propose a "one size fits all" approach for due diligence or country of origin inquiries. However, we believe further clarification and modifications are needed to the proposed rule.

Supply chain transparency and sourcing compliance programs take time to develop and implement

In order to recognize the complexities of supply chains and global trade, the proposed rule must provide transition measures in the early years of the program. The Commission correctly acknowledges in the proposal that standards of reasonableness for origin inquiries and due diligence will evolve over time as reporting and monitoring infrastructure becomes more robust. However, the proposed rule does not take adequate account of the current limitations on the ability to report (i.e., the lack of information infrastructure to track and trace point of origin) as appropriate reporting mechanisms are being developed by government and industry. In order for issuers to determine the origin of the minerals used in highly processed and complex manufactured goods, "bagging and tagging" schemes, smelter validation programs, and downstream programs to obligate all of the participants in an issuer's supply chains must all be in place, but none is likely to be fully operational in the first years of the program. In our comments below, we suggest some transition rules that not only recognize the limits on issuers' ability to report in early years, but also will increase the usefulness of the initial reports filed under the rules.

This is significant rulemaking and is expected to cost the U.S. industry $9-16 billion to implement

The NAM believes that the proposed rule is a significant rulemaking and will cost U.S. industry between $9-16 billion to implement. As such, we believe the SEC's analysis of the impact of the regulation greatly underestimates the impact on and cost to U.S. manufacturers. We encourage careful review by the SEC and the Office of Management and Budget (OMB) in light of President Obama's recently announced regulatory review policy. The SEC and OMB should undertake this additional review in cooperation with the business community to fully understand the impact of this regulation. A detailed explanation substantiating our estimate and the potential impact on the U.S. economy, competitiveness, small manufacturers, and jobs is set forth later in these comments.

We believe that the impact and cost of the regulation necessitate narrowly tailoring the requirements, acknowledging the current lack of infrastructure, taking a practical and rational approach to the requirements, differentiating between issuers who "don't know" the origin after reasonable inquiry from those that do nothing to establish origin, and supporting a phased-in approach to the disclosure requirements that requires increasingly more detailed disclosure as infrastructure comes online and supply chains become more transparent.

To achieve the goals of the law without placing undue burdens on industries or undermining the diplomatic efforts underway in the region, we believe that the SEC needs to:

1) state clearly the legal standard for compliance (i.e., that a supply chain audit approach based on risk analysis is acceptable in place of a product-based or materials declaration approach);

2) adopt a set of transition rules that recognizes the current infrastructure limitations;

3) minimize unnecessary or unwarranted harm to company brands through inexact designation of products;

4) apply the regulation only to those issuers that have the ability to influence supplier sourcing upstream; and

5) allow issuers to furnish a separate disclosure or report to the SEC in lieu of adding such disclosures to their annual report.

II. Overview of Issues

In this section, we provide an overview of our recommendations. These will be discussed in greater detail in Section III, which provides specific recommendations through responses to selected questions posed by the SEC.

1. Legal Standards

The "reasonable country of origin inquiry" and "due diligence" approaches adopted by the proposed rule are appropriate. The NAM agrees with the SEC's approach in not defining a single process for country of origin inquiries and due diligence over a supply chain. We do believe the SEC should provide some generic guidance on the approaches though, and state that issuers' are subject to a "commercially practicable" standard when determining the origin of the conflict minerals and executing due diligence. In our responses to Q33 and Q55, we provide more detail on the guidance manufacturers are seeking.

As discussed in greater detail in our responses to Q33-36, we ask the SEC to modify the terminology of "country of origin inquiry" to "reasonable inquiry." The term "country of origin" is a legal term of art and has an established standard in customs law which requires a product-by-product review that is not only unwieldy but also impossible within the context of this regulation. If the SEC maintains the "country of origin inquiry" terminology, the SEC should make clear that it is not adopting the meaning of the term as it would be applied in customs law.

2. Transition Rules

The legislation creates an aggressive timeline for finalization of the regulation and implementation of the disclosure requirements. For a multitude of reasons, the timeline is not consistent with the realities on the ground in the region or with smelters around the world that refine the minerals. *The lack of harmonization between the timing of the new requirements and creation of the necessary infrastructure to facilitate compliance with the requirements necessitates transition rules.* The most important of the transition rules we recommend is a phase-in of the disclosure requirements starting January 2012. In our response to Q58, we provide a suggested phased-in approach. The phased-in approach does not exempt or delay an issuer's requirements to report under the statute. In our approach, every issuer subject to the regulation would disclose to the SEC the use of conflict minerals and the efforts each is taking to increase transparency and stop the use of conflict minerals from the region for the first full fiscal year the regulation is in effect.

The proposed phase-in schedule is consistent with the statutory requirements. *All issuers will be held accountable for the information they provide to the SEC*. *If they knowingly or willfully provide false information, the issuer would be subject to SEC penalties.*

3. The SEC Should Adopt A Category for Conflict Minerals of Indeterminate Origin

The rule should make clear that issuers are not required by anything in the statute or the rule to physically label their products in any way with regard to the presence or absence of conflict minerals. Sec. 1502 only requires companies that "did" source from the conflict regions in the DRC or adjoining countries to submit a conflict minerals report (CMR) and only instructs that a product "*may* be labeled as 'DRC conflict free' if the product does not contain conflict minerals…" (Emphasis added). It does not mandate that the SEC require issuers who do not know the origin of the conflict minerals to file a CMR or to label their products as "not" DRC conflict free.

The SEC should create a third category, such as "indeterminate origin" for products manufactured or produced with conflict minerals that issuers (described in our response to Q58), despite their best efforts, are unable in the first years of their programs to determine origin. At least for the first years, issuers should not be required to file a CMR for such minerals. Requiring issuers to submit a CMR and/or identify their products as "not DRC conflict free" when the issuer has not been able to determine the origin after making reasonable inquiry would significantly harm global brands, place U.S. companies at a competitive disadvantage, and damage investor relations even though the issuer has in a place a policy prohibiting the use of conflict minerals from the DRC or adjoining countries in its supply chain that are not otherwise validated as conflict-free.

4. Limit Applicability

The four minerals identified as conflict minerals by the legislation are used in an overwhelming number of manufacturing processes and products. Some are used in significant quantities and are critical to the end use of the product; others are used in trace amounts or are the byproduct of a manufacturing process. The regulation needs to provide clear guidance on the scope of coverage in four areas. First, the NAM suggests that the scope of coverage should not include minerals used in chemical processes; those present in machine tools, machinery, and other equipment used in the production of goods; or minerals that are a byproduct, or are

found in trace amounts. Second, a *de minimis* standard is critical to balance the costs and benefits of the rule and to prevent manufacturers from having the impossible task of tracking trace amounts of minerals. Third, the SEC should acknowledge that the derivatives covered are tin, tungsten, tantalum, and gold. Lastly, recycled material must not be treated as if it originated from the DRC or adjoining countries. Doing so would ignore the very nature of recycled materials and undermine a growing trend to use recycled materials to reduce manufacturers' footprint on the environment.

5. Reports to the SEC Should Not BE Included on Form 10-K

The legislation does not specify that issuers should disclose their use of conflict minerals in their annual reports filed on Form 10-K for U.S. Issuers. Rather the legislation only requires that issuers "to disclose annually whether the conflict minerals did originate in the DRC or adjoining countries." Issuers whose conflict minerals did originate from the DRC or adjoining countries must "submit to the Commission a report." However, there is no specificity for either disclosure requirement that it be made in the annual report or as an addendum to the annual report. Therefore, we request that issuers be allowed to disclose to the SEC by furnishing a separate disclosure to the SEC under the Form 8-K provisions.

6. Issues not addressed in the proposed rule:

A. Confidentiality

The proposed rule does not make any provision for protecting the confidentiality of information that may be proprietary. While we recognize that disclosure is the essence of the statute, there are circumstances in which a requirement for disclosure of identifiable proprietary information may work to frustrate its purposes. In particular, if specific, identifiable supply chain information is required in reports of smelter verification processes, it may not be possible to obtain the cooperation of smelters. The vast majority of smelters are not subject to U.S. jurisdiction – many are located in the Asia and other countries. If smelters do not cooperate in the verification process, the disclosure required under the statute will collapse into a single category of "unknown" origin. Consequently, the rules should provide that smelter audit information be made public only with due regard for business confidentiality and other competitiveness concerns.

