

October 25, 2011

VIA ELECTRONIC SUBMISSION

U.S. Securities and Exchange Commission
Attn: Elizabeth M. Murphy, Secretary
100 F Street, NE
Washington, DC 20549
Electronic Address: rule-comments@sec.gov

Re: Conflict Minerals, File Number S7-40-10

To Whom It May Concern:

The Office of Advocacy (Advocacy) offers the following comment to the Securities and Exchange Commission (SEC) in response to the above-referenced proposed rule.¹ Advocacy understands the underlying purpose of the proposed rule, which is to prevent atrocities occurring in the Democratic Republic of Congo. However, Advocacy has concerns that the proposed rule fails to comply with the Regulatory Flexibility Act (RFA). Specifically, the proposed rule appears to underestimate both the costs that the proposed rule will impose and the number of small businesses that will be impacted by the proposal. Advocacy recommends that the SEC publish in the *Federal Register* an amended initial regulatory flexibility analysis (IRFA) for the proposed rule to more accurately reflect the costs of the proposed rule and the number of small businesses that it will affect.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The RFA,² as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

¹ 75 Fed. Reg. 80948 (Dec. 23, 2010), available at <http://www.sec.gov/rules/proposed/2010/34-63547fr.pdf>

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ Id.

Background

On July 21, 2010, Congress enacted section 1502 of the Dodd-Frank Act to require SEC filers to provide certain disclosures about the use of specified conflict minerals originating in the Democratic Republic of Congo (DRC).⁶ Congress intended this provision of the Dodd-Frank act to bring transparency to the financial interests that support mining in the DRC.

On December 23, 2010, the SEC issued the proposed rule to implement section 1502 of the Dodd-Frank Act.⁷ The proposed rule would require businesses that file with the SEC and manufacture products that require tin, tantalum, tungsten, and gold to report whether the minerals originated in the DRC or a neighboring country. Under the proposed rule, if a business discovers that its minerals do originate in the DRC or one of its neighbors, more reporting would be required. The businesses would be required to report on the measures they took to exercise “due diligence” on the source and chain of custody of the minerals. The proposed rule would also require businesses to provide independent verification of these steps through an independent private sector audit of the reporting.

On October 6, 2011, the SEC issued a notice to announce a roundtable regarding the proposed rule.⁸ In the notice, the SEC extended the period to submit comments for the proposed rule until November 1, 2011.⁹

The IRFA Underestimates the Cost and the Number of Small Businesses Affected by the Proposed Rule

Under the RFA, an initial regulatory flexibility analysis (IRFA) must contain: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimated number of regulated small entities; (4) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap, and conflict with other rules and regulations; and (6) a description of significant alternatives to the rule.¹⁰

In the proposed rule’s IRFA, the SEC estimated that approximately 793 small entities would be subject to the proposal. The IRFA provided that the proposed rule would add to the annual disclosure requirements of companies with necessary conflict minerals, including small entities, by requiring them to comply with the disclosure and reporting obligations. The proposed rule stated that the costs of compliance are “difficult to assess but are likely insignificant.”

Small business stakeholders have been in contact with Advocacy to express concern with the proposed rule. Small businesses contend that the SEC underestimates both the costs that the proposed rule will impose and the number of small businesses that will be impacted by the proposal.

As an example, one small business representative who met with Advocacy commented that the SEC proposed rule would impose a median due diligence burden in excess of \$65,000 per company in the electronics industry supply chain to comply with the rule during the first year alone.¹¹ This same small business representative stated that the proposed rule would impose additional estimated costs for tracking software, additional staff, training, legal expenses, and third party audits with a median total of \$170,000 per company in the electronics

⁶ Public Law 111-203.

⁷ 75 Fed. Reg. 80948 (Dec. 23, 2010), available at <http://www.sec.gov/rules/proposed/2010/34-63547fr.pdf>.

⁸ SEC Release No. 34-65508; File No. S7-40-10 available at <http://www.sec.gov/rules/other/2011/34-65508.pdf>.

⁹ *Id.*

¹⁰ 5 USC § 603.

¹¹ IPC – Association Connecting Electronics Industries comment letter to the SEC, dated March 2, 2011.

industry supply chain.¹² These high compliance costs stem from the fact that supply chains in the electronics industry are an extremely complex, multi-layered network of global trading companies and suppliers.

Similar to the electronics industry, small businesses in most industries that would be subject to the proposed rule participate in a complex supply chain that is comprised of numerous other businesses. The proposed rule would affect most manufacturers of electronics, aerospace, automotive, jewelry, health care devices, and industrial machinery. Even businesses that don't necessarily file with the SEC may be impacted if they are part of the supply chain for these metals to SEC filing companies. Because the SEC does not take into account the complexity of supply chains and the number of small businesses that are part of those supply chains, the SEC has underestimated the number of small businesses that would be impacted by the proposed rule.

Advocacy recommends that the SEC publish in the *Federal Register* an amended IRFA for the proposed rule. The amended IRFA should more accurately describe the costs and burdens of the proposed rule, and should also more accurately detail the number of small entities that would be impacted by the proposed rule. Amending the IRFA will help the SEC gain valuable insight into the effects of the proposed rule on small entities, and will require that the SEC consider less burdensome alternatives to the proposed rule.

Conclusion

Advocacy is committed to helping the SEC comply with the RFA in the development of its rule on conflict minerals. Accordingly, Advocacy stands ready to assist the SEC in amending the proposed rule's IRFA. If you have any questions or require additional information please contact me or Assistant Chief Counsel Dillon Taylor at (202) 401-9787 or by email at Dillon.Taylor@sba.gov.

Sincerely,



Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy



Dillon Taylor
Assistant Chief Counsel for Advocacy

¹² Id.