November 1, 2011

The Honorable Mary L. Schapiro
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Via e-mail: rule-comments@sec.gov

Re: SEC Initiatives under the Dodd-Frank Act – Special Disclosures Section 1502 (Conflict Minerals) File Number S7-40-10

Dear Chairman Schapiro:

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Our membership includes both large multinational corporations and small and medium-sized manufacturers. Our members depend heavily on the global supply chain to compete within the U.S. marketplace and abroad. NAM members have a strong track record of working with the U.S. government to improve supply chain transparency and compliance practices.

On behalf of America's manufacturers, the NAM is writing in response to the recent notice inviting additional comments on the Proposed Rule published by the Securities and Exchange Commission (SEC) to implement Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). As the SEC specifically asked for comments with respect to the cost of implementation and ways in which these costs could be reduced, we are concentrating our comments on those points. However, these comments do not represent the totality of NAM member concerns regarding the Proposed Rule and we refer the Commission to our submission of March 2, 2011.

NAM members support the underlying goal of Sec. 1502 to address the atrocities occurring in the Democratic Republic of the Congo (DRC) and adjoining countries and are actively working with other stakeholders to help address the problem. NAM members are participating in numerous industry-led initiatives to drive change abroad and stop the trade in conflict minerals from the DRC and adjoining countries, including industry-wide smelter certification programs. NAM members also are working to create the needed infrastructure on the ground and around the world to facilitate compliance with the proposed rule. However, the needed infrastructure and capacity to comply with the regulation as proposed do not yet exist, which would make it almost impossible for issuers to comply with the Proposed Rule and would generate enormous expense in the effort to do so.

The NAM and our member companies are working hard to increase supply chain transparency. The NAM and our members recognize the importance of preventing the use of conflict minerals from the DRC and adjoining countries and are taking steps now, in advance of a final regulation, to try and prepare for compliance with Sec. 1502 to identify and trace the source of conflict minerals in products to the extent possible. Many NAM members have already notified their suppliers of the requirement and of their intention to fully comply with the requirements of the legislation. They are telling suppliers that their cooperation in helping the industry achieve compliance with the new requirements is critical, and they need to start collecting information, to the extent possible, now.

The NAM and its member companies continue to believe that the Proposed Rule is onerous, excessively costly and constitutes a “major rule” in the context of the Regulatory Flexibility Act in that its impact will be far in excess of the $71 million contemplated by the SEC. The NAM previously commented on that estimate, and though we stand by our original estimate, we also recommend the Commission consider a recent study by the Tulane University’s Payne Center for International Development that estimated compliance costs to be $7.93 billion, close to the lower end of the NAM estimate.[i]

<u>Implementation and Compliance Costs</u>

To help the SEC understand implementation costs from a corporate perspective, the NAM asked members to pulse their supply management teams to estimate their expense to comply. A large company noted that it will incur more than $10 million per year to implement the conflict minerals law based on the following facts:

- The company has over 22,000 direct material suppliers and more than 80,000 indirect suppliers.
- The company sells more than 200,000 distinct parts/products.

Another company found that tracing material composition data for just one part (an electronic control module) through only the second tier of the supply chain cost $60,000 and took three months to complete. Clearly, it would be cost-prohibitive for the company to undertake an analysis of each part in each product it sells to determine if a conflict mineral is required or specified in each of these parts; accordingly, the company will likely have to take a “shot gun” approach and flow down a conflict minerals clause and certification request to all of its suppliers through its purchase orders or agreements.

The first company’s estimate is that it would have to hire at least 50 full-time equivalent (FTE) personnel to review and follow up on supplier conflict mineral certifications. Assuming a fully burdened cost of $100,000 per FTE, the company estimates that the cost of supplier certification follow-up would be $5 million per year. These would be recurring costs.