B. Government Contracts/National Security Concerns

There are additional requirements and considerations that should be considered with regard to Government Contractors. In addition to commercial limitations associated with disclosure of third party proprietary information, issuers doing business with the United States Government are also subject to security limitations and restrictions on disclosure of suppliers (e.g. classified programs) as well as legal restrictions such as the Procurement Integrity Law (41 USC § 423). These limitations would further limit the ability of Government Contractors to secure the necessary information to fully comply with the requirements as currently contemplated.

C. Unreliable determinations

The proposed rule states, at the text accompanying footnote 131, that "we note that under Exchange Act Section 13(p)(1)(C), failure to comply with the Conflict Minerals Provision would deem the issuer's due diligence process "unreliable" and, therefore the Conflict Minerals

Report 'shall not satisfy' our proposed rules" subjecting the issuer to liability under Exchange Act Sections 13(a) and 15(d). This statement mischaracterizes section 13(p)(1)(C), which provides that a report will fail to satisfy the requirements of the regulations only if it relies on a determination of an independent audit or other due diligence process "*previously determined by the Commission to be unreliable."* (Emphasis added.) Thus, the statute establishes a two-step process that must be satisfied before it may be concluded that an issuer has not satisfied its requirements. First, the Commission must determine that an audit or due diligence process is unreliable; and second, the issuer must file a report that relies on such an audit or due diligence process. The final rule should provide a process for the Commission to provide notice to an issuer of an audit or due diligence processes that it deems unreliable, and provide an issuer sufficient time to allow adjustment of its practices prior to consideration of any penalty associated with subsequent reports.

D. Redundant Reporting

In order to avoid redundant reporting obligations, issuers that contract for the manufacture of goods by issuers that themselves are obligated to report under the statute should not be required to report separately on the conflict minerals contained in the relevant products.

III. Specific Responses to the Questions Raised by the SEC in the Proposed Rule

In this part of our report, we provide detailed recommendations by responding to selected questions posed by the SEC.

Definition of Conflict Minerals

Q1: The final rules should apply to the specific minerals: cassiterite, columbite-tantalite, gold and wolframite, and to the specific derivatives of those minerals: tin, tantalum, gold, and tungsten.

The Act does not delineate particular mineral derivatives. In surrounding legislative discussions, gold, tin, tungsten and tantalum are identified as the elements of concern. We believe it is critical to state that the rule applies, only, at least initially, to tantalum, tin, gold, and tungsten. Without this specificity, the regulation will create much ambiguity. Only the four specific minerals should be within the scope of the rules. If the State Department chooses to designate additional minerals under the Act, then the new minerals and derivatives can be introduced into the definitive list provided in the rules in accordance with an appropriate process of revision. For legal certainty, the rule should be structured to limit the list of derivatives that must be considered to the four listed above.

Applicability to Manufacturers

Q9: The SEC should incorporate the commonly accepted government definition of manufacturing. Based upon the U.S. Census Bureau and North American 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.

Q11: The requirements on issuers should reflect the level of control the downstream company has over the manufacturing operations, the smelter, and the mine. Many of the issuers have

little to no control over the design of the components or assemblies purchased or the direct purchasing of metals. We address separately each context in which control is relevant to the reporting obligations.

1. Downstream issuers (OEMs) purchase components or subassemblies that contain conflict minerals.

Many companies purchase parts, components, or subsystems based on certain performance capabilities without specifying the materials. Companies further upstream manufacturing those products may not necessarily disclose the materials used to manufacture the part, component, or subsystem.

The information concerning minerals specifications, for example, may be considered proprietary to the supplier. Disclosure of the materials used to create the item could reveal some of the suppliers' trade secrets. In such cases, suppliers may refuse to provide issuers data on the presence of conflict minerals, which could lead to a situation in which the issuer would have to terminate its supplier relationship and seek an alternative supplier – a costly and disruptive process.

Additionally, manufacturers often operate in a just-in-time fashion. Where the issuer does not specify specific materials, the supplier will use the material that is available at the time. As an example, consider a part or component that can be manufactured using two different metals. In one instance the metal may have been refined from a conflict mineral. In another, it may not have been. The supplier will not necessarily know which metal went into a particular order and may be unable to provide definitive information to the issuer.

2. Contract Manufacturing

The rules should apply to issuers that contract to manufacture products only if the issuer directly specifies the conflict minerals as an ingredient, feature, or component of the product or process. For example, if a blueprint specifies the use of a certain amount of gold plating on an electrical contact, the issuer is explicitly specifying and directing the use of a conflict mineral in the product or process. On the other hand, if the issuer requires only a certain capability or performance by the supplier's product but does not specify the use of a conflict mineral – but the supplier chooses to use a conflict mineral – then the rules should not apply to that issuer.

3. Sourcing of Finished Goods

When an issuer sources finished goods from a manufacturer and sells those goods under the issuer's trademark, the issuer should not be required to disclose the source of the conflict minerals contained in those goods. Congress did not intend to include retail sales (or product distribution) within the scope of the reporting requirement, and the sourcing and resale of finished goods is essentially a distribution or retail function. In this instance, the manufacturer of the goods should be the party required to disclose.

4. Licensing

An issuer should not be required to disclose to the SEC information on conflict minerals used by another company licensed to use the issuer's trademark. In normal licensing arrangements, the licensor will obligate the licensee to conform to specified quality and other specifications, but will not dictate the means by which those specifications are met. This degree

of “control” should not subject the licensor to obligations under the rule. Licensors do not manufacture, contract for manufacture, or sell the products under license.

Definition of Necessary

Q16-21: The SEC should define that a 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.

We believe the phrase “essential to the product’s use or purpose” refers to the products basic function. Therefore we ask for the SEC to include “basic function” as a qualifier for “necessary...”.

We encourage the SEC to avoid defining “necessary” to include:

– Conflict minerals that are included in a product and contribute to the product’s economic utility but are not essential to its basic function.

– Manufacturing tools, equipment, or processes containing conflict minerals that are used in the production of an issuer’s product. Because production machinery has a useful life that can extend over many years, existing or newly-acquired machinery incorporating conflict minerals of unknown origin will require reporting of “unknown” status of all goods produced by use of that machinery for many years. Such reporting would do little or nothing to discourage the use of conflict minerals from conflict mines. If the rule does not exclude these scenarios, nearly every manufactured good will be subject to reporting on the origin of the conflict minerals contained in production machinery.

– Metal catalysts are used to chemically react and manufacture a range of materials from solvents to fuels to polymers. The catalysts are typically not consumed in the reaction, and can be reclaimed, reprocessed, and reused. Trace levels of the catalyst, however, will be found in the reacted manufactured product, but they do not contribute to the performance of the final product such as the polymer. Residual metal may be present in parts per million or less in products such as adhesives, films, tapes, resins, silicone, urethane, and certain coatings.

- Conflict minerals naturally occurring in a product, including inorganic fillers such as calcium carbonate, titanium dioxide and talcs, can contain metals such as tin as naturally occurring impurities. These should be excluded from coverage.

- Conflict minerals that are an unintentional byproduct of the product.

Annual Reports and Liability

Q22: The legislation does not require issuers to disclose their use of conflict minerals in their annual report. Rather the legislation requires issuers “to disclose annually whether the conflict minerals did originate in the DRC or adjoining countries.” Issuers whose minerals did originate there must “submit to the Commission a report.” However, the Act does not specify that either disclosure be made in the annual report or as an addendum to the annual report.

The Conflict Mineral Report (CMR) should be *furnished* annually in a separate report to the SEC. This will allow the SEC flexibility to tailor a reporting requirement whose timing is not dictated by the filing deadlines of existing reports. Particularly in the first year of reporting, it may be difficult for issuers to complete report preparation and to obtain independent audits of their reports within filing deadlines of existing reports. Requiring publication of the new conflict minerals disclosures in a stand-alone report or in one of the quarterly mechanism gives issuers and auditors additional time to complete this annual review and to ensure the new disclosures are more meaningful and more accurate.

