NATIONAL MINING ASSOCIATION ADDITIONAL COMMENTS ON THE SECURITIES AND EXCHANGE COMMISSION'S PROPOSED RULE IMPLEMENTING SECTION 1502 (CONFLICT MINERALS) OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

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Introduction

The National Mining Association ("NMA") appreciates this opportunity to provide additional comments on the Securities and Exchange Commission's (the "SEC" or "Commission") Proposed Rule regarding Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act" or the "Dodd-Frank Act"). NMA is a trade association representing many of the world's largest mining companies. NMA membership includes more than 325 corporations involved in all aspects of the mining industry, many of whom operate internationally. NMA would like to reiterate its support of the humanitarian goals of the Proposed Rule, and submits these additional comments with a view towards further facilitating the Commission in its efforts to devise a regulatory scheme that will be successful in achieving those goals. NMA appreciates the SEC's continuing efforts to address the many complex issues surrounding the Conflict Minerals Provision. As NMA believes has been evident in the multiple stakeholder discussions regarding the proposal in which the U.S. mining industry has actively participated, NMA members operating internationally already have a keen understanding of the importance of positively impacting the communities and developing countries in which they have operations, and many have incorporated international human rights standards into their management infrastructure and work with outside organizations to further such efforts. It is with this understanding in mind that NMA submits the following additional comments, which reiterate and expand upon several of the issues contained in NMA's previous submittal.[1]

I. Mining Issuers Are Not Manufacturers for Purposes of Section 1502 and Should Not be Required to Make Conflict Minerals Disclosures

Section 1502 of the Dodd-Frank Act requires that certain companies whose shares trade on a U.S. exchange and who file annual reports with the SEC must make disclosures relating to the source of named conflict minerals that are necessary to the functionality or production of products they "manufacture" (the "Conflict Minerals Provision"). In the Commission's proposed rules implementing the Conflict Minerals Provision,[2] the Commission states that they "do not propose to define the term 'manufacture'…since we believe it is generally understood."[3] However, included in the Proposed Rule is a contradictory assertion that "[a]

[1] NMA incorporates by reference its Comments on the Securities and Exchange Commission's Proposed Rule Implementing Section 1502 (Conflict Minerals) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, filed with the Commission on March 2, 2011.

[2] *See* SEC Release No. 34-63547 (Dec. 15, 2010) (the "Proposing Release," including the "Proposed Rule" at pp. 96 *et seq*).

[3] 75 Fed. Reg. at 80952. The Commission cites as an example the Second Edition of the Random House Webster's Dictionary, which defines the term "manufacturing" to include the "making goods or wares by hand or machinery, esp. on a large scale." Random House Webster's Dictionary 403 (2d ed. 1996).

registrant that mines conflict minerals would be considered to be manufacturing those minerals for purposes of this item."[4]

Perhaps the most important point that NMA would like to reiterate is its strong objection to the proposed inclusion of mining activities within the definition of manufacturing. Such an inclusion is contrary to the legislative intent and the four corners of the statute, as well as the plain meaning of the word "manufacturing." Unlike the approach taken in the Proposed Rule, the text of the Act shows that the Conflict Minerals Provision should apply only to persons who "source" named minerals and derivatives for use in manufactured products, not to companies that extract and produce the *minerals and derivatives themselves*. Indeed, publicly-traded mining issuers, with their largely integrated and secure supply chains, were never identified in the legislative process as a cause or contributor to the problem of armed conflict in the DRC region, and the recognized goal of the rule – "deterring the financing of armed groups in the DRC…" (Proposing Release, p. 84) – would not be served by the highly unusual and costly step of treating mining as manufacturing.

NMA again acknowledges that mining companies will play an important role in bringing to fruition the purposes of the Conflict Minerals Provision. The statute charges manufacturing issuers using the identified minerals and derivatives in their products with the responsibility for tracking and reporting on the supply chain back to the original source, and mining issuers will aid manufacturers in this task by supplying necessary mine information. However, while relevant mines will be included in supply chain tracing for those who manufacture products containing "conflict minerals," mining issuers themselves should not be subject to the proposed reporting requirements. Indeed, to require mining companies to report such information when manufacturers are already required to do so would be duplicative, and would place unnecessary burdensome costs[5] on mining issuers.[6]

The principal reasons why the final rule should distinguish mining companies from manufacturers are discussed below, and include: (a) legislative history and statutory construction; (b) intertextual analysis of the Dodd-Frank Act; (c) U.S. government practice in distinguishing mining from manufacturing; and (d) the different role implicitly envisioned for mining firms by the statute.

