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VIA E-MAIL

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

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

Dear Ms. Murphy:

This letter is submitted on behalf of the National Cable & Telecommunications Association ("NCTA"), the principal trade association of the cable industry in the United States. NCTA represents cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks, as well as equipment suppliers and providers of other services to the cable industry.[1]

NCTA supports the fundamental goal of Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act") to curb human rights violations in the Democratic Republic of Congo and its adjoining countries ("DRC Countries"). The Securities and Exchange Commission (the "Commission") has been mandated with the admittedly difficult task of implementing the provisions of Section 1502, which are "qualitatively different from the nature and purpose of the disclosure of information that has been required under the periodic reporting provisions of the Exchange Act."[2] However, we are concerned that the proposed rules extend well beyond the statutory mandate, and, if implemented as proposed, would create significant market inefficiencies and impose significant costs and burdens[3] on a far greater number of issuers than Congress intended, while producing very little benefit in terms of furthering the goal of Section 1502.

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1 The cable industry is the nation's largest broadband provider of high-speed Internet access after investing more than $100 billion over ten years to build a two-way, interactive network with fiber optic technology. Cable companies also provide state-of-the-art digital telephone service to millions of American consumers.

2 Proposing release at 51.

3 See e.g., *Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a 3rd Model in view of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act*, dated October 17, 2011, by Chris Bayer with contributions from Dr. Elke de Buhr, in consultation with experts from the consulting, IT and auditing community. The report, prepared at the request of Senator Durbin's office, concludes that the cost of implementing proposed rules would be $7.93 billion, far beyond the Commission's estimate of $71.2 million.

In particular, if the Commission were to take a more expansive view of who is subject to the statute by applying Section 1502 to those that "contract to manufacture" but do not exert any substantial control over a product's manufacturing process, numerous non-manufacturing companies, such as those in the cable, information and telecommunications service sectors that are fundamentally service providers but that distribute certain electrical devices (set top boxes, remote controls, modems, and the like) to subscribers in connection with the delivery of their services, could incur significant costs in connection with the new rules. Moreover, given how distant these companies are from the manufacturing process, imposing these burdens on such companies would do little, if anything, to further the objective of Section 1502. Accordingly, we urge the Commission to implement the statute appropriately, as drafted, without unduly burdening issuers or interfering with the Commission's primary responsibility of protecting investors. Below are our key suggestions to attain this objective.

The Final Rules Should Apply Only to Issuers That are Manufacturers.

The Commission should not implement final rules that extend beyond the plain language of Section 1502. The Commission recognized in the proposing release that Section 13(p)(2) only refers to companies that "manufacture" devices that utilize conflict minerals and not to those that "contract to manufacture." Yet, it suggested that applying the rules to companies that also "contract to manufacture" products is necessary to harmonize an alleged inconsistency with Section 13(p)(1)(A)(ii), which requires companies subject to the rules to include information about products "manufactured or contracted to be manufactured" in their conflict minerals disclosures and report.[4] We do not believe that Section 1502 contains this inconsistency. The clear purpose of Section 13(p)(2) is to establish a threshold inquiry to determine which entities should be subject to the statute – those for whom conflict minerals are necessary to the functionality or production of a product *manufactured by such person*. Only if a person is subject to the statutory scheme must it report about the products it manufactures, including those for which it contracts to manufacture. This additional disclosure is intended to ensure that a manufacturer otherwise subject to Section 1502 cannot intentionally evade its disclosure scheme merely by distancing itself, through contracting, from the manufacturing process.

We see no reason for the Commission to take a more expansive view of who is subject to the statute than is required. As noted above, expanding Section 13(p)(2) in this manner to apply to those that "contract to manufacture," particularly in the expansive manner described in the proposing release, will lead to an overly broad application of the statute that would encompass numerous non-manufacturing companies, such as those primarily in the services sectors, and require such entities to incur potentially significant costs, first to determine the applicability of the requirements to their businesses and devices and then, where necessary, to comply with the disclosure and reporting requirements. Non-manufacturing issuers will face special challenges in this regard, as the costs of reporting will necessarily include the development and implementation of new supply-chain monitoring processes and mechanisms, which may well be wholly foreign to a non-manufacturer's business. Subjecting non-manufacturing companies to these rules also would create significant market inefficiencies, as multiple companies in the same

[4] Proposing release at 18-19.

supply chain, including those entirely removed from the manufacturing process, would be reporting on the exact same conflict minerals. More importantly, by accepting the plain reading of Section 1502, the Commission would be complying with its obligations under Sections 3(f) and 23(a) of the Exchange Act in promoting efficiencies, competition and capital investment.