We do not believe that the conflict minerals disclosure and reporting requirements mandated under Section 13(p) should be required to be included in an issuer's Exchange Act annual report on Form 10-K or in a new, separate form. Rather, we believe that in light of the discrete and distinct nature of this disclosure, a more suitable approach would be to designate a new item under the Form 8-K framework for Current Reports that requires the specified information to be furnished within a reasonable time period after the end of the issuer's fiscal year, such as within 120 days. (To the extent applicable, foreign private issuers should similarly be required to submit their conflict minerals disclosure annually on a Form 6-K.)

We want to stress that the Dodd-Frank Act states that conflict minerals disclosure must be provided annually, but it does not require that it be included with the Form 10-K (unlike, for example, other disclosures related to executive compensation and certain board matters that the Act specifies be included in the annual proxy statement). We do not believe the Form 10-K is an appropriate location, primarily because the conflict minerals subject matter is both very specialized and substantially different from the financial and related information otherwise required to be included in an annual report on Form 10-K, and which investors expect to find in the annual report.

In addition, issuers will be required to implement significantly different processes to comply with the new reporting requirement that are outside the scope of processes developed for regular year-end reporting, and it may be a burden to complete the necessary inquiry and due diligence pertaining to conflict minerals on the same timetable as the Form 10-K. A failure to file the 10-K on a timely basis (subject to a short grace period) would prevent an issuer from being eligible to use certain "short form" registration statements under the Securities Act (e.g., Form S-3) and could lead to other adverse consequences, such as a negative perception by analysts and investors.

These timing concerns would be reduced if the conflict minerals disclosure was submitted as part of an 8-K report with an annual deadline later than the 10-K filing deadline. Another consideration is that the Form 10-K must include certifications signed by the CEO and CFO as specified under the Sarbanes-Oxley Act of 2002. There is nothing in the Dodd-Frank Act to suggest that Congress intended conflict minerals disclosure to be subject to the officers' certification requirement.

We agree with the Commission's proposal that the conflict minerals report (including the third party audit report) should be "furnished" as opposed to "filed", an approach consistent with that specified in Form 8-K, General Instructions B(2) with respect to the disclosure required under existing Items 2.02 and 7.01. Using Form 8-K as the vehicle for reporting the required conflict minerals disclosures would allow the Commission to provide additional flexibility to issuers in light of the unique nature of the conflict minerals information and the circumstances giving rise to this new reporting requirement.

For example, unlike Form 10-K, certain items in Form 8-K have the benefit of an instruction (General Instruction B(6)) stating that the 8-K report is not deemed an admission as to the materiality of the information included in the report. Given the specialized, policy-oriented purposes underlying the conflict minerals disclosure, we urge the Commission to consider extending the benefit of this instruction to the conflict minerals disclosure. In addition, under current rules the delinquent filing of certain information on Form 8-K does not make an issuer ineligible to use the short-form registration statement for securities offerings (see General Instruction I(A)(3)(b) to Form S-3). We believe a similar instruction would be appropriate for the conflict minerals disclosure. Finally, a new item on Form 8-K designated for conflict minerals information would be readily distinguishable from other types of disclosures, making it more accessible for interested persons.

Disclosure Requirements

Q26: Sec 1502 of the Dodd-Frank Act clearly states who is required to disclose information to the SEC. The legislation only creates an affirmative reporting obligation for issuers whose conflict minerals "did" originate from the conflict regions in the DRC or adjoining countries. The legislative history of this provision supports our position. Earlier iterations of the legislation included language requiring issuers whose conflict minerals "did or did not originate" from the DRC or adjoining countries to disclose to the SEC. During the conference on the legislation, "did not" was purposefully removed from the section to only require companies whose minerals originated in the region to report to the SEC.

Issuers using tin, tantalum, tungsten or gold that did not originate in the DRC should not have to disclose the countries from which those minerals originated. Not only does the law not support such a requirement, but also it is simply not possible for companies to identify the country of origin of every part and component in a manufactured good without a global process for tracking every element that goes into every component.

There is a significant difference between proving a negative (e.g., the conflict minerals did not originate from the conflict regions in the DRC or adjoining countries) and creating an obligation that requires a positive determination (e.g., the conflict minerals originated in Canada, Thailand, etc.) The sheer volume of products makes that impossible.

Q28: We do not believe that the SEC needs to set specific record retention requirements for the business records underlying the CMR. Registrants provide vast amounts of material information in, for example, Management's Discussion and Analysis in periodic reports, for which the SEC does not impose specific record retention requirements for maintaining the source materials used to generate the disclosures. We believe that the SEC should allow issuers to create record retention guidelines for the source materials used to generate the CMR based on individual circumstances, as registrants are allowed to do for much of the information from which periodic reports are prepared.

Country of Origin Inquiry

Q33-34: The NAM agrees with the approach of the SEC and offers several comments.

First, we believe a technical change is needed to the terminology used to describe an issuer's obligation. The SEC should change the terminology from "country of origin inquiry" to "reasonable source country inquiry." The fact is, "Country of Origin" is a term of art and has

distinct legal meaning under customs and international trade law that is not applicable to the determinations needed under Sec. 1502. Instead, the SEC should require a "reasonable source country inquiry" to determine whether conflict minerals originated in DRC or adjoining counties.

Second, the SEC should not prescribe a one-size-fits-all approach to reasonable inquiry. The nature of a reasonable inquiry will vary with the factual circumstances surrounding the issuer, such as its size, degree of influence over suppliers, and complexity of its supply chain. Specifying a specific standard of reasonableness would necessarily excuse some issuers from responsibilities that they should take on and at the same time impose an unattainable benchmark for others. In neither case would setting the standard serve the purposes of the statute. Finally, creating a specific standard for inquiry will inhibit the development of best practices that will develop as issuers design their compliance programs.

Rather than prescribe a reasonable inquiry standard, the SEC should retain the flexible standard contained in the proposed rule and acknowledge that the standard is broad enough to encompass an issuer's reliance on reasonable supplier declarations or contractual obligation with risk-based follow up and smelter validations or representations as appropriate for determining that the conflict minerals did not originate in the conflict regions of the DRC or adjoining countries.

Lastly, in determining if an issuer appropriately conducted a reasonable inquiry, the SEC should state that an issuer is subject to a "commercially practicable" legal standard. More detail is presented on the "commercially practicable" standard in our comments on due diligence.

Q35: Yes. Issuers should be able to rely on reasonably reliable representations from their processing facilities, either directly or indirectly through their suppliers to satisfy the reasonable origin inquiry standard.

Q36: Yes. The essence of the statute is to provide for disclosure of efforts by issuers to identify and eliminate from their products conflict minerals from conflict mines. Issuers' disclosures under the regulations should be sufficiently complete to allow investors to understand the basis on which the issuer has determined the origin of conflict minerals, regardless of how the declaration is characterized.

Disclosure Requirements for Unable to Determine Origin/Conflict Full

Q37-38: The law only requires companies that "did" source from the conflict regions in the DRC or adjoining countries to submit a CMR and only instructs that a product "may be labeled as DRC conflict free if the product does not contain conflict minerals…" It does *not require* the SEC to require issuers who do not know the origin to file a CMR or to designate their products as not DRC conflict free. We believe the SEC should not mandate such a requirement, as most companies for the first year, if not longer, will not know the origin of the conflict minerals in their supply chain due to the lack of information infrastructure.

Additionally, the law is clear in that it does not create a requirement for issuers to physically label their items as conflict free or full. Thus, the SEC has no authority to create such a requirement, and the regulation should not promulgate such a requirement.

While information infrastructure is still lacking, requiring issuers to submit a CMR and/or identify their products as "not DRC conflict free" when the issuer after making a reasonable source country inquiry is not able to ascertain the origin of the minerals will have significant

negative harm to global brands, place U.S. companies at a competitive disadvantage, and damage investor relations. Most importantly, the legislation *does not instruct* the SEC to create such a requirement.