Although the scope of “due diligence” is not clear at this point, in the event that a company included supplier audits as part of a due diligence program, the costs of conducting internal (by the company) supplier audits would also be substantial. Given that suppliers have multiple locations and are dispersed across the globe, the company conservatively estimates that it would cost $10,000 per audit including travel, expense and salaries of audit personnel. If the company were to audit two percent of its direct suppliers each year (e. g., 440 supplier audits) to confirm compliance with Sec. 1502, the audit costs would run to approximately $4.4 million. Of course, these costs could run much higher if it is determined that two percent is not a statistically valid sample size or such sampling is not an acceptable practice under the final SEC regulation.

The costs to the company of the required independent third party audit could also run into the millions of dollars, depending on the scope of the required third-party audit services and the nature of the audit. The company will also incur substantial costs to prepare, review, and file the conflict minerals report with the SEC, especially if the Final Rule specifies that products with metals of indeterminate origin are assumed to contain conflict minerals.

By way of comparison, the company's recurring costs to comply with the European Registration, Evaluation, Authorisation and Restriction of Chemical Substances (REACH) regulation requiring notification, reporting and authorization for the use of a small number of chemicals in their products has exceeded $5 million per year. However, the costs of compliance with the conflict minerals law are likely to be significantly higher, for the following principal reasons:

- Unlike REACH, the conflict minerals proposed rule has no *de minimis* exception.

- As a practical matter, a product-by-product analysis is cost-prohibitive and companies will have to base their due diligence and compliance programs on the assumption that all products may contain the subject metals.

- In addition to identifying whether a product contains the subject metals, the conflict minerals proposed rule also requires companies to trace the facilities used to process the conflict minerals, the country of origin of the metals, and the efforts made to determine with the greatest possible specificity their mine or location of origin, if the companies either know that their products contain conflict minerals derived from the conflict region or do not know whether or not the conflict minerals in their products are derived from the region.

- Unlike REACH, the scope of the conflict minerals law is global – it applies to all products that an issuer sells, regardless of where they are manufactured or sold.

Without a meaningful phase-in period or interim category of indeterminate origin, the company's costs, as detailed below, to implement the conflict minerals law will be substantial. The large company's conservative estimate is that it will incur more than $10 million to implement the SEC's draft conflict minerals rules. Moreover, notwithstanding its best efforts and the significant expenditure of resources, the vast majority of the metals in the company's products – regardless of the actual source of the metals that may be used in the products – will likely be considered of "unknown" origin for the following principal reasons:

- As a practical matter, the conflict mineral contract clauses can only be flowed down at the time of contract renewal/renegotiation. Many supplier contracts are long-term; hence many suppliers will not be subject to the flow down for some period of time.

- The suppliers that provide the subject metals are typically several tiers removed from the final product. Therefore, it will take a correspondingly longer time to bind these sub-tier suppliers to the conflict mineral provisions and it should be anticipated that some suppliers will refuse to sign on to the clause even if they do not provide the subject minerals because of the compliance burden.

- In addition, many smaller suppliers simply do not have the resources to comply. If they are a critical qualified supplier – particularly outside the United States – larger companies may not have the leverage to force compliance, particularly in the absence of a robust and mature validated smelter program.

Two additional highly significant sources of expense in the proposed rule are the immaturity of essential compliance infrastructure and the possible indirect costs associated with loss of supply-chain efficiencies that would be associated with the rules' requirements. First, not only has the SEC conceded that this is a highly complex rule entirely outside its traditional area of expertise, and challenging companies to undertake virtually unprecedented activities, but it would also require them to do so (during the initial implementation phase when expenses are always highest for a new rule) without the benefit of critical guidance concerning best practices that will derive from the Organization for Economic Cooperation and Development (OECD) pilot implementation program for its Guidelines for Due Diligence and Gold Supplement, the maturation of the smelter certification program, the multiple mine-to-smelter tracking programs getting underway in the region, and the completion and implementation of the EICC-GeSI compliance program. In the absence of a mature compliance infrastructure, activities contemplated in the Proposed Rule for companies who know that their products contained Congo-derived conflict minerals and those who do not know whether they do are not merely challenging but, by definition, impossible.