[4] Proposing Release, *supra* note 1, at p. 100 *et seq* (Proposed Rule with Instructions to Item 104 of Regulation S-K).

[5] The SEC's own cost-benefit analysis showed that there will be a considerable burden placed on those required to file or furnish reports, as opposed to those who do not.

[6] Note that Sen. Brownback stated that his amendment sought to "bring accountability and transparency to the supply chain of minerals used in the manufacturing of many electronic devices, *without placing a disproportionate burden on publicly traded companies.*" N.Y. Times (May 21, 2010) (emphasis added).

a. Legislative History and Statutory Construction Establish that Mining Issuers Are Not Required to Make Section 1502 Disclosures

As NMA demonstrated in its previous comments, both the legislative history and adopted language of Section 1502 of the Dodd-Frank Act clearly support the exclusion of mining issuers from Conflict Minerals disclosure requirements.

Early legislative proposals regarding conflict minerals[7] explicitly applied to anyone either using covered minerals in their manufacturing processes or engaging in the commercial exploration, extraction, importation, exportation or sale of the covered minerals. The final text of Section 1502, however, explicitly omits such reference to extraction-related activities.[8] Instead, the Conflict Minerals Provision refers solely to "manufacturing."[9] This omission evidences the intent of Congress to address the manufacturing of goods which use or contain, as opposed to the extracting and processing of, the covered minerals.

The final language adopted in the Conflict Minerals Provision likewise confirms that the disclosure requirements of Section 1502 were not intended to apply to companies at the base of a supply chain. Section 13(p)(1)(A) of the statute requires the described manufacturers to include in their reports a description of the "measures taken… to exercise due diligence on the source and chain of custody of such minerals," as well as the "facilities used to process the conflict minerals…and the efforts to determine the mine or location of origin with the greatest possible specificity." Such due diligence requirements concerning locating the mine or location of origin of the named minerals strongly belie the notion that Section 1502 was meant to apply to the mining companies themselves. Indeed, while such a requirement would be pertinent to persons, such as manufacturers of finished products and intermediaries, who are obtaining minerals and derivatives from third parties, it is not pertinent to the formal mining operation at the source of the supply chain. It is difficult to see how the legislative purpose would be served by adopting a rule that requires a mining issuer to conduct "due diligence" on the source of its own minerals.

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[7] *See, e.g.,* S.891 and S.A. 2707.

[8] On May 20, 2010, the U.S. Senate passed the financial reform bill, H.R. 4173, with Senate amendments including provisions on Congo Conflict Minerals (S.A. 3997) incorporated into its Title XV (the "Brownback Amendment"). H.R. 4173 as previously passed by the U.S. House of Representatives did not include a similar amendment. On June 25, 2010, the Conference Committee of members of the House and Senate voted to file a conference report. On June 29, 2010, the Congress released H.Rep. 111-517 (the "Conf. Rept."), which includes the core components of S.A. 3997, i.e., the Conflict Minerals Provision.

[9] The Brownback Amendment to the financial reform bill originally was introduced as S.A. 3791, on May 4, 2010. On May 5, 2010, S.A. 3791 was superseded by S.A. 3844, which added recitals and made a minor correction. On May 12, 2010, S.A. 3844 was superseded by S.A. 3997, which included the term "manufactured" to the scope provision – indicating that producers are covered by the disclosure requirement only to the extent their product is "manufactured." The Conference Report adopted June 25, 2010, similarly elaborated the disclosure duty to clarify that disclosures must identify "products manufactured or contracted to be manufactured that are not DRC conflict free…" Conf Rept. § 1502(b) (adding Exchange Act § 13(p)(1)(A)(ii)).

Similarly, the statute defines a "person described" as being one who manufactures a product for which "conflict minerals are necessary to the functionality or production of."[10] Where mining companies are concerned, the product *is* the defined mineral itself or its derivative. An additional "necessary to the product" inquiry would not be needed if Section 1502 had been intended to require disclosures from mining companies. As such, the SEC's interpretation of manufacturers to include mining issuers effectively writes out the words "necessary to the functionality or production of the product" from the statutory text. Such an interpretation runs contrary to the plain language of Section 1502, and is impermissible under the rules of statutory construction. *Scheidler v. NOW, Inc.*, 574 U.S. 9, 21 (2006) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883), "It is our duty 'to give effect, if possible, to every clause and word of a statute'"); *see also BedRoc Ltd., LLC v. United States*, 541 U.S. 176 (2004) (also quoting *Montclair*, "we will not…presum[e] that 'the legislature was ignorant of the meaning of the language it employed'"). The same problem arises with respect to ignoring the significance of the statutory term "derivative."[11] The statute includes both the named ores *and their derivatives* within the definition of the term "conflict mineral." The term "derivative" clearly implicates something other than the ore itself – namely, the processed metal[12] derived from that primary ore.[13] Therefore, to give effect to the "derivatives" language, the Commission must treat both the named ores and the processed metals derived therefrom as "conflict minerals," and therefore as inputs to manufactured products rather than as manufactured products themselves.