Until critical infrastructure is in place, most issuers will be unable to determine the origin of their conflict minerals. As a result, the majority of issuers will be treated as if they are directly sourcing from conflict mines in the DRC or adjoining country. If issuers who are unable to determine the origin, but have implemented a conflict minerals policy, made efforts towards a reasonable origin inquiry, and attested to that in the body of their reports are held to the same standard as bad actors, it diminishes the impact good actors can have on addressing the problem at hand. It also undermines the incentives for companies to implement a conflict minerals policy to prevent sourcing from the conflict mines if even after having invested significant resources they are treated the same as bad actors. If the goal is to prevent the atrocities in the region, the regulatory approach must not penalize issuers trying to do the right thing and change sourcing behavior several levels upstream in the supply chain.

Q39: The law only requires specific information from issuers who affirmatively source from the conflict region. The SEC should not require issuers to identify and to disclose the facilities, countries of origin, and mines for all products containing conflict minerals. Without question that is an impossible task. Currently under international trade laws and regulations, when companies are asked to provide the country of origin to the U.S. government, the companies provide the country of origin of the product being imported into the country or where the last substantial transformation occurred. Companies are not required, except under special conditions, to provide the country of origin of every part or component in the imported product let alone the origin of the raw materials. In this case, the SEC would be asking for information even more removed than the country of origin of a part of a component of a larger item. Issuers generally have no ability to collect that level of information.

Q40: In any case in which conflict minerals originate in a smelter that has comingles multiple sources of ore, it is not feasible to trace the minerals in the issuer's product to any specific mine or location of origin. When such smelters are subject to a smelter verification process, it will be possible to identify in the aggregate the mines or locations of origin of the ores in which the minerals originated over the period of time covered by each verification. Issuers will be able to provide aggregate information about mines and locations of origin by making reference to smelter verification reports. Because in most cases it will not be possible to associate specific mines or locations of origin with minerals in any particular product, the rule should not purport to require such information; rather, it should require disclosure of information on efforts to identify such information in the aggregate.

Q41: Weights and dates of individual shipments may be available in records developed during audits of smelters under a smelter validation program. In most cases, it will not be feasible for issuers to associate such information with conflict minerals in their products.

Audit/Audit Certification

Q42: The NAM supports the SEC's proposal that the CMR should contain a statement from the issuer certifying that it has obtained an independent third-party audit as required by statute. We do not believe that the CMR requires a separate set of certifications from individual members of management, but the report would be prepared and published by the issuer containing the requisite certifying statement. To the extent that an individual member of management must sign the CMR to certify that the statutorily-required independent third-party audit has been

obtained, this member of management should sign on behalf of the issuer and not in his or her individual capacity

Due Diligence

Q50-55: We encourage the SEC to create a flexible due diligence standard that recognizes no two supply chains are identical. The SEC should provide guidance to issuers on what would constitute reliable due diligence, but not mandate a specific set of requirements. We were encouraged by the proposed rule in its acknowledgement that issuers are only in the beginning stages of developing due diligence programs and, as such, the programs are very much works in progress that will mature over time. Given the diversity of issuers and products affected, issuers should be permitted to develop 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.

We believe that an issuer should be able to create a due diligence program aligned with reliance on reasonable representations from suppliers or a supplier declaration approach and smelter compliance to determine the origin of conflict minerals. In executing due diligence, an issuer would work with its suppliers to prevent the use of conflict minerals from the DRC or adjoining countries.

Reliable Due Diligence: Depending on the characteristics of the individual supply chain, some or all of the below may be evidence of reliable due diligence.

- Use of information gained through an industry-wide process (where appropriate);
- Creation of a conflict minerals policy and legal obligations through contract provisions, purchase orders, or other means to require reporting on sourcing from a conflict region;
- 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;
- Reliance on reasonably reliable representations from processing facilities or suppliers;
- Use of independent third party audits of the due diligence report if sourcing from the DRC or adjoining countries; and,
- Publication of the reports on the corporate website.

Standard of Care for Determining Origin: We also believe it is important to clearly state the standard of care companies must meet in executing a reasonable inquiry and due diligence. In particular, it is critical for the regulation to state that a reasonable inquiry or effective due diligence does not require 100 percent accuracy, 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 the approach standard of care for executing a reasonable inquiry and due diligence should be based on a “commercially practicable effort.”

Examples of a “commercially practicable effort” include, but are not limited to:

- Legal obligations (e.g., contracts, purchase orders) on direct suppliers to report on sourcing from a conflict region 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 a reasonable inquiry or the exercise of due diligence shall not render either unreliable if the company has engaged in behavior that is commercially practicable in conducting its inquiry or due diligence process, nor does it invalidate an issuer's determination that it did not source from the conflict regions in the DRC or adjoining countries.

Equally important, due diligence over the source and chain of custody should not mean: (1) that an issuer must identify all parties between the mine and 1st tier supplier, and (2) that the issuer should determine the materials used for every manufactured item. Rather, the issuer should work with its direct suppliers to push requirements to use conflict free minerals/metals upstream. The SEC should acknowledge that a risk-based program or use of a risk-based supply chain audit approach of entities in the supply chain is acceptable in place of a product-based or materials declaration approach. A safe harbor should be created that provides that it is sufficient for an issuer to obtain representations from suppliers with whom it is in direct contractual relationship.

Q52: Yes, an issuer should be able to rely upon a smelter validation or a reasonable representation from a supplier. Whether it is reasonable to rely on a representation by a smelter will depend on the particular circumstances surrounding the smelter. For example, some smelters may themselves be issuers who are required to file reports under the statute subject to the possibility of penalty for false reporting. Other smelters may have proprietary sources of ore that are not in the conflict region or may be able to demonstrate reliably in some other fashion that their ores do not originate in the conflict region.

Q53: No. See comments for questions 37-38.

Q54: Any reference to specific due diligence standards should be in the context of providing a safe harbor for issuers. Formulating programs and processes to produce the information needed for disclosure under the statue will be a complex and costly exercise for most issuers. Any steps that the SEC can take to ameliorate the risk that a due diligence process will later be judged to be unreliable will help to alleviate the cost burden on issuers.

Q55: No. Compliance with internationally recognized standards or guidance should be considered as a factor in determining whether an issuer has exercised reasonable due diligence.

Although we believe that adherence to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-Risk Areas is very strong evidence of reliability, this framework is newly entering an implementation phase and subject to changes based upon initial implementation efforts. Moreover, the guidelines may not be appropriate for all issuers. It may be useful to provide a list of national or international organizations and federal agencies that have developed due diligence standards or guidance for issuers to draw upon.

Timing/Phased-in Disclosure Requirements/Transition Rules

Q56: We support the requirement that a complete fiscal year begin and end before issuers are required to provide conflict minerals disclosures, and we believe that this approach is consistent with the statutory language.

Q58,61: The NAM firmly believes that the SEC should establish transition rules for implementation of the regulation. Specifically, we believe a transition period is needed for the disclosure requirements, for inventory already at smelters, for products made from existing inventories, and for acquisitions.
Transition period for disclosure requirements:

The NAM believes that the SEC should create a phased-in approach for the disclosure requirements. This is not prohibited by the law and would result in a practical implementation of the rule while minimizing undue burden and cost to industry. It would also recognize that the needed infrastructure and capacity to comply with the regulation does not yet exist, which makes it practically impossible for issuers to comply with the proposed rule. This approach is also needed to prevent a *de facto* embargo against the region in Africa. Without flexibility, there is a very real danger that issuers may simply prohibit sourcing from the region entirely. This would not only defeat the goals of the legislation but it would significantly undermine the United States' and the entire international community's diplomatic efforts in the region.

Therefore, we provide the following proposal for phasing in disclosure requirements. This proposal does not create loopholes or exempt issuers. All issuers subject to the law would provide a report on their use of conflict minerals the first full year the regulation is in effect.

The SEC should adopt a transition rule that requires reporting only with respect to conflict minerals that are derived from metal smelted on or after January 1, 2012. Such a transition would accomplish several purposes. It would provide issuers an opportunity to put in place smelter verification programs covering a greater portion of the smelting industry, thus limiting the need to report unknown origins due to having material in inventory that entered the downstream flow prior to having any visibility of the origin of ore used by the smelters. Similarly, it would allow issuers time needed to communicate through their supply chains the expectation that conflict-supporting minerals will not be provided, and to work through the system inventories of metal whose origin is not known. Finally, tying the transition rule to a specific date alleviates the difficulties of filers whose reporting periods would commence prior to the beginning of 2012 by virtue of not being on calendar-year reporting.

