WILMERHALE

Thomas W. White

+1 202 663 6556(t)
+1 202 663 6363(f)
thomas.white@wilmerhale.com

June 2, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Conflict Minerals, Release No. 34-63547; File No. S7-40-10

Dear Ms. Murphy:

On behalf of IPC—Association Connecting Electronics Industries, we submit for the Commission's consideration in the above-referenced proceeding the enclosed memorandum on "The Commission's Statutory Authority to Phase-in Its Conflict Minerals Disclosure Rules."

Please feel free to contact the undersigned if you have any questions or would like additional information.

Sincerely yours,

Thomas W White

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The Commission's Statutory Authority to Phase-in Its Conflict Minerals Disclosure Rules

IPC—Association Connecting Electronics Industries has requested that WilmerHale provide this memorandum analyzing the legal authority for the Commission to adopt a phase-in of the requirements of the conflict minerals rules to be adopted pursuant to section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. As discussed below, we believe that such authority exists both by virtue of the statutory text of the Act and the Commission's general exemptive power under the Securities Exchange Act of 1934.

Background

Section 1502(b) of the Dodd-Frank Act amended the Exchange Act to add a new Section 13(p). That section directs the Commission to adopt rules requiring public disclosures about the use of "conflict minerals" in products manufactured by certain reporting persons. "Conflict minerals" are defined as columbite-tantalite (coltan), cassiterite, gold, wolframite or their derivatives. Congress adopted this provision to address concerns that the exploitation and sale of these minerals "is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein."[1] The Commission proposed rules to implement Section 13(p) on December 15, 2010.

As the Commission is aware, many commenters on the rule proposal have advocated that the Commission adopt a phase-in or transitional approach in order to address the substantial practical difficulties issuers currently face in seeking to trace the origins of conflict minerals included in their products and to determine if these minerals are or are not "DRC conflict free."[2] IPC, for example, has stressed that at present the infrastructure largely does not exist to provide sufficient supply chain transparency. IPC recommended a three year phase-in of the rules "based upon the anticipated dates at which on-the-ground tracking systems are in place and supplying verifiable 'conflict-free' minerals and a significant number of smelters have been audited and their products validated as 'DRC conflict free.'"[3] Under IPC's proposal:

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No.111-203, § 1502(a) (2010).

[2] The Commission specifically requested comment on whether it should phase in the rules. *See* Release No. 34-63547, *Conflict Minerals*, Question 58, at 59 (Dec. 15, 2010).

[3] IPC-Association Connecting Electronics Industries, *Comments on SEC Proposed Rule on Conflict Minerals*, at 12 (Mar. 2, 2011).

- The SEC would establish a transitional category of conflict minerals of "indeterminate source" (in addition to categories of "DRC conflict free" and "not DRC conflict free").

- During fiscal years 2012-2014, issuers would be required to disclose to the SEC that specific conflict minerals are necessary to the functionality of a product as well as to provide information about their conflict minerals policy and a statement that due to a lack of infrastructure in place, it is not possible to determine the origin of the conflict minerals in question. To the extent that a company did have information that some or all of its conflict minerals did originate in the DRC or adjoining countries, it would have to provide the requisite conflict minerals report as to those conflict minerals.

- After fiscal year 2014, when sufficient infrastructure is expected to have been developed to permit companies to determine the source of all of their conflict minerals, the "indeterminate source" category would no longer be available.

For the reasons set forth below, we believe the Commission has the authority to adopt a reasonable phase-in process along the foregoing lines.

The Dodd-Frank Act Gives the Commission Discretion to Adopt Phase-in Mechanisms

Section 13(p)(1)(A) directs the Commission to promulgate regulations requiring reporting persons 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 [to the functionality or production of a product manufactured by such person], in the year in which such reporting is required, *did originate* in the Democratic Republic of the 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. . . .

