at&t

Theodore Kingsley
General Attorney
AT&T Services, Inc.
1133 21st Street NW – Suite 900
Washington, DC 20036

T: 202-463-4627
F: 202-463-8066
Email: tk6181@att.com

March 9, 2011

via email: rule-comments@sec.gov

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

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

Dear Chairman Schapiro:

AT&T Inc. appreciates the opportunity to respond to the Proposed Rules for Implementing Section 1502 of the Dodd-Frank Act, SEC Rel. No. 34-63547 issued on December 15, 2010 by the Securities and Exchange Commission (the "SEC" or the "Commission").

AT&T is one of the largest telecommunications providers in the world, providing local, long distance, enterprise and wireless services. As part of its operations, it provides equipment manufactured by thousands of manufacturers. AT&T is concerned that the proposed rules are too broad and will reach retailers, such as AT&T, that have only a minimum of contacts with the manufacturing process. As discussed below, AT&T believes that retailers who merely place their marks on goods or who do no more than order goods with particular features should not be subject to the rules.

The Statute Applies Only to True Manufacturers

The Proposed Rules correctly note that the Conflict Minerals Provision applies to any person for whom conflict minerals are necessary to the functionality or production of a product manufactured by that person (citing section 1502(B)), and that, therefore, "the Conflict Minerals Provision was intended to apply only to issuers that manufacture products."[1] After declining to define the term "manufacture" because the term is "generally understood,"[2] the Commission questions whether the rules should "apply equally to those who manufacture products themselves and those who contract to have their products manufactured by others".[3]

[1] Proposed Rules at 17
[2] Id. (*citing* Random House Webster's Dictionary 403 (2d ed. 1996) as including the "making goods or wares by hand or machinery, especially on a large scale").
[3] Id. at 18-19 (footnotes omitted, emphasis added).

equally to those who manufacture products themselves and those who contract to have their products manufactured by others".[3]

The express language of the statute raises no legitimate question as to whom it applies. The two operative provisions in section 1502(b) are the definitional section listing "persons described" (codified at Section 13(p)(2)(B) and the section listing what must be disclosed (codified at Section 13(p)(1)(A) of the Securities Exchange Act of 1934 (Exchange Act)). These provisions must be read together.

First, Exchange Act Section 13(p)(1)(A) requires the Commission to promulgate regulations "requiring any *person described in paragraph (2)*" to make the relevant annual disclosures. A "person described in paragraph (2)" is "any person for whom conflict minerals are necessary to the functionality or production of a product manufactured by that person."[4] As the Proposed Rules provide, "the Conflict Minerals Provision was intended to apply only to issuers that manufacture products."[5] The disclosure regulations should thus apply exclusively to entities that are traditionally described as manufacturers. The SEC has deemed manufacturing to be generally understood to be the "making of goods or wares by hand or machinery, esp. on a large scale."[6] If a company is not making or transforming goods, the rules should not apply.

The other relevant provision, Section 13(p)(1)(A)(ii), requires that the "person described", to-wit: manufacturers, to include in their disclosures "a description of the products manufactured or contracted to be manufactured that are not DRC Conflict Free."[7] This is the only time the phrase "contracted to be manufactured" appears in the statute. The intent is evident. Manufacturers may not avoid their obligations by contracting or subcontracting any aspect of the manufacturing process. The Conflict Minerals Provision applies to manufacturers, whether or not they make their goods or wares directly or indirectly by contracting or subcontracting with other manufacturing firms. In sum, the statute applies to manufacturers and manufacturers who subcontract any or their entire product manufacturing.[8]

<u>It is Imperative that the SEC Narrowly Interpret "Contract to Manufacture"</u>

---

[3] Id. at 18-19 (footnotes omitted, emphasis added).
[4] Id. at 17
[5] Id.
[6] Id. at n.52
[7] Exchange Act Section 13(p)(1)(A)(ii)
[8] We agree with commenters that recommend that the SEC should incorporate the commonly accepted government definition of manufacturing based upon the North American Classification System. CTIA, The Wireless Association (CTIA), March 1, 2011, Comments at 4, and National Association of Manufacturers (NAM), March 2, 2011, Comments at 6.