The proposed phase-in schedule is consistent with the statutory requirements. All issuers will be held accountable for the information they provide to the SEC. If they knowingly or willfully provide false information, the issuer would be subject to SEC penalties.

Phase 1: January 2012- January 2014

Issuers would have to disclose to the SEC based on one of three options:

1. Negative Determination: If the conflict minerals are not from the DRC or adjoining countries, the issuer would furnish to the SEC a separate disclosure to the SEC stating that based on its reasonable inquiry the minerals were not sourced from the DRC or adjoining countries.

2. Positive Determination: If the conflict minerals did originate from the DRC or adjoining countries, the issuer would furnish a separate CMR report on its due diligence to the SEC and publish the CMR on its company's website.

3. Unknown Determination: If the issuer is unable to determine the origin after a reasonable inquiry, the issuer shall furnish a separate disclosure to the SEC and make it available on its website stating the following:

   - the company's conflict minerals policy;
   - the company's reasonable inquiry to determine the origin; and,
   - the conflict minerals used in its supply chain.

   Such disclosure would be subject to the SEC's review to determine if the issuers' statement is unreliable.

Phase 2: January 2014-January 2015

For conflict minerals in which infrastructure and capacity is operational to trace the origin of the conflict mineral(s) (likely tantalum and tin), issuers would have to disclose to the SEC based on one of two options:

1. Negative Determination: If the conflict minerals are not from the DRC or adjoining countries, the issuer would furnish to the SEC a separate disclosure to the SEC stating that based on its reasonable inquiry the minerals were not sourced from the DRC or adjoining countries.

2. Positive Determination: If the conflict minerals did originate from the DRC or adjoining countries, the issuer would furnish a separate CMR report on its due diligence to the SEC and publish the CMR on its company's website.

For minerals in which infrastructure and capacity are not operational (likely tungsten and gold)[1], issuers would have the option to submit an "Unknown Determination."

3. Unknown Determination: If the issuer is unable to determine the origin after a reasonable inquiry, the issuer shall furnish a separate disclosure to the SEC and make it available on its website stating the following:

   - the company's conflict minerals policy;
   - the company's reasonable inquiry to determine the origin; and,
   - the conflict minerals used in its supply chain.

   Such disclosure would be subject to the SEC's review to determine if the issuers' statement is unreliable.

[1] The State Department or Commerce Department should be tasked to determine when the majority of smelters for a specific minerals have been validated.

Phase 3: January 2015-Onward

For conflict minerals in which infrastructure and capacity is operational to trace origin (tantalum and tin and likely tungsten and gold), issuers would have to disclose to the SEC based on one of two options:

1. Negative Determination: If the conflict minerals are not from the DRC or adjoining countries, the issuer would furnish to the SEC a separate disclosure to the SEC stating that based on its reasonable inquiry the minerals were not sourced from the DRC or adjoining countries.

2. Positive Determination: If the conflict minerals did originate from the DRC or adjoining countries, the issuer would furnish a separate CMR report on its due diligence to the SEC and publish the CMR on its company's website.

If it is determined by a government agency that the infrastructure is still not operational (e.g., gold), then issuers would be able to submit an "unknown determination."

3. Unknown Determination: If the issuer is unable to determine the origin after a reasonable inquiry, the issuer shall furnish a separate disclosure to the SEC and make it available on its website stating the following:

    - the company's conflict minerals policy;
    - the company's reasonable inquiry to determine the origin; and,
    - the conflict minerals used in its supply chain.

    Such disclosure would be subject to the SEC's review to determine if the issuers' statement is unreliable.

This approach to disclosure is appropriate given the varying levels of capacity and infrastructure available for each mineral/metal to provide data on origin. Gold, in particular, needs substantially more time and study to determine how to trace the origin and provide transparency. According to experts working on the bagging and tagging schemes and smelter validations, once a scheme is operational it takes, at a minimum, nine months for the issuers to receive information from suppliers on the origin. The proposed phased-in approach is based on this information.

We recognize that there is concern that bad actors will simply use the "undetermined" category as a way to ignore their new obligations under the law. While there will always be bad actors, the majority of issuers subject to the new requirements place a high value on corporate compliance. Providing false information and knowingly misleading the SEC will have significant negative repercussions for issuers and subject them to penalties under the law. Plenty of checks exist to prevent a company from making reckless reasonable inquiries to determine if conflict minerals originated in the DRC or adjoining countries. Given today's regulatory environment, the threat of an SEC enforcement action as well as the other potential penalties is a strong deterrent to companies that do not comply with the requirements.

Our phase-in proposal is also consistent with the requirements of the law. Sec. 1502 (b) requires companies:

> "to disclose annually whether conflict minerals that are necessary… did originate in the Democratic Republic of the Congo…and in cases in which such conflict minerals did originate [to] submit to the Commissioner a report.."

Such language only requires and creates an affirmative obligation to disclose and submit a conflict minerals report if the issuer knows that the minerals in its products originated in the DRC or adjoining countries. If the issuer does not have actual knowledge that the minerals originated from the DRC, the authorizing statute creates no further obligation for the issuer. Therefore, it is within the SEC's discretion to create a third category for an unknown determination.

This position is further supported by the legislative history of Sec. 1502 of the Dodd-Frank Act. During the conference on the Dodd-Frank Act, the Senate offered changes to the House of Representatives Offer on Section 1502 dated June 23, 2010 (attached as addendum A to our comments) which specifically amended the Section 1502 and "clarified that only companies that source from the DRC and adjoining countries need to file anything with the SEC" by removing "or did not" from the statutory language. This change created an affirmative obligation only if the minerals in an issuer's product(s) originated in the DRC or adjoining countries. The House Offer on Section 1502 read:

> "[an issuer is required] to disclose annually…whether conflict minerals that are necessary…*did or did not (emphasis added)* originate in the Democratic Republic of Congo or an adjoining country and, in cases in which such conflict minerals did originate [to] submit to the Commission a report…"

"Did not" was purposefully removed by the Senate to narrowly tailor the disclosure and reporting requirements to apply to only issuers who have actual knowledge that the minerals in their products originated from the DRC or adjoining countries.

For Inventory Already at Smelters

The regulation should specify that inventory of conflict minerals at smelters or processing centers that was obtained prior to January 1, 2012 is not covered by the regulation to allow the institution of reliable smelter audit programs. Efforts to institute a smelter verification program vary greatly for each conflict mineral: some are more advanced than others. If there is no transition rule for conflict minerals 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 as manufacturers will be unable to obtain the information due to that fact that all minerals are comingled in the smelting process without identifying or distinguishing between different countries of origin.

For Products Made from Existing Inventories

Based on the same rationale for the requested transition rule for inventory of conflict minerals already at smelters, we ask for a transition rule for parts and components and products manufactured with the refined metals already incorporated in finished goods or manufactured from conflict minerals already in the suppliers' inventories prior to January 1, 2012. This will 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.

In certain sectors, such as automotive or aerospace, the issuer will have service parts that are used in the repair and maintenance of the products in the stream of commerce and which may or may not be currently produced and sold. Many times these items have a supply chain that is distinct from that of the product currently being manufactured and sold thus increasing the burden on the issuer. While issuers will work to ensure that this supply chain is also conflict free, the consumer has a much more limited choice in purchasing the item. Additionally the test of "necessary to the functionality" may change depending upon whether the item is being incorporated into a final consumer product or being sold as a replacement part (i.e. radio). Parts or components in the repair or maintenance supply chain obtained or manufactured prior to January 1, 2012 must be subject to the above transition rule.

For Stockpiled Metals

There are significant stockpiles of refined metals in the global market, including at metal exchanges for gold and tin. We recommend that the regulation specify that stockpiles of metals in inventory prior to January 1, 2012 not be covered by the regulation. The minerals from which these metals were derived were extracted and refined before supply chain transparency systems were implemented. Requiring country of origin inquiry and due diligence on such inventories would not further the policy intent of the law and could have unintended impact on global metals markets.