To assist issuers in determining whether they are, in fact, "manufacturers," the Commission should define the term "manufacture" by looking to the North American Industry Classification System ("NAICS"), which is "the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy." NAICS categorizes enterprises based on their primary business activities, and, under this system, clearly differentiates between manufacturers, information service providers and retailers. For instance, "information services" (NAICS code 51 XXX) includes newspaper publishers, software publishers, motion picture/TV/radio industries, and cable and other subscription programmers (including all of our cable industry members). By contrast, "manufacturing" (NAICS code 3133XXX) includes, among many other activities, communications equipment manufacturing and computer peripheral equipment manufacturing. As such, the NAICS system correctly recognizes that there is a distinction between an entity that manufactures equipment and an entity that provides services using such equipment. The Commission should use this classification scheme to determine which issuers are properly subject to the final rules.

If the Commission nonetheless implements final rules that reach beyond Section 1502's plain language, we strongly urge the Commission to limit the scope of the definition of "contract to manufacture" so that it takes account of the realities of an issuer's position in the supply chain. Numerous non-manufacturing issuers in a broad range of industries, and in particular in the cable, information and telecommunications service and media industries, routinely contract with suppliers for products that they use and lease or otherwise distribute to customers in connection with their services. While these service providers might require that a product contain certain functionality or capabilities, they do not have control over, or even necessarily have any understanding of, the manufacturing process itself. Many contracts between issuers and their suppliers do not deal with the manufacturing process of the subject products and instead focus primarily on quantity, dimensions, functionality and/or performance. Accordingly, the Commission should find that where a contract does not provide the issuer with any substantial control over a product's manufacturing process, the non-manufacturing issuer is not "contracting to manufacture" and should not be subjected to any required disclosures. Likewise, when an issuer sources finished products from a manufacturer and provides those products under the issuer's trademark or tradename, or when an issuer licenses its trademark or trade name to a product manufacturer, the issuer should not be subject to disclosure obligations.

A recent comment letter from congressional supporters of Section 1502 reflects an intent to focus the rules' compliance burdens on those companies actually engaged in the activity of manufacturing:

> *5. All manufacturing companies must be included.* Section 1502(b) intended for all *manufacturing companies* that use minerals in their products, regardless of

> how small the percentage or what label *they manufacture* under, to be required to trace and disclose information on their supply chains. This intention should be reflected in the final regulations.[5]

The above reflects a more sensible view of which issuers should be subject to the rules – as well as the relevance of branding decisions – than the Commission's proposing release.

Regardless of the Scope of the Parties Covered by the Rule, the Commission Should Carefully Evaluate Costs and Burdens to Avoid Duplicative Reporting Obligations That Produce Little, if any, Incremental Benefit and Should Provide Examples of Reasonable Due Diligence.

The Commission should implement final rules that reduce redundancies and uncertainties with respect to compliance. This is especially important if the Commission interprets Section 1502 over-broadly to impose disclosure obligations on issuers that "contract to manufacture" but do not exert any substantial control over a product's manufacturing process. These issuers are at the greatest risk of being disproportionately and unduly burdened. Any incremental disclosures would produce little, if any, additional benefit toward attaining the goal of Section 1502. Because these non-manufacturing issuers are so far removed from the process by which conflict minerals are obtained, they will need to look to their suppliers to get such information; many of these suppliers, in turn, will be producing their own conflict mineral disclosure and report. There is no purpose in adopting rules that would result in such duplication. While we realize that a few manufacturers may not be public companies, Congress itself did not extend the reach of Section 1502 to private companies; the Commission should not endeavor to fill this void through the back door by imposing obligations on non-manufacturing companies, far removed from the manufacturing process, through an unduly broad and burdensome interpretation of Section 1502.