Furthermore, as expressed in greater detail in NMA's previous comments, the co-sponsors of the Brownback Amendment made multiple statements indicating that their intent was to require disclosure of the use of conflict minerals and their derivatives in manufactured products such as everyday consumer electronic goods. By way of example, in the only floor

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[10] 13(p)(2)(B).

[11] 13(e)(4) – The term "conflict mineral" means –
(A) Columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives… (emphasis added).

[12] Specifically, gold, tin, tantalum and tungsten. *See* Reporting Release at 11-12 ("Cassiterite is the metal ore that is most commonly used to produce tin, which is used in alloys, tin plating, and solders for joining pipes and electronic circuits. Columbite-tantalite is the metal ore from which tantalum is extracted. Tantalum is used in electronic components, including mobile telephones, computers, videogame consoles, and digital cameras, and as an alloy for making carbide tools and jet engine components. Gold is used for making jewelry and…in electronic, communications, and aerospace equipment. Finally, wolframite is the metal ore that is used to produce tungsten, which is used for metal wires, electrodes, and contacts in lighting, electronic, electrical, heating, and welding applications").

[13] It is important to note that only the named primary ores and their derivatives (listed in fn. 12) are "conflict minerals." Therefore, while processed gold is included within the definition of "conflict minerals" because it is a derivative of gold ore, where such gold is extracted as a byproduct of a primary zinc, nickel, copper, or lead ore body no other derivative of those unlisted ores (namely, the zinc, nickel, copper, lead, or other minerals contained in those ore bodies) is a conflict mineral under the statute.

statement identified on the Brownback Amendment, co-sponsor Sen. Durbin of Illinois stated that the purpose of S.A. 3997 was to "encourage[] companies using [covered] minerals to *source them* responsibly."[14] Sen. Durbin also later said that the amendment was designed to address the fact that "the products we use every day – from automobiles to cell phones – may use one of these minerals from this area of conflict…"[15]

Thus, in modifying, improving and discussing the legislation, Congress expressly omitted any reference to mining activities. Congress did not think it necessary to apply the Conflict Minerals Provision to SEC mining issuers in order to accomplish the purpose, set forth in Section 1502(b) of the Conference Report, of minimizing the extent to which the "exploitation and trade of conflict minerals" helps to "finance conflict" in the Democratic Republic of the Congo. Such companies simply do not implicate the concerns that prompted the enactment of the statutory provision. Rather, the legislation implicitly assigns to mining companies the role of cooperating with the efforts of buyers to conduct supply chain audits and to obtain certifications regarding the source and origin of minerals and their derivatives. Accordingly, activities such as mere extraction and processing of conflict minerals should not trigger the disclosure requirements in the Conflict Minerals Provision.

b. <u>Explicit References to Mining in Sections 1503 and 1504 Further Support the Conclusion that Mining Issuers Are Not Required to Make Conflict Minerals Disclosures</u>

The Supreme Court has consistently held that "[a] familiar principle of statutory construction…is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (also citing, e.g., *Lindh* v. *Murphy,* 521 U. S. 320, 326 (1997) and *Russello* v. *United States,* 464 U. S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'")).

Sections 1503 and 1504 of the Dodd-Frank Act make clear references to mining activities. Section 1503, entitled "Reporting Requirements Regarding Coal or Other Mine Safety," specifically provides that it applies to "each issuer that is required to file reports pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934 *and that is an operator, or that has a subsidiary that is an operator, of a coal or other mine*…"[16] Similarly, Section 1504 of the Act states that "the Commission shall issue final rules that require *each resource extraction*

[14] Cong. Rec. S3817 (May 17, 2010) (emphasis added).

[15] Cong. Rec. S3817 (May 17, 2010).

[16] §1503(a) (emphasis added).

issuer to include in an annual report…"[17] Furthermore, Section 1504 defines a resource extraction issuer as an issuer that engages in the commercial development of oil, natural gas, or minerals, and defines such development as including "exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or the acquisition of a license for any such activity."[18] Such language is quite similar to that contained in earlier versions of the conflict minerals provisions[19] which was intentionally excluded from the final version of Section 1502.

