National Retail Federation®
The Voice of Retail Worldwide

November 1, 2011

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

Re: File Number S7-40-10 – Issues Related to Implementation of the Dodd-Frank Act – Special Disclosures Section 1502 (Conflict Minerals)

Via email: rule-comments@sec.gov

Dear Chairman Schapiro:

Pursuant to the request by the U.S. Securities and Exchange Commission ("SEC") published in the Federal Register (76 Fed. Reg. 63,573) on October 13, 2011, the National Retail Federation ("NRF") is submitting the following comments on behalf of its member companies in the U.S. retail industry on issues related to implementation of the conflict minerals provision (section 1502) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[1] NRF also references its comments filed with the SEC on March 2, 2011, which discuss many of the issues currently before the SEC. To avoid repetition, we will focus these comments on particular questions raised during the SEC's stakeholder roundtable on October 18, 2011.

As the world's largest retail trade association and the voice of retail worldwide, NRF represents retailers of all types and sizes, including chain restaurants and industry partners, from the United States and more than 45 countries abroad. Retailers operate more than 3.6 million U.S. establishments that support one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. NRF's Retail Means Jobs campaign emphasizes the economic importance of retail and encourages policymakers to support a Jobs, Innovation and Consumer Value Agenda aimed at boosting economic growth and job creation.

As a preliminary point, NRF reiterates the retail industry's strong support for efforts to achieve the objectives of this law – to end the violence and exploitation associated with armed groups in the Democratic Republic of Congo (DRC) funded in part through the illicit mining and sale of the minerals subject to this law. U.S. retailers take their responsibilities under the conflict minerals law very seriously, and are already implementing due diligence measures to ensure consumer products sold in their stores do not contain metals smelted from ores sourced from DRC conflict mines. However,

[1] Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010).

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retailers and other affected industries clearly face some daunting challenges in this effort, many of which were discussed during the stakeholder roundtable.

Scope

During the stakeholder roundtable, a basic question was posed whether the application of the law to derivatives of the subject minerals should be limited to gold, tantalum, tin, and tungsten. In our view, it will be challenging enough just to focus enforcement and compliance on these four metals without expanding coverage to other byproducts of the subject ores.

For example, both iron and niobium are extracted from tantalite-columbite ores, which are the primary source for the metal tantalum. Steel is smelted from iron and niobium is used in tiny percentages in many specialty steel products. The SEC heard during the stakeholder roundtable that the primary economic interest in the subject ores derives from the four metals currently covered – gold, tantalum, tungsten, and tin. Including iron, niobium within the scope of the reporting requirements of the conflict minerals law would greatly expand the law's reach, cost, and complexity of enforcement and compliance without significantly advancing its objectives. Therefore, if only from a cost-benefit perspective, the application of the law should be limited to gold, tantalum, tin, and tungsten.

Phased Implementation

During the summit, industry stakeholders, including retail company, Signet Jewelers, discussed at length the measures they are putting into place to comply with the conflict minerals law, including adopting the OECD due diligence guidelines. However, there was a unanimous view among this stakeholder group that the SEC should pursue a phased implementation due to the time necessary to get these systems in place for full compliance.

While some progress is being made, it was noted that there is still a significant lack of infrastructure in the DRC countries and little in the way of a system in place that would allow companies to identify and track the origin of the subject minerals through the supply chain with any degree of reliability or accuracy. It was generally observed that the smelters and refiners are the significant choke points in the supply chain for obtaining information collected from the mines.

There are efforts underway to address this problem by developing smelter-certification programs, such as the electronics industry's validation program (GeSI/EEIC). However, it is clear there is still a significant amount of work and time necessary to develop and implement these programs. For example the certification initiative is furthest along for tantalum, which has so far resulted in only seven of approximately 100 smelters being certified as conflict-free, principally because those smelters don't use any minerals of African origin.

Compared to the other subject metals, gold presents certain unique challenges in setting up an effective tracking and certification system, most of which were highlighted in NRF's previous submission to the SEC and explained by the panelist from Signet Jewelers. For example, gold has a particularly fragmented supply chain, and, after smelting, it must be further refined before it can be sold on the commercial market. Therefore, any viable tracking and certification system for gold must take this situation into account and involve both the smelter and refinery.

The problem with tracking the subject minerals and metals through the supply chain is further highlighted by the fact that the conflict-minerals map that the State Department is required under the law to publish as an aid for the business community, is so laden with caveats as to be basically useless in identifying conflict mines in the Eastern Congo.

As currently envisioned, issuers must submit a statement to the SEC that the issuer does or does not have conflict minerals in the goods it manufactures or contracts to manufacture. As things now stand, the inability to get this information means that the vast majority of issuers will not know the answer, in which case they will, in effect, be presumed to have the subject minerals in their supply chains. As such, they will be required to file a conflict minerals report with the SEC, including an audit, that will only confirm that the issuer is unable to ascertain the origin of any of the subject minerals in its products.

These limitations and constraints argue strongly in support of the recommendation by industry stakeholders that the SEC abandon this either/or option, and allow issuers, for an interim period, to report that the origin of any subject minerals in their products is "indeterminate." This change would prevent issuers from being tainted as having conflict minerals in their supply chains merely because they are unable, due to the lack of information, to confirm whether that is indeed the case.