(Emphasis supplied.) By using the term "did originate," this section should be interpreted to require affirmative disclosures only where the reporting person knows or has determined that conflict minerals in fact originated in the Democratic Republic of the Congo or adjoining countries during the reporting period. However, the term "did originate" contemplates (but does not expressly address) situations where the reporting person does not know and is unable to determine that the minerals in fact originated in the subject countries during the reporting period. But the statute does not specifically instruct the Commission how to address the situation where a reporting entity reasonably cannot determine the source of the conflict minerals using the

currently available resources and infrastructure. In that circumstance, we believe Section 13(p)(1)(A) provides the Commission ample discretion to adopt a reasonable transition rule that allows the reporting person, when it is unable in good faith to determine the origin of the conflict minerals, to state that the minerals are of "indeterminate source" until such time as the infrastructure exists to enable them to make this determination.

The legislative history supports this interpretation. While the Senate included conflicts minerals provisions in its version of the financial regulatory reform bill passed in May 2010, the statutory language ultimately enacted was provided by the House. Notably, the original "House Offer" in the Conference Committee would have required disclosures whether "conflict minerals that are necessary . . . did *or did not* originate in the Democratic Republic of the Congo or an adjoining country." (Emphasis supplied.) The phrase "or did not" was removed at the request of the Senate conferees.[4] That change removed what would otherwise have been an affirmative, binary disclosure obligation—whether the conflict minerals "did or did not" originate in the subject countries—that would have gone into effect in the first fiscal year after adoption of the rules. Eliminating "or did not" thus expanded the Commission's rulemaking discretion.

Phase-in Would be an Appropriate Exercise of the Commission's Exemptive Authority

The interpretation of Section 13(p)(1)(A) set forth above is reinforced by the Commission's general exemptive power under Section 36 of the Exchange Act. Section 36 enables the Commission to conditionally or unconditionally exempt persons, securities, or transactions from any provision of the Exchange Act or any rule or regulation thereunder "to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." Section 36 gives the Commission flexibility to fashion workable rules that respond to potential impracticalities, burdens, and costs that might otherwise result from rigid application of a regulatory mandate. By placing the conflict minerals rules in the Exchange Act, Congress expressly enabled the Commission to approve a phase-in, if, for the reasons articulated by IPC or other commenters, it concludes that doing so would be necessary or appropriate in the public interest and consistent with the protection of investors.

Moreover, applying Section 36 to permit a phase-in of the conflict minerals rules would be entirely consistent with the Commission's prior practice in implementing important statutory mandates. In 2003, the Commission adopted transitional rules for implementation of the requirements of Section 404 of the Sarbanes-Oxley Act. The Commission's final rules provided for a two-step phase-in period for Section 404's requirements that each issuer provide an annual management evaluation of its internal control over financial reporting (ICFR) and an audit of ICFR by its registered public accounting firm. The Section 404 rules adopted in 2003 would

[4] *See* Comment Letter from National Association of Manufacturers, at 18 and accompanying attachments (Mar. 2, 2011).

have applied to accelerated filers beginning with the first fiscal year ending after June 15, 2004, but non-accelerated filers would not have become subject to the requirements until the first fiscal year ending after June 15, 2005. In establishing the implementation schedule, the Commission concluded that "the transition period is appropriate in light of both the substantial time and resources needed to properly implement the rules and the corresponding benefit to investors that will result."[5] The Commission cited Section 36 among the statutory authorities for the Section 404 rules. On several occasions, the Commission further extended the deadlines for certain issuers, particularly non-accelerated filers, to provide the ICFR reports and audits, in each case taking into account the potential costs and burdens of compliance.

Conclusion

In sum, we believe that the Commission has ample authority to adopt a reasonable phase-in that will take into account the practical realities of developing a mechanism to trace conflict minerals to their source of origin. Exercise of this authority would not in any way be inconsistent with or subvert the public policy underlying Section 13(p), because the transition relief would only be available in situations where reporting persons, in good faith, are not able during the initial reporting periods to determine the source of origin of their conflict minerals. The Dodd-Frank Act itself has built into it sufficient flexibility to allow an interim disclosure system that allows a reporting person to identify the source of minerals as "indeterminate" when more definite information is not available. And the Commission's general exemptive authority, either standing alone or in conjunction with Dodd-Frank, similarly gives the Commission the necessary flexibility.

[5] *Final Rule: Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, §II(J), http://www.sec.gov/rules/final/33-8238.htm#iij.