In comparison, the Commission, in explaining the scope of Section 1502, provides a much different view of what type of issuer is subject to the disclosure regulations by referring to "generally understood" *manufacturing* activities such as the "*making* of *goods or wares* by hand or machinery."[20] Consequently, when looked at in conjunction with other sections in the Dodd-Frank Act, it is clear that Congress purposefully made a distinction between extractive, or mining and mineral processing, operations and those processes "generally understood" to constitute the manufacturing of products containing minerals in the Conflict Minerals Provision. In other words, where Congress intended to address mining activities in a particular provision of the legislation, Congress made such intent clear by specifically naming mine operators. Congress, however, specifically omitted any such reference to extraction-related activities in Section 1502, and in light of the Supreme Court's ruling in *Hamdan v. Rumsfeld*, a negative inference can be drawn from this exclusion.

c. Mining-Related Activities Are Not "Manufacturing" for Purposes of Section 1502

Although the SEC states that it is not defining the term "manufacturing" because it is generally understood, by including mining issuers as "manufacturers" the Proposed Rule actually does define the term, and does so in a manner that is inconsistent with its generally understood meaning. Rather than take such an approach, NMA instead again urges the Commission to clarify that the activities performed by the mining industry – namely extraction, beneficiation, and minerals processing – do not constitute manufacturing for purposes of Section 1502. The commonly accepted standards found in the U.S. Census Bureau's North American Industry Classification System (NAICS) clearly distinguish extractive and beneficiation activities from manufacturing activities. Furthermore, mineral processing operations should likewise not be considered manufacturing for purposes of Section 1502, as they are closely interconnected with extraction and beneficiation, and are integral to the development of commercial minerals and their derivatives.

[17] §1504(q)(2)(A) (emphasis added).

[18] §1504(q)(1)(A).

[19] *See* S.891 and S.A. 2707.

[20] *See* Proposing Release, Fn. 1 *supra*, at footnote 52 (emphasis added).

1. Extraction and Beneficiation

NAICS standards are used by Federal statistical agencies to classify business establishments for the purposes of collecting, analyzing, and publishing data related to the U.S. business economy. More importantly, the U.S. Environmental Protection Agency (EPA) uses the NAICS definitions to administer programs that apply to mining and mineral processing operations. As explained in greater detail in NMA's previous comments, under the NAICS definitions, all mining, milling, and beneficiation activities, as well as the production of concentrates, are classified as mining as opposed to manufacturing activities.[21] A clear distinction is made in the NAICS definitions between the extraction and preparation of raw materials and their derivatives, and the production of new goods from those raw materials and derivatives. NMA believes that the Commission should follow the general tenor of the definitions in the NAICS, particularly in light of the fact that the NAICS is used to classify operations under programs that apply to hardrock mining which are administered by federal U.S. agencies.

Not only is such an approach consistent with the statutory text and legislative history of Section 1502 as previously explained, it is also necessary to reduce duplicative submissions from multiple companies along a supply chain, as product manufacturers will already be including origin and chain of custody information in their reports (on the basis of the certification or similar information provided by suppliers in the mining industry). Indeed, the SEC's cost-benefit analysis contained in the Proposed Rule found that there will be a considerable burden placed on those required to file reports under Section 1502, and as such the SEC should not require duplicative reporting by multiple entities along a supply chain, particularly given the fact that the secured mining operations of SEC mining issuers are not the source of the problems at which the Conflict Minerals Provision is aimed.

The draft SEC rules should therefore be revised to indicate that extraction and beneficiation activities, including those related to the production of doré,[22] gold concentrate, or other concentrates (such as copper, nickel, zinc, or lead) containing gold, do not constitute product manufacturing or contracting to manufacture. The SEC rules should clearly exclude issuers engaged in extraction and beneficiation from direct reporting, and by-products derived from extraction and beneficiation including certain sludges, slimes, flue dust, carbon fines, and slag should also be considered outside the scope of the Conflict Minerals Provision.

2. Mineral Processing

Additionally, as NMA has previously explained, there are certain mineral processing activities included in the "manufacturing" section of the NAICS standards that should be

[21] Mining activities, including the mining of the identified minerals, are included under NAICS definition # 21. Manufacturing is addressed under NAICS definitions # 31-33.

[22] Dore is a gold-silver mixture sent by the mines for further refining and separation into gold and silver.

excluded from the scope of "manufacturing" for purposes of the Conflict Minerals Provision. Exclusion of these activities for purposes of Section 1502 is appropriate given the purposes of these processes, as well as the congressional intent of the provision. These mineral processing activities such as smelting and refining are necessary to facilitate maximum mineral recovery, and at times include the physical or chemical transformation of such materials. However, these types of manufacturing activities are uniquely associated with the mining industry and are necessary to the ultimate production of the named minerals and derivatives themselves, and, therefore, are not being manufactured for the purposes of the Conflict Minerals Provision.