Similarly, the proposed rule's indirect effect will be to degrade the flexibility, resilience, and efficiency of supply chains around the world, because it will deter companies from varying sub-tier suppliers based on availability, cost, and quality due to the compliance expense of documenting altered supply chains. The result--an inflexible, unresilient, and inefficient supply chain—will increase costs to consumers for the whole spectrum of products and services they buy, without any incremental advancement of the purposes of the Act.

In sum, it is reasonable to assume that it could cost a large issuer more than $10 million per year to comply with the draft rules. Based on the experience member companies have had with REACH, the costs could be significantly higher. Worse yet, notwithstanding the significant efforts undertaken to comply with the conflict minerals rules, until the compliance infrastructure is implemented, the reports filed by issuers will contain essentially meaningless information for investors because the vast majority of issuers will have to list virtually all of their products as possibly containing conflict minerals because their origin is unknown. The bottom line is that a meaningful phase-in period that allows time for compliance infrastructures like a validated smelter program to take effect is required to reduce these substantial implementation costs and provide reports that are helpful to investors.

<u>Limiting Compliance Costs</u>

The NAM believes there are ways in which the SEC can limit the economic impact on issuers. We urge the SEC to seriously consider the following:

1. Phase-in

The SEC should phase-in the disclosure requirements. This is not prohibited by the law and would result in a practical implementation of the rule while minimizing undue burden and cost to industry. As noted earlier, it would also recognize that the needed infrastructure and capacity to comply with the regulation does not yet exist, which makes it practically impossible for issuers to comply with the [ii]Proposed Rule. A phased-in approach <u>does not</u> exempt or delay an issuer's requirements to report under the statute. Every issuer subject to the regulation would disclose to the SEC the use of conflict minerals and the efforts each is taking to increase transparency and stop the use of conflict minerals from the region for the first full fiscal year the regulation is in effect. Attached is an outline (previously submitted) of what companies might do to implement the requirements during a phase-in. This proposed phase-in approach will significantly discourage the use of conflict minerals while providing time for a validated smelter program to emerge. As explained in more detail in the attachment, it is fully consistent with the language and intent of the statute and strikes the appropriate cost/benefit balance. An element in striking the appropriate balance could be a *de minimis* provision, and the SEC should work with a group of industry representatives and the Commerce Department to assess its feasibility during the phase-in.

For a variety of legitimate business reasons, manufacturers maintain varying levels of supplied materials in inventory for future use. Existing inventory is a fact of life and will have the effect of extending the purge cycle considerably for certain metals. Supplier obsolescence of electronic parts in products with long lifecycles requires the purchase of large inventories before the part is removed from the market to keep the overall product functioning until its end of life.

At the October 18 SEC roundtable, some of the panelists remarked that legitimate inventories of some minerals would easily add an additional year to the process of flushing non-conflict-free and indeterminate material through all layers of the supply chain, providing further argument for a phase-in, and excluding previously existing inventories.

As another example of why a phase-in is necessary and appropriate, consider that at the point when the mine and/or smelter is certified conflict-free, the timeline for end-product manufacturers to build and ship their first conflict-free product will be governed by inventory realities. Each layer of the supply chain below the certified layer contains material that is indeterminate at best and non-conflict-free at worst. Please see the illustration of the sequential flushing of each layer of the supply chain, as the conflict-free material begins a long journey through these supply chains.