For Acquisitions

The rule should provide for the circumstance where an issuer acquires or otherwise obtains control (for example through foreclosure) over a manufacturer that previously has not been obligated to provide reports under Section 1502 and therefore may not have instituted any process to determine the origin of conflict minerals in its products. In such cases, the issuer should not be required to report on products manufactured by the acquired firm until the end of the first reporting period that begins no sooner than 8 months after the effective date of the acquisition. This lead-in period is similar to the time that will elapse between the adoption of final rules implementing the Dodd-Frank Act and the commencement of the reporting period applicable to calendar-year filers, and is necessary to allow time for the acquiring issuer to implement its conflict minerals reasonable inquiry and due diligence processes throughout the supply chain of the acquired firm.

Reporting

Q59: “Possession” should not be the determining factor. The rule should not specify the date of first possession of conflict minerals as the reporting event, because the statutory requirement to report is triggered not by acquisition or possession of conflict minerals, but by inclusion of the conflict minerals in a product (or production process) of the issuer. An issuer’s reasonable inquiry or due diligence process may well include steps to continue to verify the origin of conflict minerals or to investigate allegations concerning the origin of conflict minerals after the issuer takes possession of them or products in which they are incorporated. In such cases, conflict minerals that are identified as non-conflict free may be returned to the supplier and never incorporated into an issuer’s product or not used to manufacture a product. If the rule specifies a reporting trigger, it should be producing or placing on the market a product containing conflict minerals. Such a trigger would need to be accompanied by a transition rule, as discussed in the response to Q 61.

De Minimis

Q62: The conflict minerals identified by the legislation are used in a vast number of products in varying quantities and for various purposes. It is generally impossible for companies to trace the minerals in every product in which they are used. For most products, a quantity of a material must reach a certain threshold before it is possible to identify its actual presence in a part or component. We believe adopting an appropriate *de minimis* standard is critical to the proper functioning of the statute. We acknowledge that it will be difficult to formulate an appropriate standard, but by working together with industry and other governmental agencies, the SEC should craft a standard that recognizes the diversity of products that contain the conflict minerals and the uses for the conflict minerals without diminishing the impact of the legislation on the overall cause. Typically, if legislation doesn't specifically prohibit an agency from creating a *de minimis* standard then it is at the discretion of the agency to do so. We encourage the SEC to develop an appropriate *de minimis* standard.

There is sufficient case law that supports the NAM's position that the SEC has the discretion to create a *de minimis* standard. The maxim *de minimis non curat lex* ("the law cares not for trifles") is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept. See, *e. g., Republic of Argentina* v. *Weltover, Inc., 504* U. S. 607, 618 (1992); *Hudson* v. *McMillian,* 503 U. S. 1, 8-9 *(1992); Ingraham* v. *Wright,* 430 U. S. 651, 674 (1977); *Abbott Laboratories* v. *Portland Retail Druggists Assn., Inc.,* 425 U. S. 1, 18 (1976); *Industrial Assn. of San Francisco* v. *United States,* 268 U. S. 64, 84 (1925).

Sec. 1502 does not expressly prohibit the SEC from establishing a *de minimis* standard. While two Members of Congress who have submitted a letter to the SEC stating they do not approve of a *de minimis* standard, the Congress did not take that position. Based on precedent, a legislature can reject the principle of *de minimis* in any particular law but it must do so in clear and unmistakable language. The Congress did not reject the principle in clear and unmistakable language. The law is silent on *de minimis* and, as a result, the SEC has discretion and should adopt such a standard.

In numerous other regulations in which companies are required to trace raw materials, a *de minimis* standard was created (e.g., the Lacey Act and the Berry Amendment). A *de minimis* standard is not a loophole or exemption, and, if properly designed, it will not materially decrease efforts to increase supply chain transparency. Rather, it would allow the SEC and issuers to focus on the products containing a significant amount of the conflict minerals in a manner that will change supply chain behavior. It thus avoids a very high cost and burden associated with tracing miniscule amounts of materials with little corresponding effect on ameliorating the DRC-region atrocities.

We offer three possible approaches to a *de minimis* standard. We believe further analysis by the government and industry is needed to determine which approach is appropriate for this regulation. Particularly, we believe the SEC should work with a group of industry representatives and the Commerce Department to review the three possibilities described below:

1. Product Specific *De Minimis*: In terms of tracing materials in products, a quantity of a material usually must reach a certain threshold before it is possible to identify its actual presence in a part or component. Therefore, consistent with other regulatory schemes, we

propose that the conflict minerals must trigger a threshold content value of 0.1 percent or greater of the part or component.

2. Company Specific *De Minimis* per conflict mineral: Some issuers use such a *de minimis* portion of global usage of a mineral that they lack the ability to use market forces to change behavior. Issuers that use such a negligible percent of the global supply should not be subject to the disclosure requirements. We propose that issuers who use less than 0.01 percent of the global usage of a certain conflict mineral be considered *de minimis* and outside the scope of the law.

3. Industry Usage *De Minimis:* Identify the top industry users that account for 80+ percent of the usage and consider the remaining 20 percent *de minimis*. Each conflict mineral and/or related metal can be assigned to certain industries based on NAICS or other standard industry code for manufacturers.

A d*e minimis* threshold is necessary to alleviate the need for companies to trace truly "insignificant" amounts that would be virtually impossible to trace. To try to trace these small amounts would be prohibitively costly, and even after spending significant time and financial resources would still in all likelihood be untraceable.

The use of metal compounds in catalysis exemplifies why a *de minimis* standard is needed. Catalysts themselves may be organo-metallic complexes, i.e., further processed and not in mineral form. Such metal catalysts are broadly used to chemically react with and manufacture a range of materials, from solvents to fuels to polymers. The catalysts are typically not consumed in the reaction, and can be reclaimed, reprocessed and reused. Trace levels of the catalyst, however, will be found in the reacted manufactured product, but they do not contribute to the performance of the final product. Consider that a polymer may be used to make a tape or adhesive, which may be used to make a component, which may be used to make the final consumer product, that product may be 10 steps removed from the actual mining operation. The manufacturers of these materials with trace levels will be hard pressed to determine the material origin, let alone influence the supply chain to change the material origin.

We are not seeking a *de minimis* standard to exclude issuers from coverage. However, it is needed to allow issuers to focus their limited resources on those products that contain conflict minerals at levels where the issuer can trace its content and change supplier behavior.

Finally, without a *de minimis*, the rule inadvertently punishes diligent manufacturers who have spent significant resources for more than a decade to find out what is in raw materials and products down to lower and lower levels for environmental, health and safety reasons. Manufacturers with such enhanced composition records are finding an inordinately large number of products that "contain" the conflict mineral derivatives. In some cases, this is merely due to the use of raw materials, such as calcium carbonate, silica, and talc, which are themselves based on mined materials, in which, for example, a conflict mineral derivative might be present at a very small amount as a natural impurity.

In other cases, the presence of the conflict mineral chemical might be merely an artifact of analysis. For example, tin is part of a common package of metals which are tested for environmental compliance (solid waste and water regulations). The so-called presence of tin at ppm levels probably reflects the detection limit of analytical technique, not that tin is actually there. However, materials suppliers may express this as "less than xx ppm", which falsely indicates a possible use of a conflict mineral.

Recycled Materials

Q63-68: 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.

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 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 reclaimed metals. To the contrary, the DRC rebel groups would prefer that industry avoid using reclaimed material since that boost demand for ore and primary metals.

The final rule should include an alternative approach for recycled or scrap sources, but the approach as proposed requiring issuers using conflict minerals from recycled or scrap sources to furnish a CMR including a certified independent private sector audit is unworkable. Issuers who 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 for determining that the minerals did not originate from conflict mines in the DRC or adjoining countries should apply to recycled materials. Under such a system, issuers would still be subject to enforcement actions and other penalties and thus can not simply state that their metals are recycled without inquiring of the origin.

Treating recycled materials as “conflict full” intrinsically does not make sense. By the very nature of the material, an issuer using a recycled material will not be able to provide any of the details required in a CMR. Recycled materials may be decades old. Instead, issuers should have a reasonable basis for believing the material is recycled and maintain auditable records to support the determination.