The processes that fall within this category include the NAICS manufacturing classifications for "nonferrous metal (except aluminum) production and processing,"[23] "nonferrous metal (except aluminum) smelting and refining,"[24] "primary smelting and refining of copper,"[25] and "primary smelting and refining of nonferrous metal (except copper and aluminum)."[26] NMA believes it is appropriate to exclude these from the reporting requirements of Section 1502 in all instances, but at a minimum they must be excluded where those processes are for the primary production of metals other than those listed as "conflict minerals."

NMA is pleased that the Proposed Rule appears to acknowledge that exclusion of the primary metal is appropriate where a "conflict mineral" is produced as a byproduct of the primary production, as is the case with smelting and refining processes for base metals such as copper, lead, zinc, nickel, and other ores and concentrates that produce byproducts which may contain small amounts of gold. The Proposing Release, at p. 24, explicitly states that the Proposed Rule would only cover a mineral that is "intentionally included in a product's production process." This approach avoids effectively labeling all such primary ores and concentrates as conflict minerals - a nonsensical result not intended by Congress. Furthermore, in light of the fact that the statute calls upon manufacturers to trace the named minerals that they use in their products back to their source, it makes sense for the SEC to only require that supply chains be traced back to the original wolframite, cassiterite, columbite-tantalite, and gold used in the products. While this will include primary metals mining operations for the named conflict minerals – though again, only for purposes of securing the supply chains, not for purposes of conflict minerals disclosures – it should not include primary mining operations for other minerals which may contain the named minerals as a byproduct. In the example above of certain quantities of gold being contained in primarily copper, lead, zinc, or nickel ore bodies, the gold itself is not available for use in a manufactured product until it is separated during a mineral processing phase. The supply chain for such gold, therefore, should not begin until the

[23] NAICS Code 3314.

[24] NAICS Code 33141.

[25] NAICS Code 331411.

[26] NAICS Code 331419.

gold has been separated, though again "manufacturing" does not begin for purposes of conflict minerals disclosures until the separated gold is then used in later products. This is particularly so given the fact that at no time has there been an inference that secure mineral processing operations are the source of the problems at which the Conflict Minerals Provision is aimed. Rather, it is the unsecured primary mining of the named minerals that has been and can be exploited by unlawful armed groups in the DRC and surrounding countries. The approach endorsed by NMA therefore serves the important purposes of Section 1502 without unduly burdening SEC issuers by requiring that they trace supply chains back further than is needed to achieve the statutory aims.

The legislative history of Section 1502 also clearly illustrates that the reporting requirements in the Conflict Minerals Provision are not intended to address the extraction and production of identified minerals, but rather to "bring accountability and transparency to the supply chain of minerals used in the manufacturing of many electronic devices"[27] so as to minimize the exploitation of conflict minerals for use in the financing of conflict in the DRC. Therefore, processes that are aimed at extracting larger amounts of secondary minerals such as gold from ores and other materials do not constitute "manufacturing" or "contracting to manufacture" products for which conflict minerals are "necessary to the functionality of." While these additional smelting and refining processes follow extraction and beneficiation, they still result in the same end – the production of minerals and their derivatives themselves. As such, these processes are qualitatively different from those contemplated by the Conflict Minerals Provision.

As previously indicated, the statutory language adopted also strongly suggests that Section 1502 is intended to facilitate the tracking of the *use* of the listed minerals and their derivatives in the creation of everyday consumer products such as cell phones. The minerals and derivatives themselves are not the "manufactured" products contemplated by the statute – they already exist, even where they require additional processing to be successfully recovered. To conclude otherwise would be to blatantly ignore the statutory language regarding "necessary to the functionality of the product" and "derivatives," as well as the requirement that reports include a description of the efforts taken to determine the mine or location of origin and the facilities used to process the conflict minerals. Additionally, mineral processing information will already be disclosed in the reports of manufacturing companies, and therefore mining issuers should be excluded from Section 1502 disclosure requirements to avoid duplicative and costly reporting.

For the aforementioned reasons, therefore, mining issuers who engage in extraction, beneficiation, and mineral processing activities do not constitute persons manufacturing a product for which conflict minerals are necessary to the functionality of, and should thus not be subject to the disclosure requirements of the Conflict Minerals Provision.