The original Dodd-Frank Conflict Minerals amendment to the Senate financial services bill was specifically modified to include the words "manufactured by" – a modification that indicates that downstream retailers were specifically eliminated from being considered as a "person described" as they are not manufacturers. Indeed, in connection with this amendment, the Senate sponsor of the amendment, Senator Sam Brownback, described the provision as "a narrow SEC reporting requirement." (Cong. Rec., May 18, 2010, at p. S3866.)

The proposed rules, unfortunately, expand the concept of "contract for the manufacturing of products" to having "any influence" over the manufacturing of products. "Any influence" is simply too broad a standard and is at direct odds with the "narrow SEC reporting requirement" that Senator Brownback described.

To come within the scope of the rules a party should have direct and substantial control over the manufacturing process – control that is limited to instances where the issuer has direct, close and active involvement in the sourcing of materials, parts, ingredients or components to be included in that product that may contain metals smelted from conflict minerals.9

As it stands, the proposed rule would capture any number of retail issuers whose sole contact with manufacturing is the use of their sales mark or their involvement in choosing the features of a product. It is no different from a customer who orders a computer from Dell. He picks various components, and Dell assembles the computer. That person is no more a manufacturer than is AT&T when AT&T orders smart phones from an OEM with particular features or colors. Any other interpretation would cause virtually every retailer in the United States who makes this type of selection for its products to be a contract manufacturer under the proposed rules. Other examples of unintended consequences of the broad terms of the proposed rule include:

- A car dealership that specifies features for its cars when it orders inventory from the manufacturer will unknowingly be transformed into a contract manufacturer.
- A company that merely licenses the use of its trademark for use by a manufacturer may be deemed a contract manufacturer under the proposal. It would be difficult to reconcile with the statute any rule that would consider a licensor to be contracting for manufacture a product that carried the licensor's mark without further involvement.

Moreover, retailers should also be permitted to provide that products must have a certain minimum "American Made" content, be child labor free, or be free of carcinogens without being labeled as a manufacturer. Because of the immense and possible impossible burden of tracking the tens of thousands of products bearing a retailer's mark,

[9] CTIA Comments at 4, National Retail Federation (NRF) Comments, March 2, 2011 at 5.

we are concerned that many retailers may be forced to abandon their sustainability goals in order to be able to comply with the burdens of the proposed rules.

The fact that a reseller is the exclusive provider of a particular manufactured product, however, should not alone be determinative in establishing whether that reseller's relationship with the manufacture is such as to be deemed a contract manufacturer. The retailer still must have a direct, close and active involvement in the sourcing of materials, parts, ingredients or components to be included in a product that may contain metals smelted from conflict minerals in order to come within the scope of the rules. In cases where an OEM designs a product, and wants to tap the marketing power of a branded reseller through an exclusive arrangement, the OEM is using the reseller as a sales channel, in direct contrast to the reseller outsourcing manufacturing to an OEM. Similarly, a collaborative decision between resellers and manufacturers for the sale and distribution of OEM manufactured devices for the same purposes would fall outside of the scope of true contract manufacturing.

AT&T operates a world wide network and delivers a range of data, voice and video communications solutions to enterprise, government and individual customers. AT&T does not manufacture any of the products used by itself or its customers, but rather obtains those products from third party vendors, often original equipment manufacturers (OEM), many of whom contract out portions of their production. As a reseller positioned just before end customers, AT&T is further removed from conflict mineral mines than any entity in our supply chain – likely with ten, twelve, or even more layers of intermediaries between the mines and ourselves. This separation from the mines means that of all entities in our supply chain that could be affected by this law, AT&T has the poorest visibility of conflict minerals content. At the same time, we face an extremely broad set of suppliers and sub-suppliers to account for. We have over 50,000 direct suppliers, each of whom has its own network of suppliers and so on all the way back up those ten or twelve layers. Moreover, this population of suppliers and sub-suppliers can see substantial churn, such that over a period of time, even more individual companies are involved. By way of illustration, our wireless handset supply chain has approximately 15 direct OEM suppliers, more than 20 original design manufacturers or contract manufacturers in the next layer, perhaps 60-80 major component suppliers in the layer beyond, probably over 1,000 commodity parts suppliers beyond that, and an unknown number of brokers and distributors leading back to metals manufacturers, smelters, and ultimately to the mines. Handsets commonly contain about 1,000 parts and most of them do not have markings to indicate who made them, let alone where the materials came from. In view of our remoteness from the mines, our poor visibility of conflict minerals content (we have a scant subset of the information our OEM direct suppliers have), and the enormous number of supply chain intermediaries between us and the mines, it is surely "a bridge too far" to draw resellers into scope.

