By E-mail

Chairman Mary L. Schapiro
Commissioner Luis Aguilar
Commissioner Elisse Walter
Commissioner Troy Paredes

Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Dear Chairman and Commissioners,

The International Corporate Accountability Roundtable ("ICAR") along with Global Witness and our partner the Enough Project submit this letter to counsel against the introduction of a second comment period as requested by the Chamber of Commerce in its letter to the Securities and Exchange Commission ("Commission") dated July 18, 2011. We believe the Commission has acted in accordance with relevant Executive Orders, including the general principles of regulation, public participation, integration and innovation and flexibility as detailed in Executive Order 13563. Furthermore, we believe that the Commission has been rigorous and diligent in identifying burdens, costs and complexities in developing the proposed rule, we also note benefits derived from industry and governmental initiatives spurred by Section 1502 may be slowed down by any delay in reporting requirements. Next, we offer our comments on the recent decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Business Roundtable v. SEC*, F.3d No. 10-1305, 2011 U.S. App. LEXIS 14988 (D.C. Cir. July 22, 2011) and it's applicability to Section 1502. Finally, we believe the rules would satisfy congressional intent if they applied equally to mining issuers, and defined certain key terms. We therefore urge the Commission to deny the request for a second comment period and incorporate the definition of the key terms below into the final rule.

A. Economic Analysis

1. The Commission performed a thorough and accurate economic analysis

The Commission considered data from a variety of sources and thoroughly considered the impact of its regulations. The proposed rule reflects the Commission's due diligence in considering evidence derived from a wide array of sources, including the National Association of Manufacturers, the prevalence of these minerals in the Congo and the percentage of the minerals in global supply. Thus, the Commission found that approximately 15% to 20% of the world's tantalum, and a considerably smaller percentage of the other three conflict minerals originate in the DRC. Therefore, the Commission assumed that only 20% of the 5,994 or 1,199 affected issuers would have to furnish a Conflict Mineral Report under the rule.[1]

Further, as to potential costs, the Commission considered submissions from an industry group and a non-profit and averaged the highest and the lowest estimates they received to obtain an aggregate estimate of $16.5 million for the 1,199 issuers estimated to be required to file Conflict Minerals Reports.[2] The Commission continued to use figures and estimates obtained by a variety of groups, including industry groups, to develop these cost assessments. Thus, while the analysis may not reflect the arguably "anecdotal"[3] information referenced by the Chamber, we believe that the Commission has engaged in a thorough analysis of the cost and burdens to industry of the proposed rule.

2. A Federal court should defer to and uphold the Commission's economic analysis where it is reasonable

In the case of the rulemaking process for Section 1502, we believe the proposed rules reflect a reasonable approach to conducting economic analysis. A Court will review the Commission's economic analysis under an arbitrary and capricious standard. The Court will look to see whether the analysis was reasonable, and if it was, the court stops there. Federal courts give deference to an agency's economic analysis and will uphold regulations based on such an analysis if the agency establishes a "reasonable basis for its decision." In re Core Communs., Inc., 455 F.3d 267, 279 (D.C. Cir. 2006) (citations omitted); Nat'l Wildlife Federation v. EPA, 286 F.3d 554, 563 (D.C. Cir. 2002) ("[W]hen reviewing economic analyses… a court's inquiry will be limited to whether the Agency considered the cost of technology, along with other statutory factors, and whether its conclusion is reasonable") (citations omitted). See also Forest Conservation Council v. United States Forest Service, 2007 U.S. Dist LEXIS 70153, *43 (W.D. Wa. 2007) ("[T]he Court finds no merit in Plaintiffs' statutory and regulatory challenges… [the agency] enjoys broad discretion as to the manner in which it conducts the required economic analysis…")

3. The Commission's approach is consistent with the guidelines and principles articulated in Executive Orders issued over the last twenty years.