[27] *See* fn. 13.

d. The Proper Role of Mining Issuers Is that of Facilitating Efforts to Secure Supply Chains

NMA would like to again acknowledge that mining issuers will play a vital role in helping manufacturers establish traceable supply chains for the identified minerals by providing mineral source information to downstream purchasers. Because the statute imposes on manufacturing issuers using the named minerals and derivatives in their products the responsibility for tracking and reporting on the supply chains back to the original source, to avoid duplicative and burdensome requirements and to comply with the intent and text of the statute, reporting should be thus limited to those issuers that manufacture or contract to manufacture products using or containing the named minerals. Reporting should not be required of the members of the primary metals and minerals industry who produce the named minerals and derivatives themselves. To require otherwise would be contrary to the text of the Dodd-Frank Act, would not make sense within the context of the Proposed Rule, would unjustifiably blur the distinction between mining and manufacturing typically observed by federal agencies, and would not advance the aims of the Conflict Minerals Provision.

II. The Proposed Rule Makes Impermissible Presumptions Concerning the Named Minerals

Section 1502 provides that "a product may be labeled as 'DRC conflict free' if the product does not contain conflict minerals that *directly or indirectly finance or benefit armed groups* in the Democratic Republic of the Congo or an adjoining country."[28] The proposed regulatory scheme, however, does not properly take into consideration the issue at the very heart of the Conflict Minerals Provision – determining whether minerals used in consumer goods helped to finance or benefit armed groups in designated conflict areas. Rather, the proposal makes two impermissible presumptions: 1) a rebuttable presumption that *all* of the named minerals throughout the world are "conflict" until shown that they did not originate from the DRC or an adjoining country; and 2) a seemingly non-rebuttable presumption that all of the named minerals that did originate in the DRC or adjoining countries are conflict regardless of whether their sale helped finance or benefit armed groups. As discussed in further detail in NMA's previous comments and below, neither presumption is accurate, nor do they help further the aims of the Conflict Minerals Provision. To avoid unwarranted stigmatization and to prevent the Conflict Minerals Provision from misleading investors, the rule should instead create a presumption that an integrated supply chain, traceable to a mine located outside a designated conflict area or identified as a secure/benevolent source within a designated conflict area, does not support armed conflict.

a. Minerals Not Originating In Designated Conflict Areas Should Be Exempt from Disclosure Requirements

[28] 13(p)(1)(D) (emphasis added).

The broad language used in the Proposed Rule creates a presumption that any named minerals are conflict unless investigated and proven otherwise. While the Dodd-Frank Act is clearly designed to address minerals originating in those areas identified as "conflict" and mapped as such by the U.S. State Department, the exceedingly broad regulations proposed by the SEC trigger disclosure requirements for minerals not originating in designated conflict areas. The geographic area addressed in the legislation is specific with respect the DRC and adjoining countries, and the regulations need to be revised to align with the conflict mapping performed by the State Department so as to be consistent with the text of the statute. The Commission should therefore adopt a reporting approach that limits unnecessary reputational harm to the identified minerals and reporting companies by requiring disclosure only with respect to those minerals that actually come from an area identified in the conflict mapping performed by the State Department under § 1502.

b. <u>Disclosure Requirements Inadequately Address Whether Minerals Finance or Benefit Armed Groups</u>

Both the statutory language as well as the legislative history of Section 1502 underscore the fact that the Conflict Minerals Provision is intended to discourage the use of those minerals from the DRC and adjoining countries which directly or indirectly finance or provide benefit to armed groups. However, the due diligence requirements concerning supply chain determinations included in the Proposed Rule focus primarily on facilities and countries of origin. The inquiry central to the purpose of Section 1502 – whether the minerals used in manufactured products directly or indirectly financed or benefited armed groups – is ignored. The Proposed Rule therefore creates a presumption that, after the source of origin of a mineral is determined, the question of whether it actually benefited armed groups is at best unimportant, at worst irrelevant. In other words, the Proposed Rule creates a seemingly non-rebuttable presumption that all listed minerals and derivatives from designated conflict areas are, in fact, financing violence. Such a presumption could likely unintentionally damage the reputation and economic viability of legitimate business enterprises operating in the designated areas, and could have a devastating impact on the economies of the named countries.

A clear distinction must be created between those minerals originating from "benevolent" sources located within the designated conflict areas, and those originating within the designated conflict areas that indirectly or directly benefit armed groups. Such a distinction is necessary to avoid the potential negative ramifications of creating a non-rebuttable presumption of conflict funding. NMA reiterates its endorsement of the creation by the SEC, in conjunction with the U.S. State Department, Commerce Department, and any other relevant international agencies, of a list of accredited sources and entities along the supply chains of the designated minerals within the identified conflict regions. This approach is consistent with the text of Section 1502, which specifically calls on the Secretary of State to develop "a plan to provide guidance to commercial entities seeking to…formalize the origin…of conflict minerals…[and] to ensure that conflict minerals used in the products of…suppliers do not

directly or indirectly finance armed conflict or result in labor or human rights violations."[29] If this distinction is not made, and the final rule has the effect of stigmatizing legitimate sources of minerals and derivatives, then those sources will be driven out of the market. The resulting vacuum likely would only be filled by armed groups. As a result, the regulation could foster the very problem it is seeking to deter.