Tin Supply Chain – Purge Cycle Illustration for 9-tier Supply Chain		
	Supplier Tier	Typical Inventory on Hand (not accounting for larger inventories)
1	ore inventory & transit time	4.0 Months
2	broker warehouse	2.0 Months
3	smelter inventory on hand	2.0 Months
4	metal distributor inventory	2.0 Months
5	sub-component inventory	2.0 Months
6	finished component inventory	4.0 Months
7	sub-assembly inventory	2.0 Months
8	full assembly inventory	2.0 Months
9	finished product inventory	4.0 Months
Time lag for validated conflict-free metals to reach the end product purchaser:		24.0 Months

It becomes clear that non-conflict-free material that was in-process or inventoried, will not be able to be "returned for credit," all the way back up the supply chain to the mines. Thus, this in-process and inventoried material will have to be consumed by participants at every level of the supply chain, until it is completely flushed through.

2. Interim Category of Indeterminate Origin

The SEC should create an interim "indeterminate origin" category. Sec. 1502 only requires companies that "did" source from the conflict regions in the DRC or adjoining countries to submit a conflict minerals report (CMR) and only instructs that a product "*may* be labeled as 'DRC conflict free' if the product does not contain conflict minerals…" (Emphasis added). It does not mandate that the SEC require issuers who do not know the origin of the conflict minerals to file a CMR or to label their products as "not" DRC conflict free.

Consequently, the SEC should create an interim third category, such as "indeterminate origin" for products manufactured or produced with conflict minerals for which issuers, despite their best efforts, are unable in the first years of their programs to determine origin. Requiring issuers to submit a CMR and/or identify their products as "not DRC conflict free" when the issuer has not been able to determine the origin after making reasonable inquiry would significantly harm global brands, place U.S. issuers at a competitive disadvantage, and damage investor relations even though the issuer has in a place a policy prohibiting the use of conflict minerals from the DRC or adjoining countries in its supply chain that are not otherwise validated as conflict-free. If issuers are held to the same standard as bad actors, it diminishes the impact good actors can have on addressing the problem at hand. Contrary to the assertions of some commenters, this is not a loophole designed to avoid or stall S. 1502 obligations. As noted above, issuers subject to the regulation would disclose to the SEC the use of conflict minerals and the efforts each is taking to increase transparency and stop the use of conflict minerals from the region for the first full fiscal year the regulation is in effect.

It is worth noting that the OECD wrote to the SEC on July 29, 2011, arguing much the same point: "As a time-bound measure, issuers should not describe a product as not 'DRC conflict free' when the issuer and the mineral processor have (i) taken reasonable steps and made good faith efforts in accordance with the OECD and UN GoE due diligence recommendations to conduct due diligence on the minerals in that product; and (ii) know and can show that they have identified, assessed and responded to risks in accordance with the risk management strategies recommended by the OECD and UN GoE (United Nations Group of Experts) due diligence recommendations."

3. Due Diligence

The SEC should create a flexible due diligence standard that recognizes no two supply chains are identical. Any reference to specific due diligence standards should be in the context of providing a safe harbor for issuers. The SEC should provide guidance to issuers on what would constitute reliable due diligence, but not mandate a specific set of requirements. A reference to the OECD Guidelines among others would be useful guidance as would a list of national or international organizations and federal agencies that have developed due diligence standards or guidance. Issuers should be permitted to develop due diligence plans that are consistent with their supply chains and information available from recognized government sources. In executing due diligence, an issuer would work with its suppliers to prevent the use of conflict minerals from the DRC or adjoining countries.

A number of NAM members are participating in the OECD pilot project to test the implementation of the OECD Guidelines for Due Diligence. Again, given that the Guidelines were finalized only in May 2011, that this critical year-long pilot program which will determine key elements of their interpretation has just now gotten underway, and that the OECD's Gold Supplement has yet to be issued, we believe that a phase-in is appropriate.