Accordingly, if the Commission does promulgate final rules that cover service provider issuers that "contract to manufacture" but do not exert any substantial control over a product's manufacturing process, the Commission should explicitly allow such issuers to fully satisfy their obligations by reasonably relying on the representations of their suppliers. If such an issuer is dealing with a supplier that is a private company, the issuer should be able to rely on that supplier's certifications, and if that supplier has represented that it has made a commercially practicable effort to determine the country of origin of its conflict minerals, but has been unable to do so, the non-manufacturing issuer should be able to rely on that representation and state that it has an unknown source determination. Issuers also should be able to rely on information gained through industry-wide processes.

Moreover, the Commission should carefully consider the significant costs of having multiple audits of the same supply chain, especially in the case of non-manufacturers that contract to manufacture but do not exert any substantial control over a product's manufacturing

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5 *See* comment letter dated September 23, 2011, from Reps. Howard L. Berman, Donald M. Payne, Jim McDermott, Karen Bass and Barney Frank; United States Congress at http://www.sec.gov/comments/s7-40-10/s74010-313.pdf (emphasis added).

process. It is difficult to imagine any incremental benefit to investors of duplicative audits (especially in light of the fact that the nature and purpose of these disclosures are not to enhance investor protection). In fact, it would seem that such duplication would only harm investors by imposing additional costs on public companies, while doing little, if anything, to further the intent of Section 1502 to curb the violence in DRC Countries.

The Disclosure Requirements Should be Phased in.

Section 1502 states that the conflict mineral disclosure and report should be provided "annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations." Section 36(a) of the Exchange Act, however, allows the Commission to exempt any person or class of persons from any provision or provisions of the Exchange Act if necessary or appropriate in the public interest and consistent with the protection of investors. Given the significant burden the conflict mineral reporting requirements will impose on public companies and the lack of infrastructure currently in place to determine and certify the origin of these conflict minerals, it would be in the public interest to exempt companies from these provisions for at least their first full annual reporting period subsequent to the Commission's adoption of the rules. Allowing companies subject to the final rules this minimal amount of time to put reliable tracking and third-party audit and certification procedures in place ultimately will result in the provision of more complete and accurate information, which is in the public interest. In addition, because Section 1502 was predominantly adopted to address the underlying causes of the conflict in DRC Countries rather than to further investor protection, exempting companies from the conflict mineral reporting requirements for at least one annual reporting period will not hinder the protection of investors.

Moreover, if the Commission's final rules cover service provider issuers that "contract to manufacture" but do not exert any substantial control over a product's manufacturing process, there should be a two-step phase-in process, with non-manufacturing issuers being afforded an additional one-year phase-in period.

Conflict Minerals Disclosure Should Not be Part of the Periodic Reporting System; Website Disclosure Should be Sufficient.

The proposed rules would require that an issuer disclose whether its conflict minerals originated in DRC Countries in the body of its annual report on Form 10-K, and if the issuer cannot so determine, that it furnish a conflict minerals report as an exhibit to its annual report. However, consistent with our concerns outlined above, the Commission should follow the plain language of Section 1502, which does not require that these disclosures be included in an issuer's annual report. Further, given that the nature and purpose of these disclosures differ from the nature and purpose of the disclosures required under the periodic reporting provisions of the Exchange Act, an issuer should be permitted to make the required disclosures available exclusively on its website and should not be subject to securities law liabilities with respect to those disclosures. This approach to disclosures and liabilities would be consistent with numerous other rules promulgated by the Commission in recent years with respect to corporate governance matters, including provisions permitting the posting of audit committee charters and codes of conduct on an issuer's website in lieu of filing them with their periodic reports or proxy statements and deeming that the audit committee and compensation committee reports that appear in a company's proxy statement are furnished and not filed. As a practical matter, website disclosure also would be more useful for those looking for this information, as numerous companies include information on corporate governance and social responsibility matters on their websites.

Thank you for your consideration of our comments. We would be happy to further discuss our concerns and recommendations. Please feel free to contact me at (202) 222-2445 or ngoldberg@ncta.com.

Sincerely,

Neal M. Goldberg