III. Additional Considerations Should be Given to Gold in Light of its Unique Characteristics

Gold provides perhaps the most telling example of why it is critical for the Commission to devise a regulatory scheme that only applies the "conflict" label to minerals that have been used to directly or indirectly financially benefit armed groups. Only 0.2% - 0.3% of annual international gold production comes from the DRC. Given the small likelihood that a particular shipment of gold originated from a conflict area, rather than using pejorative terms that confuse investors and the public into thinking that all gold finances or potentially could finance armed groups in the DRC region, the final rule should make it clear that gold originating from outside the conflict areas or from a secured source within the DRC region is presumed to be "DRC conflict free." Such an approach would permit application of the regulatory reporting requirements to gold from actual conflict areas of the DRC and adjoining countries, but would not unfairly stigmatize or blemish the reputation of gold generally.

Additionally, certain provisions need to be included in the final rule to protect confidential information with respect to gold shipments. Due to the intrinsic value of gold, certain information regarding its location and movement has the potential to pose a security threat that could jeopardize the safety, health, and welfare of staff from the mines to the refineries and beyond. Protection mechanisms should also be established where certain price and cost information is needed during the voluntary reporting process.

Lastly, recognition must be given to the fact that, among the named minerals, gold is uniquely handled in the marketplace. Again because of its intrinsic value, gold is recycled and stockpiled in much larger quantities than are the other named minerals. While this issue is discussed in more detail below and in NMA's previous comments, it should generally be noted that such gold-specific market transactions in turn make the supply chain of gold more complicated than that of the other named minerals. A given amount of gold tends to stay in the global marketplace for a much longer duration than other minerals, and as such the SEC needs to make special provisions concerning the securing of gold supply chains.

IV. Reporting Requirements

a. General Reporting Comments

[29] 13(c)(1)(A).

NMA would like to reiterate its previous comments concerning reporting under Section 1502. Again, NMA does not believe that mining and mineral processing issuers need to report under Section 1502. However, in terms of the disclosures the rules will require of manufacturers, NMA agrees with the SEC's approach to allow disclosures to be furnished rather than filed with the Commission.

Furthermore, the Commission should not require the contents of a Conflict Minerals Report or any related disclosures to be included in the issuer's annual report, as such information is, as the SEC has acknowledged, "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."[30] Additionally, because nearly all information in annual reports is deemed to be filed, not furnished, and is therefore automatically incorporated by reference into other filings when the annual report is so incorporated, requiring such information to be included in the annual report could have potential unintended consequences for the broader SEC disclosure regime. Therefore, such disclosures should instead be permitted in a separate form and furnished annually on EDGAR, such as on Form 6-K for foreign private issuers[31] and on Form 8-K for domestic issuers, with provisions made for the protection and redaction of confidential or sensitive business information.[32]

NMA also strongly disagrees with the SEC's suggested requirement that a mine's location be disclosed "with the greatest possible specificity" and that information concerning the capacity of each mine and weights and dates of individual mineral shipments be disclosed. As previously stated, NMA fails to see the significance of disclosing such details in a certified audit report or Conflict Minerals Report. Such disclosure would be unduly burdensome and could expose sensitive details which could be used to determine transportation routes, storage locations, transfer stations, and other shipping details of valuable minerals. This type of disclosure therefore poses a risk to the security, health, safety, and welfare of all staff involved in the transport of minerals from a mine to a refinery and beyond. Additionally, such disclosure could highlight areas where minerals could be intercepted by armed groups, thereby exacerbating the very armed conflict the statute is designed to prevent. To address these issues, the SEC should only require that the approximate geographic location of a mine within a country be disclosed. Additionally, while NMA does not believe that mine and shipment-related data should be the subject of disclosure, should the Commission require it the Commission should allow for redaction of such information and should require it only when a manufacturer has determined that the minerals necessary to the functionality or production of

[30] Proposing Release at footnote 128.

[31] Indeed, because foreign private issuers often use one report to meet the obligations of the disclosure regimes of multiple countries, it is particularly important that foreign issuers be permitted to keep the distinct type of disclosures required by Section 1502 separate from their annual reports.