Depending on the characteristics of the individual supply chain, the below may be evidence of reliable due diligence:

- Use of information gained through an industry-wide process (where appropriate);
- Creation of a conflict minerals policy and legal obligations through contract flow-down provisions, purchase orders, or other means to require reporting on sourcing from a conflict region;
- Supply chain risk assessment;
- Obligations on suppliers to push the new policies upstream and transmit information downstream through contract provisions;
- Inclusion of a description of policies and procedures to remediate instances of non-conformance with the policy;
- Participation in or reliance on information gained from an industry-wide or smelter validation process;
- Reliance on reasonably reliable representations from processing facilities or suppliers;
- Use of independent third-party audits of the due diligence report if sourcing from the DRC or adjoining countries; and/or,
- Publication of the reports on the corporate website.

It is particularly important that the final rule omit any requirement that companies be required to attempt, much less to complete, tracking the conflict minerals in their supply chain downstream from the mine to the end-user or tracing such minerals upstream from the end-user to the mine of origin. One of the most ambitious recent efforts to assess the challenges that would be involved, RESOLVE's 2010 *Study of the Challenges of the Supply Chain for Target Metals Used in Electronics*, prepared for EICC-GeSI, illustrates the challenges:

> The tracing and tracking research resulted in a partial map of the electronics supply chain….As expected, RESOLVE encountered a number of breakage points in the supply chain mapping due to lack of supplier response or inadequate information. Overall response rate for the surveys was approximately 24% over the approximately six months of survey outreach. (Again, this figure represents response from suppliers RESOLVE identified rather than a percentage of the entire supply chain.) Some suppliers declined to participate, while others simply did not respond to repeated requests from RESOLVE and EICC and GeSI members….[iii]

A recent study by two scholars at the School of Environment, Enterprise, and Development at the University of Waterloo examined the feasibility of tracing or tracking conflict minerals specifically in the context of section 1502 of the Dodd-Frank Act summarized the RESOLVE report's conclusions:

> The survey analysis illuminated the length and complexity of supply chains from mining to electronic end products….Management chains from five to nine links covered a range of actors…Although over 120 companies were engaged (and known to trade actively together), only three complete chains were traced, for example where a single company controlled several parts of the supply chain….After encountering difficulties in tracing, RESOLVE tracked metals from known mines in four cases, and an additional three

chains were connected via a combination of tracing and tracking methods. RESOLVE only identified mine locations in five cases, none of which were in conflict zones.[iv]

That University of Waterloo study concluded:

> Tracking of materials requires a physical chain along the life cycle. In the metals/electronics supply, this chain is broken as minerals are both mixed from multiple sources and undergo physical transformation when smelted (and refined) into metals, making metal tracking not possible. Tracing of materials from end-use back to mine sources requires either a physical trail (which for metals is not present) supported by a documentation trail, or material that can be chemically fingerprinted to a source. Although minerals can be fingerprinted based on chemistry, metals provenance is not identifiable. Thus, the US regulation proposed to implement [section 1502] is flawed, as it does not recognize physical characteristics of the metals supply chain, and assumes metal tracing to be a management issue rather than a physical challenge.[v]

4. Audits

The NAM carefully noted the discussion regarding audits at the October 18 roundtable. Given that the audits could be the single largest component of ongoing compliance expenses under the Proposed Rule, the SEC should provide the greatest possible guidance as to what would constitute an acceptable independent private-sector audit. Clarity is needed as to the appropriate standard and the type of audit required. We believe that the audit should examine a company's due diligence compliance program and procedures, for example, rather than a materials-based outcome approach verifying whether the company was able to trace the minerals in its products back to the smelter. According to the Government Accountability Office standards cited in footnote 101 of the Proposing Release, an audit may be either an attestation engagement or a performance audit. An attestation engagement is likely to be more standardized than a performance audit, but can only be conducted by an accounting professional, whereas a performance audit may be less standardized but can be conducted by a non-accountant expert. It is possible that one way to minimize the expense to companies is to allow companies the choice of either audit.

Thank you for the opportunity to provide these comments.