We believe recycled conflict minerals should have parity with conflict minerals originating from a conflict-free mine so as to encourage manufacturers to use recycled and scrap materials, to reduce the demand for minerals that would support armed groups in the DRC and adjoining countries. This could be accomplished by providing that after a manufacturer conducts a reasonable inquiry into the source of its conflict minerals no further action is required if either: (1) the minerals were determined to originate not from the DRC or adjoining countries, or (2) the minerals originated from a scrap or recycled source.

The four main metals derived from the four minerals specified in the law all have a high percentage of Reclaim shown in the table below.

Metal	Ore	Demand Satisfied Though Reclaim
Gold	Gold	35% [1]
Tin	Cassiterite	34% [2]
Tantalum	Coltan	40% [3]
Tungston	Wolframite	30% [4]

1) World Gold Council www.gold.org
2) International Tin Research Institute www.itri.co.uk
3) Tantalum-Niobium International Study Center www.tanb.org
4) International Tungsten industry Association www.itia.info

IV. Economic Impact

The SEC has estimated the total economic impact as being $46 million. Based on discussions with member companies the NAM's estimate of the cost to manufacturers of complying with the draft rule would be $9.4 billion ($8 billion for issuers and $1.4 billion from smaller companies that are not issuers). As an alternative methodology, we also extrapolating from the recent experience of company costs in complying with the European Union's hazardous waste directive, and estimated on that basis that the economic impact of the SEC's proposed regulations could be as high as $16 billion.

We believe the SEC's estimate of $46 million is grossly underestimated because it did not take all the relevant factors into consideration. While the bulk of the cost will be borne by issuers, most of whom are large companies, the burden on smaller companies that are affected even though they are not subject to the SEC's jurisdiction, will be disproportionately high and may even lead to companies having to go out of business.

We want to preface our economic impact analysis by stressing that we are not providing information on the cost of the regulation as an argument for creating loopholes, exemptions, or modifications that undermine the intent of the legislation. Rather, we believe that the impact and cost of the regulation necessitates narrowly tailoring the requirements, acknowledging the current lack of infrastructure, taking a practical and rational approach to the requirements, differentiating between issuers who "don't know" the origin after reasonable inquiry from those that do nothing to establish origin, and supporting a phased-in approach to the disclosure requirements that requires increasingly more detailed disclosure as infrastructure comes online and supply chains become more transparent.

Effect on Issuers

First, the SEC's estimate on the cost of implementing a new due diligence policy through a corporate supply chain does not reflect the expansive nature of this rulemaking or the sheer number of suppliers and items covered. Based on the due diligence standard proposed by NAM, other trade associations, and the multi-stakeholder group, all 5,994 affected issuers will have to make substantial changes to their corporate compliance policies and supply chain operating procedures. First, issuers may have to revise legal obligations with first tier suppliers. Issuers may also have to develop new IT systems to collect and maintain records supporting

their conflict minerals policies. And lastly, issuers may have to implement risk-based programs that use company control processes to verify that suppliers are providing credible information and pushing contractual obligations upstream. The SEC's aggregate estimate that due diligence will cost only $16.5 million does not even begin to cover the cost of changing legal obligations throughout a supply chain let alone account for the new IT systems and risk-based programs to verify the accuracy of the information.

In coming up with what we believe to be a more realistic estimate, the NAM surveyed its members to determine the average number of 1st tier suppliers. We also sought and obtained an independent estimate of the average number of suppliers. The breadth of the supply chain is considerably larger than many individuals realize.

Based on our consultations with a number of large manufacturers, and based on research by The Global Research Center for Strategic Supply Management at the W.P. Carey School of Business at Arizona State University, it is reasonable to estimate that the average issuer has at least 2,000 1st tier suppliers[2]. (Some NAM members subject to this rule have over 10,000 1st tier suppliers and thus their costs will be substantially higher.) Due diligence as proposed by the NAM and others and as presumably accepted by the SEC would require issuers to use their position to put pressure on suppliers to prevent the use of conflict minerals from the DRC or adjoining countries. This is likely to require issuers to change the legal terms of doing business with their first tier suppliers. This would require substantial supplier-by-supplier outreach.

Based on the due diligence standard proposed by the NAM, other trade associations, and the multi-stakeholder group, all 5,994 affected issuers would have to make substantial changes to their corporate compliance policies and supply chain operating procedures. Companies conservatively estimate at a minimum that two hours of employee time at $50 per hour will be required to change legal obligations to reflect a company's new due diligence policy – and considerably more than two hours is a distinct possibility. Therefore, the collective cost to change legal obligations across the 5,995 issuers affected is a minimum of $1.2 billion (2 hours x $50 per hour x 2000 suppliers x 5,994 companies).

Second, issuers must collect information and maintain auditable records for the SEC. To do so issuers may need to develop new IT systems to collect information on their suppliers. Most manufacturers and suppliers may have to develop new computer systems or revise existing systems to track, store, and exchange data regarding mineral origins. Because of the global nature of supply chains, these systems will need to be available globally, have high storage capacities, and advanced communication, and data transfer functionalities. Based on previous changes to supply chain computer systems over the last several years, the cost per company is likely to range from $1 million to $25 million depending on the size and complexity

[2] The NAM surveyed a cross section of its membership to determine the number of first tier suppliers. Based on the responses from companies, it is reasonable to assume as a baseline that the majority of companies subject to the requirements have at least 2,000 first tier suppliers. In fact, only two of the companies that the NAM surveyed reported under 2,000 first tier suppliers. The Global Research Center for Strategic Supply Management at the W.P. Carey School of Business at Arizona State University recently conducted a 2010 Supply Management Performance Benchmarking Report that supports the NAM's estimate. In fact, the report provides statistical data concluding that on average companies have over 7,000 first tier suppliers. Not only does this provide legitimacy to the NAM's estimate but also provides strong support to suggest that the total cost has been grossly underestimated. *See http://www.capsresearch.org/Research/Benchmarking/Benchmarking.aspx.*

of the supply chain. Again making a conservative estimate of $1 million per IT system, the collective cost would be $6 billion. ($1 million X 5,994 = $6.0 billion).

Third, the SEC uses a very conservative estimate for the cost of the CMR audit. First, the SEC assumes that only 20 percent of the 5,994 affected issuers will have to furnish a CMR, since only about 20 percent of the world's supply of the conflict minerals comes from the DRC. However, now and for the foreseeable future, the majority of issuers are unable to determine the origin of the minerals because the information infrastructure on origin does not exist. Since, as proposed by the SEC, issuers who are unable to determine the origin must submit a CMR, the overwhelming proportion of issuers will have to do that. We conservatively estimate that 75 percent, or 4,500, of the nearly 6,000 affected issuers will have to submit a CMR.

After speaking with several auditing firms and companies that use audits, we believe the SEC's assumption that a CMR will cost on average $25,000 is not accurate. Based on feedback we have received, $25,000 would only cover the initiation of an audit for a small company with a simple supply chain. The majority of issuers subject to this regulation are large multinationals with complex supply chains with thousands, if not tens of thousands, of suppliers. NAM member companies estimate, at a minimum, such an audit would cost at least $100,000. Based on this analysis, the audit of the CMR will collectively cost $450 million not $30 million as projected by the SEC. ($100,000 X 4,500 issuers filing a CMR.)

Fourth, issuers may have to implement risk-based programs that use company control processes to verify that suppliers are providing credible information and pushing legal obligations upstream. This would require substantial man-hours to verify the accuracy of the information and determine that suppliers are providing credible information. Based again on the average number of 1st tier suppliers, on an annual basis if an issuer spent an average of only a half hour on each of 2000 suppliers, 1000 hours at $50 per hour would be needed to verify the credibility of the information. This would collectively cost $300 million (1000 X $50= $50,000; $50,000 X 5,994 = $300 million).

Based on the above analysis, the cost of compliance in the aggregate is roughly $8 billion for issuers (audits plus due diligence programs) not $46 million as proposed by the SEC.

The above estimate does not include many other costs that issuers will incur such as creation and filing of the annual report, the increased cost of the minerals as demand for DRC free grows, and the increased cost of parts and components from suppliers. These other variables could easily add another several billion dollars to the implementation cost of the regulation.

Effect on Small Business

The SEC has also dramatically underestimated the impact on small businesses. It has only looked that those small businesses that must file annual reports with the SEC. The SEC states that the "proposal would affect small entities that file annual reports with the Commission under the Exchange Act." According to the SEC, only 793 small entities would be affected.