This change would not absolve issuers from undertaking proper due diligence measures to examine their supply chains. The addition of the "indeterminate" category would mean, however, that an issuer would not have to file a conflict minerals report, and undertake the considerable expense of an audit that would not yield any useful information. With the total costs of compliance estimated by the National Association of Manufacturers (NAM) and Tulane University[2] as being around $8 billion a year, this temporary exemption would alleviate the business community of an unnecessary, costly, and onerous compliance requirement.

Therefore, we reiterate our call for the SEC to adopt a transitional rule with phased implementation of the enforcement requirements on issuers and to allow an "indeterminate" category in the issuers' statement to the SEC. We refer the SEC to comments submitted by NAM, which provide a detailed explanation how this phased implementation would work.

Definition of "Manufacturer" and "Contracted to be Manufactured"

In its last submission, NRF explained at length why the SEC should define the term "contracted to be manufactured" as requiring a party to maintain substantial control over the manufacturing process in order to fall within the scope of the conflict minerals law.

During the stakeholder forum, the panelist from Kraft Foods provided a useful example supporting this argument. The panelist explained that Kraft orders marketing materials – such as

[2] Chris Bayer and Dr. Elke de Buhr, "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," Tulane University Payson Center for International Development (Oct. 16, 2011).

pens, thumb drives, key chains, and the like – that are given away to consumers and business customers at trade shows to promote its products. The extent of Kraft's control over the manufacturing of these inexpensive, free promotional materials appears to be merely having its logo attached. Under our proposed definition, such products should clearly fall outside the definition of contracted to be manufactured, and a company ordering such promotional materials should not be required to identify them under this law in its report to the SEC.

Definition of "Necessary to the Functionality or Production of a Product"

Panelists at the stakeholder summit also discussed at length the question of whether and how to define the term "necessary to the functionality or production of a product." One panelist argued that functionality should not be "the salient test" regarding enforcement of the conflict minerals law. However, it is clear that this term is critical in determining whether or not a product falls under within the reporting obligations of the conflict minerals law. As we previously argued, the use of the term "necessary to the functionality" in the statute is limiting language suggesting Congress did not intend that all subject minerals should fall within the scope of the statute if, according to the common definition of the word "functionality," they do not pertain to performance or a particular need with respect to a particular product.

Regarding how this term should be interpreted to include or exclude products from the reporting requirements, NRF argued in our previous submission to the SEC that a metal produced from a subject mineral should only be considered necessary to the functionality of a product if it is (1) intentionally added to the product, and (2) it is essential to the product's basic function, use or purpose. In addition, at least one panelist argued that the requirement would be met only if the subject metal or ore is specifically mentioned in a contract or purchase order.

This definition would necessarily exclude subject minerals and metals that: are naturally occurring; are an impurity or unintentional by-product; are part of a manufacturing tool, process or catalyst; or do not appear in the final product. In our view, not excluding ores and metals on this list would greatly increase the complexity, cost, and difficulty of enforcement and compliance without advancing the goals of the law.

Finally, we would like to reiterate our position that companies should be able to get advanced rulings on the question of functionality as it applies to particular products that would be similar to the procedures available through Customs and Border Protection (CBP) on the classification and valuation of imported products.

Reasonable Country of Origin Inquiry

With respect to what would constitute a "reasonable country of origin inquiry" as required in the initial issuer statement to the SEC, NRF agrees with those panelists who argued that the focus should be on identifying smelters and their efforts to certify the country of origin of the ores they source. The GeSI/EEIC validation program currently under development will help facilitate this effort. However, once it is fully in place, an issuer's due diligence obligations should be considered met if it acts in reliance on a certificate provided by a smelter as to the origin of the subject ores processed in its facility.

De Minimis

The question whether the SEC should adopt a *de minimis* standard was also debated during the stakeholder roundtable. A number of challenges were highlighted, including the difficulties in tracking whether a particular product contains *de minimis* quantities, whether measured by value, weight, or volume, of the subject metals. Also, it was noted that small quantities in a particular product may be significant when spread over an entire product line.

We urge the SEC to continue to examine whether a *de minimis* standard makes sense in the context of enforcement of the conflict minerals law and how that standard might be administered. One point to consider is whether a *de minimis* standard should be applied to entire product lines rather than single products. In other words, if all widgets that an issuer manufacturers or contracts for manufacture contain, in the aggregate, only negligible quantities of the subject metals, then an issuer would note such in its annual filing with the SEC and then be exempted from any further reporting requirements under the law. In this situation, an issuer would still have the burden of proof to verify that claim if the SEC request evidence to substantiate it.

Additional Considerations

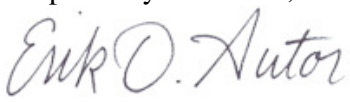
During the stakeholder summit, SEC staff asked for examples of when companies have tried to trace a product back through the supply chain to its origin, how much time it took, the cost, and how well they were able to accomplish the task. NRF has polled its members and the common response was that this issue is difficult to quantify because it is too early in the process, the companies do not yet have sufficient guidance on compliance, and the cost will be incremental as issuers, their suppliers, and subcontractors develop and implement compliance protocols.

Conclusion

Given the range of challenges highlighted at the stakeholder summit in crafting the rules to implement the Dodd-Frank conflict minerals law, NRF urges the SEC to adopt solutions that will facilitate enforcement, compliance, and achieve the objectives of the law, while avoiding unreasonable and insurmountable burdens on U.S. business.

NRF appreciates the opportunity to comment on the SEC's proposed rules for implementation of the conflict minerals law. Any questions should be directed to me at (202) 626-8104 or by email at autore@nrf.com.

Respectfully submitted,



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