Sincerely,

Stephen Jacobs

Attachment: Concept Paper on Phase in (previously submitted)

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[i] Bayer, Chris, *A Critical Analysis of the SEC and NAM Economic Impact Models and the Proposal of a Third Model in view of the Implementation of Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act,* Payson Center for International Development, Tulane University Law School (October 17, 2011) (viewed 10/31/11 at http://www.payson.tulane.edu/assets/files/3rd_Economic_Impact_Model-Conflict_Minerals.pdf).

[ii] *See, e.g.,* RESOLVE, *Tracing a Path Forward: A Study of the Challenges of the Supply Chain for Target Metals Used in Electronics* at 4 (April 2010) ("While confidence can begin to be built, it will likely happen in steps and through testing, trial and error. This is particularly true for sources from regions in or near conflict zones").

[iii] *See* RESOLVE, *Tracing a Path Forward: A Study of the Challenges of the Supply Chain for Target Metals Used in Electronics* at 2 (April 2010).

[iv] Young, S.B., and Dias, G., *Life Cycle Management of Metals Supply to Electronics: Tracking and Tracing "Conflict Minerals",* (viewed 10/21/11 at http://ssrn.com/abstract+1875976).

[v] Young, S.B., and Dias, G., *Life Cycle Management of Metals Supply to Electronics: Tracking and Tracing "Conflict Minerals",* (viewed 10/21/11 at http://ssrn.com/abstract+1875976). See also *id.* ("Thus, it is obvious that there are significant management issues related to the length and complexity of the metal/electronics supply chain, but it is the physical attributes of the mineral ores that undergo transformations at the smelter and the refinery that **breaks the chain** of supply for metals, making tracking not possible.") (emphasis in original).

NATIONAL ASSOCIATION OF
Manufacturers

July 26, 2011

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

Re: File Number S7-40-10

Dear Ms. Murphy:

Attached is a concept paper explaining the views of the National Association of Manufacturers regarding a phase-in period of the Conflict Minerals rule. Please ensure that copies of this paper are received by the appropriate individuals in the SEC.

Thank you.

Sincerely,

Franklin J. Vargo

National Association of Manufacturers
Conflict Minerals Phase-in Concept
June 24, 2011

Introduction

Several government officials have asked what would occur during a phase-in of the Conflict Minerals Rule. The National Association of Manufacturers' members have consistently stated that companies would begin reporting to the SEC in accordance with the schedule in the legislation. All issuers subject to the law would provide the required disclosure of their use of conflict minerals the first full year the regulation is in effect and would report on due diligence actions as required.

However, because complex supply chains do not have traceability of conflict minerals built in, the NAM believes that a phase-in of the disclosure is warranted. We believe a phase-in is not prohibited by the law and would result in a practical, effective, and pragmatic implementation of the rule. It would also recognize that the needed reporting and information infrastructure on the ground in the Democratic Republic of the Congo and capacity to provide fully validated supply chains for affected minerals does not yet exist. In fact, the Department of State Conflict Minerals Map has not been kept up to date, which makes it practically impossible for issuers to comply in a meaningful way with the proposed rule. The OECD has recognized that:

> "Internal control mechanisms based on tracing minerals in a company's possession are generally unfeasible after smelting, with refined metals entering the consumer market as small parts of various components in end products. By virtue of these practical difficulties, downstream companies should establish internal controls over their immediate suppliers and may coordinate efforts through industry-wide initiatives to build leverage over sub-suppliers, overcome practical challenges and effectively discharge the due diligence recommendations contained in this Guidance."

Without flexibility, there is a very real danger that issuers may simply prohibit sourcing from the region entirely. This would not only defeat the goals of the legislation but it would significantly undermine the United States' and the entire international community's diplomatic efforts in the region.