This estimate totally overlooks the fact that when issuers seek to establish their supply chains are free of conflict minerals, they will all have to turn to their first tier suppliers and require due diligence. Those suppliers will turn to their suppliers, who will then turn to theirs, etc. Ultimately a large portion of America's 278 thousand small and medium-sized manufacturers

could be affected by the requirement to provide information on the origin of the minerals in the parts and components they supply to companies subject to the SEC.

Smaller firms will be especially impacted if the SEC does not create a third category for unknown determinations. These firms will be required by issuers to provide detailed information on the origins of the minerals in the products they supply to issuers. For example, major OEMs will be requesting their suppliers regardless of whether the suppliers are subject to SEC requirements directly, to provide detailed information on the origin of the materials used in the parts and components they are supplying to the OEMs. The burden is on suppliers to provide proper information regarding the source of the minerals because OEMs must execute due diligence over the source and supply chain.

In seeking to estimate the cost of obtaining this information, it must be recognized that, in effect, small businesses will be asked to use the same diligence as issuers. As large manufacturers on average have 2,000 first tier suppliers (and some have 10,000 or more), and recognizing that those suppliers have their own suppliers, it may quickly be seen that a substantial portion of America's smaller manufacturers may be involved. Utilizing the SEC's estimate of $25,000 for an audit, which we believe would cover the cost of an audit for a small company with a simple supply chain, and estimating that only one in five smaller companies would be in one or more issuer's supply chains, the cost to smaller companies could easily be $1.4 billion in the aggregate. (278 thousand companies x .2 x $25,000 each = $1.39 billion.)

Smaller companies will be disproportionately affected by the requirements under this regulation. They will face larger per unit cost increases because of smaller business volumes, more limited resources to produce the required documentation, and less leverage over their suppliers, both foreign and domestic. Smaller companies typically do not have the customs and compliance staff typical of larger corporations and companies thus making compliance efforts even more difficult.

Due to the lack of infrastructure, smaller firms may not be able to provide information on the origin of the minerals to the issuers. The cost of compliance may, in fact, be prohibitively high and, as a result, many larger issuers or downstream companies may be forced to discontinue use of any supplier that cannot provide assurances that their products are DRC conflict minerals free. As a result, many could be driven out of the market or forced to stop supplying companies subject to the SEC. For this reason, the SEC needs to consider alternative means of implementing Sec. 1502.

An Alternative Estimate: Comparison to the European Union (EU) Regulation on Hazardous Substances (RoHS)

In 2006, the EU enacted a regulation banning companies from placing new electronic and electrical equipment containing more than agreed levels of lead, cadmium, mercury, hexavalent chromium, polybrominated biphenyl, and polybrominated diphenyl ether flame retardants on the European market. According to Technology Forecasters, Inc, the RoHS directive cost the electronics industry more than $32 billion for initial compliance and $3 billion annually to maintain compliance. The study also found the average cost per company was $2,640,000 to achieve initial RoHS compliance and another $482,000 for annual maintenance.

Implementation of Sec. 1502 can be expected to cost at least the same, if not more than implementation of the EU RoHS program. RoHS and Sec. 1502 are similar in that they require companies to trace materials used in their products. However, Sec. 1502 is broader in scope

because: 1) it covers more products and sectors than RoHS; 2) it discriminates against origin as opposed to a ban and (3) does not include a *de minimis* or other weight-based exception for products containing only small or trace amounts of the ores. Companies will have to implement compliance schemes similar to but much more expansive than their RoHS programs and thus will incur greater cost.

Given similarities between the two regulations, if the average cost per company for compliance with RoHS was multiplied against 5,994 issuers subject to the SEC's proposed rule, the cost of compliance with the SEC rule would be nearly $16 billion. We encourage the SEC to review the cost of implementation for RoHS as the agency crafts the Sec. 1502 regulation.

Need for Broader Review of the Economic Impact

Based on the requirements of the Paperwork Reduction Act (PRA) and the Regulatory Flexibility Act (RFA), we believer the Office of Management and Budget (OMB), the Small Business Administration (SBA), and other relevant agencies such as the departments of Commerce and State) need to review the SEC's proposed rule and evaluate whether it meets the requirements of the PRA and RFA. The NAM does not believe the SEC has met its obligations under those two acts.

Under the PRA, the SEC is required to:

> "(1) minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government;"

We agree with the SEC when it stated in the proposed rule, "that the burden on issuers could be significant" to collect the information required. It is for this reason that we believe OMB should engage in greater scrutiny of the proposed rule. The proposed rule, by requiring issuers who do not know the origin of the minerals, not for the lack of trying, to submit a CMR, drastically increases the amount of paperwork issuers will have to collect and provide to the SEC to make the required disclosures. In order to minimize the paperwork burden, the SEC should allow issuers after a reasonable inquiry has occurred to disclose that the origin of the conflict minerals is unknown without having to submit a CMR. Under the proposed rule, as shown above, we believe the total cost based on the volume of paperwork issuers will have to create will cost issuers and smaller firms $9.0 billion. This is a huge paperwork burden.

Under the RFA, the SEC is required to provide a regulatory flexibility analysis that includes:

> "(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
>
> (4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
>
> (c) …a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as—

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities."

The SEC cannot simply look at the 739 smaller companies who are listed on a stock exchange and must file reports to the SEC. As we have shown above, the spillover and cascading effects of the regulation are likely to affect a very large number of smaller companies and cost them well over $1 billion.

Given the state of the United States economy, implementation of new compliance programs costing tens of billions of dollars will negatively impact competitiveness and, potentially, cost jobs.

V. Conclusion

In conclusion, based on the NAM's estimate and the comparison to RoHS, it is fair to conclude that compliance with the proposed regulation is $9-$16 billion. This merits significant review and consideration of the alternate methods or approaches to implement the requirements of Sec. 1502 to minimize the impact on manufacturing, competitiveness, and jobs. The NAM believes our comments provide practical recommendations that will minimize the impact while simultaneously achieving the goals and requirements of the Dodd-Frank Act.

Sincerely,

Stephen Jacobs

Attachments

Via email: rule-comments@sec.gov

SUMMARY OF SENATE CHANGES TO HOUSE OFFER ON SECTION 1502

1. Clarifies that only companies that source from the DRC and adjoining countries need to file anything with the SEC.
   - Page 13 lines 19 and 20: strike "or did not"

2. Clarifies that private sector audits are strictly audits of representations made in reports, not audits of supply chains.
   - Page 14 line 3: "A description of the measures taken by the person to exercise due diligence on the chain of custody of such minerals, which shall include an independent private sector audit of such report submitted through the Commission conducted in accordance with standards established by the Comptroller General of the United States in accordance with rules promulgated by the Commission in consultation with the Secretary of State.

3. Clarifies that "conflict free" refers to mineral sourcing in the area of the DRC (narrowing).
   - P14 line 12, before conflict free, insert "DRC"

4. Clarifies that companies will certify their audits.
   - P 14 line 24, insert "such a certified audit shall constitute a critical component of due diligence"

5. Clarifies that it is Commerce analysis of reports in previous years, not the current year, that will identify unreliable auditors or processes.
   - P 15 line 8, between process and determined, language to clarify previously determined (leg counsel fixing)

6. Technical correction to reduce scope and to enable companies to file reports correctly.
   - P 15 insert between 2 and 3: (D) DRC CONFLICT FREE.—For purposes of this paragraph, a product may be labeled as ' DRC conflict free' if the product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.

7. To ensure transparency for companies that do not have to file with the SEC.
   - P.22 line 19 Insert Brownback additional report into extant GAO report

(b) DISCLOSURE RELATING TO CONFLICT MINERALS ORIGINATING IN THE DEMOCRATIC REPUBLIC OF THE CONGO.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) is amended by adding at the end the following new subsection:

"(o) DISCLOSURES RELATING TO CONFLICT MINERALS ORIGINATING IN THE DEMOCRATIC REPUBLIC OF THE CONGO.—

"(1) REGULATIONS.—

"(A) IN GENERAL.—Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did or did not originate in the Democratic Republic of Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report—