Executive Order 13579, released on July 11, 2011, incorporates Executive Order 12866 and Executive Order 13563 by reference. Executive Order 12866 states:

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[1] Securities and Exchange Commission, 17 CFR Parts 229 and 249 [Release No. 34-63547; File No. S7-40-10], page 73.
[2] Ibid at page 74.
[3] July 18, 2011 Tom Quaadman, Vice President, U.S. Chamber of Commerce p. 5

> "Each agency shall assess both the costs and the benefits' of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."[4]

Executive Order 13579 presents a number of sections that seek to guide regulatory efforts. It is understood that the guidance provided is issued with full respect for the independence of the agencies to which it is addressed, and hence nothing in the Executive Order is meant to be binding.[5] However, when measuring the performance of the Commission along these principles of guidance, it is clear that the Commission has been rigorous and diligent in identifying burdens, cost and complexities in developing this rule. The proposed rule reflects robust public engagement, integration and innovation and a flexible regulatory approach.

a. Public participation

In ensuring public participation in the process, Executive Order 13579 states that public participation generally means a comment period greater than 60 days, provides for an "open exchange" of ideas and seeks the views of those impacted by the regulations[6]. The Commission has clearly met this standard.

In this rulemaking, the Commission held two comment periods, one requesting comment on the proposed initiatives in Dodd-Frank and the second following the release of the Commission's proposed rule. Additionally, the Commission extended the comment period for the proposed rule by 30 days to allow for further input and consideration of the rule and its impacts.

The Commission's website is replete with comments submitted by interested Stakeholders from July 2010 to August 2011. Finally, the Commission, as documented on its website, met with interested persons multiple times over a 12 month period to discuss these issues, thereby further evidencing a diligent and rigorous rulemaking process.

b. Integration and innovation

According to the memorandum accompanying Executive Order 13579, section 3 "is designed to reduce burdens, redundancy, and conflict, and at the same time to promote predictability, certainty, and innovation." The Commission determined that there are no federal rules that duplicate or overlap with the Commission's proposed rule[7], ensuring that redundancy would not occur and harmonization would should it be necessary.

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[4] Executive Order 12866, see attached
[5] http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf p. 2
[6] http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-28.pdf p. 2
[7] http://sec.gov/rules/proposed/2010/34-63547.pdf

c. Flexibility in Approach

Ultimately, the proposed rulemaking reflects the Congressional intent of Section 1502 to address a critical human rights situation. The proposed rule identifies a regulatory approach, public disclosure, which reduces burdens and maintains flexibility and freedom of choice for the public.[8] Section 1502 does not penalize companies for sourcing from the DRC countries. It provides investors material information to help them make decisions about companies in which they should invest and provides consumers information to help them make informed buying decisions.

B. Initiatives in play to comply with Section 1502 and final rules are ongoing, and would be slowed down by any phase-in or delays in reporting requirements

In response to the law, electronics companies, regional governments, and the tin and tantalum industries have put systems in place to ensure conflict-free minerals from the Great Lakes Region. These benefits are hard to quantify, but reflect the intent behind the enactment of Section 1502. Any delays in issuing final rules, including by opening a second comment period, could slow down these reforms. Thus, in the following ways, progress is happening on the ground now:

- The Congolese army has vacated several major mines including Bisie and Omate, creating the best opportunity in years for the establishment of conflict free mineral supply chains. Buttressing this development, 170 Congolese mining police have been trained by the UN and deployed at mine sites. This does not yet include every mine in eastern Congo, but it is a significant indicator of progress as compared with previous years. ;
- The Congolese government is now starting to arrest and prosecute minerals smugglers and other criminals;
- A multi-stakeholder group made up of the Congolese government, the United Nations, local businesses, and civil society have recently started a validation program for mine sites, a first step towards establishing mineral traceability. This will facilitate supply chain due diligence and further enable responsible international investment in Congo's minerals sector. The validation team visited 58 mine sites in North and South Kivu and is currently in the process of scoring mines along a conflict-free and non-conflict free spectrum. The report of the validation team will be completed by October 2011 at latest;
- In order to comply with the law, the electronics industry has put in place the EICC Conflict-Free Smelter program to audit mineral smelting companies, and now all four CFS mineral programs are in place;
- The tin industry has put in place a bag-and-tag minerals tracing initiative in Rwanda and some parts of Congo;

[8] Executive Order 13563

Section 1502 is not a panacea for Congo's problems, but addressing the issue of conflict minerals is an opportunity to cut off a major source of cash for armed groups and abusive sections of the army, to facilitate reform the mining sector, and to improve livelihoods in eastern Congo.