It is important to understand the complexity of a modern supply chain in order to understand why a phase-in is critical to achieve the intent of the legislation and for companies to be able to reasonably comply with it. Supply chains are made up of layers known as tiers. At the top of the chain is the manufacturer of or party contracting to manufacture the final product. These top tier parties will generally have privity of contract only with Tier 1 suppliers. Tier 1 suppliers will have their own suppliers (Tier 2 suppliers) and so on. Supply chains can often be many Tiers deep. Manufacturers and those contracting to manufacture will generally be able to exercise control only over Tier 1 suppliers, with whom they are in privity of contract which experience shows diminishes substantially as one moves further down the supply chain to the raw materials producers.[1] Moreover, even with respect to Tier 1 suppliers, manufacturers will

[1] Thus, for example, the United Kingdom Ministry of Justice *Guidance* interpreting the UK Bribery Act of 2010 acknowledges: "Where a supply chain involves several entities or a project is to be performed by a prime contractor with a series of subcontractors, an organization is likely only to exercise control over its

only be able to negotiate new conditions and commitments as existing contracts or other agreements are renewed or new ones are entered into. In addition, many of the companies in Tiers could be small businesses and/or non-public companies located anywhere in the world (with the communication and cultural issues that go with that fact) without the infrastructure, resources, and capability to meaningfully comply. Many of these companies are not familiar with SEC reporting or the penalties carried for non-compliant filers.

Tracing minerals through the supply chain back to origin will be very challenging. The supply chain from mining to final product could follow the path as shown below for a metallic catalyst.

1. Mining
2. Negociant
3. Comptoir
4. Trader
5. Ore beneficiation (concentration of ore constituents by physical separation processes)
6. Smelting (extraction of metal from ore via multiple chemical reactions)
7. Refining (purification of crude metal)
8. Metal (tin or gold) is sold to company A, which makes the metallic catalyst
9. Catalyst is sold to Company B, which uses it to manufacture a polymeric coating (note that catalyst is not incorporated into the polymer chain, but is reclaimed for future use)
10. Company C purchases the coating and uses it to coat a part
11. Part is sold to Company D, which uses it to make a larger part
12. Larger part is sold to Company E, which uses it to make an assembly
13. Assembly is sold to Company F, an auto company, which uses it in manufacturing a car

Because of the complexity of the supply chain and the lack of reliable information about the source of these minerals[2], in the phase-in period we envision that companies would develop internal compliance programs, due diligence procedures and reasonable inquiry approaches perhaps drawing from common industry approaches to conflict minerals due diligence, adapted appropriately to company- and industry-sector circumstances.

relationship with its contractual counterparty…The principal way in which commercial organizations may decide to approach bribery risks which arise as a result of a supply chain is by employing the types of anti-bribery procedures referred to elsewhere in this guidance (e.g., risk-based due diligence and the use of anti-bribery terms and conditions) in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain." *Id.* at 16 (March 2011).

[2] The Electronic Industry Citizenship Coalition and the Global e-Sustainability Initiative, the leading industry and non-governmental organizations working on supply chain due diligence for conflict minerals, have only just completed the first list of "conflict free smelters" and it represents tantalum smelters only; lists covering smelters processing tin, tungsten, and gold are planned for later this year. See: http://eicc.info/documents/PR%20Extractives%20CFS%20Tantalum%20List%20FINAL.pdf

Possible Phase-in Approach

A rational and reasonable phase-in could be structured in the following manner:

First Year:

- Adopt and clearly communicate to first-tier suppliers the company policy or similar corporate statement or industry position for the supply chain of the minerals originating from conflict-affected and high-risk areas. The policy or similar corporate statement should incorporate the standards against which due diligence is to be conducted, consistent with appropriate standards and/or common industry approaches, adapted appropriately to company and industry sector circumstances. (Examples of company efforts underway to inform their suppliers can be provided.) Companies should:

- Publish the policy or similar corporate statement or industry position on the use of conflict minerals on the corporate website.

- Implement a process to identify whether tin, tantalum, tungsten or gold are used in company products or processes.