[32] Note, however, that if issuers wish to include the conflict mineral-related disclosures in their annual reports, they should be permitted to do so on Form 20-F or Form 40-F.

its product both originated in the DRC region and directly or indirectly financed or benefited armed groups in the region.

Finally, NMA continues to agree that a reasonable country of origin inquiry standard is the appropriate standard for determining whether an issuer's conflict minerals originated in the DRC region. NMA also agrees that Section 1502 disclosures should not be subject to liability under Section 18 of the 1934 Act unless the issuer explicitly states that the disclosure is filed under the 1934 Act, and that these documents should not be considered incorporated by reference into any filing, except to the extent that an issuer specifically incorporates them by reference. This is particularly so in light of the fact that, as the Commission has stated, the nature and purpose of the conflict minerals disclosure requirements are not for the protection of investors, and any information material to a reasonable investor's decision to invest in an issuer's securities is already required in the issuer's registration statements filed under the Securities Act and, in many cases, in periodic reports filed under the Exchange Act.

b. Exemption of Stockpiles from Disclosure

As previously noted by NMA, depending on the point in the supply chain, conducting due diligence on the source of existing stockpiles or inventories of conflict minerals could be challenging if not impossible. Therefore, the final rule should either exempt existing stockpiles from reporting requirements, or allow for extra flexibility in regard to this type of disclosure. Furthermore, any stockpiles of minerals that pre-date the effective date of the new rules should be completely exempt from reporting requirements. However, should a manufacturer or company contracting to manufacture a product wish to voluntarily include stockpiled minerals in their initial disclosure or Conflict Minerals Report, they should be permitted to do so.

c. Recycled or Scrap Source Disclosures

NMA would like to reiterate that classifying conflict minerals obtained from a recycled or scrap source as DRC conflict free is appropriate. The recycling of minerals should generally be encouraged, and is already widely practiced with respect to gold. However, due to the impossibility of determining the original source of recycled and scrap minerals, a "reasonable country of origin inquiry" should be conducted, not for the original source of the mineral but rather for the point at which the mineral re-entered the supply chain when the mineral was recycled. For example, when recycling gold from a pile of used cell phones, the chain of inquiry should end at the time the gold was extracted from the cell phones for re-use rather than at the original source of the gold contained in each individual cell phone, as such a determination would be impossible to make. A Conflict Minerals Report and certified independent private sector audit may then be required, but again the focus of such an inquiry should be the "recycled source/origin," or point at which the conflict mineral reentered the supply chain after being recycled, not the point at which the recycled conflict mineral was originally mined.

Furthermore, all gold bars in storage at the central banks on the effective date of the new SEC rule should be grandfathered. Similarly, all bars marked with the London Bullion Marketers

Association (LBMA) stamp on or before the effective date of the new SEC rule should be classified as DRC conflict free. All gold coins issued by governments or other entities prior to the effective date of the new SEC rule should be grandfathered. A definition of recycled and scrap gold is needed to grandfather gold bars, LBMA bars, and gold coins produced before the effective date of the new SEC rules as well as to specifically exclude sludges, slimes, flue dust, carbon fines, slag, and other by-products from consideration as conflict minerals.

Conclusion

NMA appreciates the SEC's continued engagement with stakeholders while it attempts to put together a workable regulatory scheme to both facilitate the expressed goals of the Conflict Minerals Provision and avoid unnecessary and unwarranted costs for SEC issuers. The fact that the Conflict Minerals Provision has already raised awareness of the human rights violations being financed by the exploitation of unsecured natural resources extraction in the DRC region is a testament to its important aims. However, the proposal as written contains several major flaws that undermine or detract from the very purpose of Section 1502 – to help eliminate the use of minerals in our everyday consumer products that have helped to fund armed conflict in the DRC and adjoining countries. Specifically, the inclusion of mining and mineral processing issuers within the definition of "manufacturing," presumption that all named minerals originating in the DRC region are conflict, and overly detailed reporting requirements run contrary to the text of Section 1502 and the purposes of the Conflict Minerals Provision. NMA therefore endorses a system whereby SEC mining issuers as well as local artisanal miners can obtain "conflict free" certifications and can then aid manufacturing issuers in identifying the original source of their minerals and determining that their products have not helped to finance armed conflict in the DRC region. Such a system would only involve mining and mineral processing issuers to the extent that they are needed to secure supply chains, thereby avoiding duplicative and burdensome disclosure requirements and remaining within the scope of the statutory language. Likewise, such a system would not unfairly stigmatize the use of the named minerals – particularly the named minerals legitimately sourced in the DRC region – and would encourage conflict-free mining operations in the DRC.