Although AT&T does not (1) make or assemble any of these products or their component parts, (2) determine the materials to be used in the production of a product or (3) determine the manner in which products are produced, AT&T does disclose to

manufacturers its purchasing policies, which include compatibility with its network and adherence to its polices against child labor and other guidelines. It may also request that a product offer certain features. Under the proposed rules, although AT&T has no part in the manufacturing process, it may be viewed as an issuer that "contracts to manufacture." AT&T influences our suppliers in a number of ways – we require them to comply with laws, to provide us with safe, functional products that operate on our network with a degree of reliability to assure customer satisfaction, and we may request particular features and functionality. None of this activity gives us a better view into the conflict minerals chain of custody at the distant end of a multi-level, multi-tiered supply chain. It simply reflects the way 21st century technology companies do business in a rapidly changing, globally competitive environment.

Finally, entities may resell products manufactured by others that do bear the reseller's logo on the products' manufactured components. In this case, if the same essential products are also sold through other retail outlets (with or without corresponding reseller branding), retailers should not be deemed to have contracted the products' manufacture – a given retailer is simply one of multiple sales channels, and the addition of the corporate brand to an otherwise standard manufactured product should not bring resellers within scope. Examples of such products in the AT&T space include home cordless phones and wireless accessories.

Products Purchased for Internal Service Provider Consumption

An overly elastic definition of contract to manufacture based on "any influence" could bring into question a non-manufacturer's purchase of equipment and inventory used to provide services, which, unlike physical products, cannot contain conflict minerals. AT&T, for example, purchases a range of electronics equipment to operate the network connectivity services it provides to the public, in addition to myriad items such as light bulbs, building controls, fleet vehicles, office equipment, etc. These items -- like the wrench in the SEC's example (Proposed Rules at 24) -- should not subject AT&T to the rules and AT&T requests that the SEC clarify this point.

Light Touch Regulatory Alternatives

AT&T respectfully suggests that the record in this proceeding overwhelmingly supports a tailored rule in accordance with the comments of NAM, NRF, and CTIA. If however, the SEC adopts a definition of "contract to manufacture" that is so broad as to sweep in issuers that are not commonly described as manufacturers, then the same record overwhelmingly supports a lighter-touch "safe harbor" compliance mechanism for entities that do not have the same view into the mine-to-smelter chain of custody as manufacturers.

To the extent that any disclosure requirements are applied to non-manufacturers, the requirements must be tailored to the economic realities and burdens of a retailer that has an exponentially greater number of ultimate sources than any manufacturer, not the

auditing and reporting obligations that are more properly applied to manufacturers in light of the latter's better view into the mineral sourcing and smelting custody chains. Specifically, a separate safe harbor should be established for non-manufacturers that would permit such entities to use best procurement practices to comply with the requirements of Section 1502(b).

For example, the SEC could establish a disclosure requirement for non-manufacturing issuers that would allow them to comply with the Conflict Minerals rules by certifying that in all contracts with upstream suppliers of products, the certifying non-manufacturing party: (1) obtains binding representations from upstream suppliers to follow the Conflict Minerals Rules, and (2) if the upstream party is not jurisdictionally subject to the Conflict Minerals Rules, then that party will nonetheless provide information, on request, on the use of Conflict Minerals in the products being supplied under the contract.

No further audits, reports or other requirements should be imposed on non-manufacturers. Since Section 1502(b) manufacturers within the supply chain will already be providing such reports pursuant to the proposed rule under Section 1502(b)(1), there is simply no need to require duplicative and costly report and auditing requirements on non-manufacturing entities. To the extent that upstream or downstream manufacturers are not jurisdictionally subject to the Act, however, downstream issuer non-manufacturers will not be in a position to complete the reports and audits that would otherwise have been performed by the manufacturer without extraordinary burden. A requirement that such downstream non-manufacturers nevertheless certify to certain procurement best practices even with entities not subject to the Act will indirectly put pressure on all manufacturers to be forthright and forthcoming on their use of conflict minerals.

Sincerely,

Theodore Kingsley
General Attorney