

August 21, 2012

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

Dear Chairman Schapiro,

We are legal scholars and law students at the University of Utah S.J. Quinney College of Law where we concentrate in international human rights law. We write to you in our personal capacities as citizens concerned about the implementation of Dodd-Frank Section 1502. As legal scholars and students, we represent neither industry nor an interest group. We have evaluated the merits of 1502 and the Proposed Rules and from our unique vantage point recognize the need for the Final Rules to reflect a balance of various competing interests.

We write to emphasize the very important position of business in relation to human rights. Indeed, there is a growing consensus that a range of commercial activity, such as mineral extraction, must be performed in a way that, at a minimum, respects human rights. Under the United Nations Framework and Guiding Principles on Business and Human Rights recently endorsed by the Human Rights Council, commercial actors cannot turn a blind eye to the potentially adverse impacts of their activities on human rights. The intent behind Section 1502 reflects this understanding.

Moreover, there is a growing trend on the part of consumers and investors to make purchasing and investing decisions based on respect for human rights. These types of decisions would not be possible without readily available information on how the companies that would benefit from them behave with regard to human rights. Section 1502 reflects this trend in the marketplace, as well as the recognition that legislative action is, in most cases, necessary for consumers and investors to have access to this kind of information.

We believe that Section 1502 is an important measure to address the connection between business and harm to human rights. We also believe that, if implemented properly, it could provide a model for similar forms of legislation in the future that would address similar humanitarian situations as that occurring in the Democratic Republic of

Congo (DRC) and secure the interest of investors in having access to information that influences purchasing decisions. Therefore, we believe that the Final Rules should more fully reflect the growing consensus of the need for corporate social responsibility with respect to human rights.

Some industry representatives and commentators claim that Section 1502 could operate as a blanket ban on minerals from the Congo, ultimately causing more harm than good. This claim is part of an argument for a less robust implementation of Section 1502. Although Section 1502 has had the effect of reducing mineral exports from the eastern DRC, which in turn has resulted in increased economic hardship on the local population, early evidence from the UN Group of Experts on the DRC indicates, there has also been a reduction in the level of violence funded by the minerals trade. Additionally, much of the fear of purchasing minerals sourced in the DRC can be attributed the uncertainty created by a lack of Final Rules. Nevertheless, several companies have pledged to continue purchasing conflict-free minerals from the region, for example, by taking ownership of the supply chain or by purchasing minerals through conflict-free certified smelters. Once the uncertainty surrounding the implementation of Section 1502 has been resolved by the issuance of Final Rules and there are mechanisms in place to streamline compliance, it would be highly unlikely for companies to completely avoid purchasing minerals from a region as mineral-rich as the DRC and more likely that compliance methods will be strengthened as they are streamlined.

We also note that the United States government invests heavily in humanitarian aid and funds nation-building efforts in the DRC as a core contributor to the United Nations Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). As such, United States has a strong interest in protecting these investments in creating a durable peace and security in the region from commercial activities at odds with these ends of companies that enjoy access to U.S. securities markets to raise capital. Requiring disclosure of those commercial activities that contribute to conflict as Section 1502 demands is an eminently reasonable means for the United States to protect its social investments in the DRC.

Based on the foregoing considerations, we advocate for a robust implementation of Section 1502 to ensure it is effective and consistent with Congressional intent. The final rules should reflect the growing consensus of the need for businesses to respect human rights, the desire of consumers and investors to know what commercial activities their purchases and investments support, and the desire of the federal government to protect its investment in the DRC from the commercial activities of companies that benefit from the protection of domestic laws and enjoy access to capital markets in the United States.

That being said, the final rules should adequately account for the interest of business in cost containment. Based on our research with respect to members of industry, it seems that the primary cause of apprehension for companies covered by Section 1502 is the uncertainty surrounding its implementation and enforcement, including the lack of

clear compliance standards. Industry representatives use words such as “paralysis” and “panic” in reaction to this uncertainty.

With these considerations in mind, we conclude with four recommendations for improvements on the proposed rules:

1. Instead of a “reasonable country of origin” inquiry, companies that use conflict minerals in products they manufacture or contract to manufacture should be required to exercise due diligence to discover the source of those conflict minerals. This is more in line with legislative intent, as Sen. Durbin and Rep. McDermott, the authors of Section 1502, expressed in their comment to the SEC. Moreover, as the proposed rules acknowledge, a “reasonable country of origin” standard is amorphous, causing it to contribute to the “paralyzing” uncertainty for companies covered by Section 1502. By contrast, there are several available and relatively well developed due diligence standards on mineral supply chain oversight that the final rules could incorporate, including those set forth by the OECD, which brings us to our next recommendation.
2. Allow covered companies to satisfy their due diligence requirements by following the due diligence guidelines established by the OECD or the United Nations Group of Experts on the DRC. This reduces uncertainty for covered companies by incorporating preexisting standards of due diligence and by providing a much more detailed explanation of what constitutes due diligence than exists in the proposed rules. Moreover, such an approach has been advocated by parties on all sides of the issue, from NGOs to industry groups to the State Department.
3. Incorporate the concept of mitigation as it is explained in the OECD and Group of Experts due diligence guidelines. In other words, do not penalize a company for the inadvertent use of conflict minerals. For example, if a company employing a reasonable conflict-free mineral strategy subsequently discovers that it has been purchasing non-conflict-free minerals through a breach in its supply chain and that company demonstrates that it has taken prompt remedial measures, then that company should not be required to label its products “not conflict free.” This approach encourages companies to continue to source conflict-free minerals from the DRC, prevents companies attempting in good-faith to respect human rights from being unjustly penalized, and takes into account the complexity of the contemporary supply chain.
4. Treat conflict minerals reports submitted by covered companies as being “filed,” and not merely “furnished,” to the SEC. Although the text of Section 1502 contains the ambiguous word “submit,” this recommendation is more consistent with legislative intent, as Sen. Durbin and Rep. McDermott communicated in their comment. Furthermore, we believe it is an important measure to ensure that Section 1502 serves its purpose.

Absent these clarifications to the proposed rules we are deeply concerned that the result will be a weak implementation. Humanitarian crisis warrant strong implementation to encourage industry to assume internationally recognized obligations to respect human rights.

We hope that you will find these recommendations useful and incorporate them into the final rules. Thank you for your consideration of our concerns.

Sincerely,



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