C. Applicability of *Business Roundtable* ruling to Section 1502

There has recently been some attention on the implications the of recent ruling in *Business Roundtable v. SEC*, __ F.3d __, No. 10-1305, 2011 U.S. App. LEXIS 14988 (D.C. Cir. July 22, 2011) for particular provisions of the Dodd-Frank Act, including Section 1502.

Crucially, however, the rules struck down in *Business Roundtable* are fundamentally different from the proposed rules for Section 1502 in that *they were not mandated by statute*. The court in *Business Roundtable* took great issue with the Commission's decision to issue rules that would facilitate proxy access for shareholder nominees. This action was originally based on the Commission's longstanding authority under the Exchange Act, although a provision was subsequently written into the Dodd-Frank Act explicitly authorizing – *but not mandating* – the Commission to regulate proxy access. It was the Commission's proactive view that proxy access was a problem and that companies would enjoy improved governance if shareholder nominees could more easily contest elections. One of the biggest problems the D.C. Circuit identified with this decision was the fact that the Commission failed to consider whether there would be a real net gain in value from issuing rules at all. *Business Roundtable*, 2011 U.S. App. LEXIS 14988 at *16-17 (Commission must consider costs of rule facilitating particular conduct, even if that conduct is already authorized by law); *id.* at *27-29 (same); *Id*. at *26 (Commission failed to explain why existing provisions were inadequate).

Section 1502, unlike proxy access, required the Commission to issue specific rules, thus leaving little room for discretion. Given this statutory specificity, it would be inconsistent to apply *Business Roundtable*'s strict rule, which presumes that the Commission is exercising discretion to issue regulations that may or may not be warranted.

D. The rules should apply to mining issuers

We agree with the Commission's decision to consider mining issuers as persons who are manufacturing conflict minerals when they extract those minerals.[9] This is consistent with national and international norms. As noted in Footnote 5 of the Enough Project's September 24, 2010 submission (attached to this letter), the United States Controlled Substances Act's definition of manufacture includes "production… either directly or indirectly by extraction from substances of natural origin."[10] Similarly, the OECD's due diligence guidelines apply to all actors along the supply chain, including miners, and the due diligence guidelines drafted by the UN

[9] *See* 75 Fed. Reg. 80948, 80953 (Dec. 23, 2010)
[10] 21 U.S.C.A. § 802(15) (2007

Group of Experts and adopted by the UN Security Council state that due diligence should apply to "individuals and entities prospecting, exploring for and extracting minerals…".[11]

Including mining issuers is consistent with the law's overarching intent – to create transparency in the supply chain from mine to product. Exempting mining from regulation would eliminate a critical component of transparency from the supply chain and undermine the law as enacted by Congress.

E. Defining key terms

Finally, the Commission should define several key terms in Section 1502. This will eliminate perceived ambiguities and reduce any uncertainty regarding the scope, application, or meaning of Section 1502. We urge the Commission to define the key terms below in accordance with Enough's September 24, 2010 submission, attached to this letter

1. Necessary;
2. Functionality;
3. Production; and
4. Manufactured.

Conclusion

The proposed rule reflects a rigorous and diligent analysis of costs and burdens, is based on robust public participation and an open exchange of ideas, and creates a flexible, innovative and integrated approach to compliance. Additionally, issuing final rules that apply to mining issuers and that define the key terms listed above will strengthen the rules in a practical way, eliminate loopholes and effectuate the intent of Section 1502.

We therefore urge the Commission to deny the request for a second comment period, and to issue strong final rules, with no phase-in or delays in reporting requirements.

Yours sincerely,

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[11] UN Group of Experts at 84.