- Where practicable, begin the process to develop a chain of custody or a traceability system for purchased tin, tantalum, tungsten and gold by contacting first-tier suppliers*.* This process of establishing a chain of custody or traceability system may be implemented through participation in industry-driven programs (including smelter certification processes), national or international standards organizations, and/or through contract flow-down provisions or other written commitments.

Year Two:

- Strengthen company engagement with suppliers. A supply chain policy or similar corporate statement should be incorporated into contracts, purchase orders, and/or other means/agreements with first-tier suppliers, as contracts or other agreements are entered into or renewed. As part of this, ask first-tier suppliers to 1) push the new policies upstream to their suppliers, and 2) adopt contract provisions, purchase orders, specifications or use other means to encourage their suppliers to transmit information downstream from smelters/refiners.

- As practicable, follow up with first-tier suppliers that have not responded to requests for information. Conduct the reasonable country of origin inquiry, and due diligence based on the results of that reasonable country of origin inquiry.

- Assess risks of adverse impacts in light of the standards of the supply chain policy or similar corporate statement.

- Obtain reasonably reliable representations from processing facilities or first-tier suppliers.

- Publish the results of these efforts on the corporate website.

Year Three:

- Devise and adopt a risk management plan, including a description of policies and procedures to address non-conformance with the policy or similar corporate statement.

- As required, obtain independent third party audits of the Conflict Minerals report if directly sourcing from the DRC or adjoining countries.

- Implement a risk-based program that uses company control processes or common industry approaches to evaluate information provided by first-tier suppliers.

- In addition, as reflected in NAM comments, as infrastructure and capacity to trace mine source becomes operational for specific minerals, manufacturers will trace and report the origin of the conflict minerals more consistently and reliably.

The proposed phase-in schedule is consistent with the statutory requirements. All issuers will be held accountable for the information they provide to the SEC. If they knowingly or willfully provide false information, the issuer would be subject to SEC penalties. Our phase-in proposal is also consistent with the requirements of the law. Sec. 1502 (b) requires companies:

> "to disclose annually whether conflict minerals that are necessary… did originate in the Democratic Republic of the Congo…and in cases in which such conflict minerals did originate [to] submit to the Commissioner a report..."

Such language only requires and creates an affirmative obligation to disclose and submit a conflict minerals report if the issuer knows that the minerals in its products originated in the DRC or adjoining countries. If the issuer does not have actual knowledge that the minerals originated from the DRC, the authorizing statute creates no further obligation for the issuer.

This position is further supported by the legislative history of Sec. 1502 of the Dodd-Frank Act. During the conference on the Dodd-Frank Act, the Senate offered changes to the House of Representatives Offer on Section 1502 dated June 23, 2010 (attached as addendum A to our comments) which specifically amended the Section 1502 and "clarified that only companies that source from the DRC and adjoining countries need to file anything with the SEC" by removing "or did not" from the statutory language. This change created an affirmative obligation only if the minerals in an issuer's product(s) originated in the DRC or adjoining countries. "Did not" was purposefully removed by the Senate to narrowly tailor the disclosure and reporting requirements to apply to only issuers who have actual knowledge that the minerals in their products originated from the DRC or adjoining countries.

This approach to disclosure is appropriate given the varying levels of capacity and infrastructure available for each mineral/metal to provide data on origin. Gold, in particular, needs substantially more time and study to determine how to trace the origin and provide transparency. According to experts working on the bagging and tagging schemes and smelter validations, once a scheme is operational it takes, at a minimum, nine months for the issuers to receive information from suppliers on the origin. The proposed phased-in approach is based on this information.

Manufacturers subject to the new requirements place a high value on corporate compliance. Providing false information and knowingly misleading the SEC will have significant negative repercussions for issuers and subject them to penalties under the law. Checks exist to prevent a company from failing to make reasonable inquiries to determine if conflict minerals originated in the DRC or adjoining countries. Given today's regulatory environment, the threat of an SEC enforcement action as well as the other potential penalties is a strong deterrent to companies that do not comply with the requirements.