UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

THE CHAIR

July 21, 2014

The Honorable Mike Crapo
United States Senate
239 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Crapo:

Thank you for your May 23, 2014 letter regarding the implementation of the Commission's Conflict Minerals rule in light of the April 14, 2014 decision by the U.S. Court of Appeals for the D.C. Circuit. In your letter, you express concern about implementation of the rule and request information about the Commission's decisions and activities subsequent to the Court's decision.

As you know, the Commission adopted the Conflict Minerals rule ("Rule 13p-1") pursuant to a mandate in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The National Association of Manufacturers, the U.S. Chamber of Commerce, and the Business Roundtable challenged the rule in the courts and, as you noted, the D.C. Circuit issued a decision on April 14, 2014. In that decision, a panel of the Court of Appeals unanimously rejected all of the challenges to the rule based on the Administrative Procedure Act ("APA") and the Securities Exchange Act of 1934, including challenges to the Commission's economic analysis. A majority of the panel, however, concluded that the statute and the rule "violate the First Amendment to the extent the statute and rule require regulated entities to report to the Commission and to state on their website that any of their products have 'not been found to be "DRC conflict free."'" In so concluding, the majority specifically noted that there was no "First Amendment objection to any other aspect of the conflict minerals report or required disclosures."

Following the decision of the Court of Appeals, on April 29, 2014, the staff of the Division of Corporation Finance issued a statement on the effect of the Court of Appeals decision.[1] In its statement, the Division indicated that it expects companies to file any reports required under Rule 13p-l on or before the due date and that the reports should comply with and address those portions of Rule 13p-l and Form SD (the new specialized disclosure report form created by the rule) that the Court of Appeals upheld. Specifically, the staff stated that companies would not have to identify their products as "DRC conflict undeterminable" or "not found to be 'DRC conflict free,'" but should disclose, for those products, the facilities used to produce the conflict minerals, the country of origin of the minerals, and the efforts to determine the mine or location of origin. Also, although no company is required to describe its products as

[1] See http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541681994.

"DRC conflict free," if a registrant voluntarily elects to do so in its Conflict Minerals Report, it would have to obtain an independent private sector audit of its Conflict Minerals Report as required by the rule.[2] The April 29 statement provided that companies are expected to file any reports required under the rule on or before the due date and that the reports should comply with and address those portions of the rule that the Court of Appeals upheld. The statement also provided more specific guidance, pending further action from the Commission or a court, regarding compliance with the rule to assist companies in providing their disclosure.

Additionally, in light of the court's decision, under the authority provided by Section 705 of the APA, on May 2, 2014, the Commission issued an order staying the effective date for compliance with those portions of Rule 13p-1 and Form SD that would require registrant statements that the Court of Appeals held would violate the First Amendment. The stay will remain in effect pending the completion of judicial review, at which point it will terminate.[3] As stated in the order, the Commission concluded that limiting the stay to those portions of the rule requiring disclosures the Court of Appeals held would impinge on issuers' First Amendment rights furthers the public's interest in having issuers comply with the remainder of the rule, which was mandated by the Dodd-Frank Act and upheld by the Court of Appeals.

The Commission's stay did not affect the filing date with respect to those portions of the rule that the Court of Appeals upheld. After the Commission issued its stay order, the appellants filed an emergency motion with the Court of Appeals seeking a stay of the entirety of the rule. The Court denied the appellants' motion for a full stay on May 14, 2014.

As noted, the Commission's stay order was issued pursuant to Section 705 of the APA, which provides that an agency may postpone the effective date of an action taken by it pending judicial review when it finds that "justice so requires."[4] In adopting the rule, the Commission concluded that if any provision of the rule was held to be invalid, such invalidity "shall not affect" the validity of the remainder of the Rule.[5] After considering the court decision and the request for a stay, the Commission concluded that a partial stay was consistent with what justice requires, as it avoids the risk of First Amendment harm pending further proceedings, while still furthering the public's interest in having issuers comply with the remainder of the rule. In its opinion, the Court of Appeals explicitly noted that the challengers did not have any First Amendment objection to any other aspect of the rule or required disclosures.[6] The majority also specifically limited its First Amendment holding to the requirement that issuers report to the Commission and state on their website that any of their products have "not been found to be

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[2] *See* Conflict Minerals Frequently Asked Questions at number 15, http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm.

[3] *See* http://www.sec.gov/rules/other/2014/34-72079.pdf.

[4] 5 U.S.C. §705.

[5] 77 Fed. Reg. 56,333.

[6] *See Nat'l Ass'n of Mfrs. v. SEC*, No. 13-5252, slip op. at 17 n.8, http://www.cadc.uscourts.gov/internet/opinions.nsf/D3B5DAF947A03F2785257CBA0053AEF8/$file/13-5252-1488184.pdf.

'DRC conflict free.'"[7] And the Court's reasoning—that the particular language "have not been found to be 'DRC conflict free'" forces an issuer to tell consumers that its products are "ethically tainted"—is not implicated by the remainder of the required disclosures, which merely describe the issuer's efforts to determine the source of its minerals.

The deadline for filing a petition for rehearing or rehearing en banc has now passed and appellants did not file a petition. As such, any further judicial review will be directed towards the portion of the rule invalidated under the First Amendment.

As the Commission explained in adopting the rule, Congress's goals were to "enhance transparency" and "to bring greater public awareness of the source of issuers' conflict minerals and to promote the exercise of due diligence on conflict minerals supply chains."[8] The rule's requirement that issuers perform a reasonable inquiry into the origins of the conflict minerals that are necessary to the functionality or production of their products and disclose the results of that inquiry furthers these goals, as does requiring certain issuers to exercise due diligence on the source and chain of custody of their conflict minerals and disclose the due diligence undertaken. With regard to the due diligence requirement, the due diligence used by a company must conform to a nationally or internationally recognized due diligence framework, and the adopting release indicates that the Organisation for Economic Co-operation and Development's due diligence framework satisfies that criteria. That framework continues to be relevant to compliance with the rule.

The actions taken by the Commission and staff with regard to the portions of the rule that the court upheld maintain the status quo by giving effect to all aspects of the Court's decision in this case. The Commission's order stays the obligation to comply with the portion of the rule that the Court found not to comport with the law, but allows the portions of the rule that the Court unanimously upheld to go into effect on schedule. In so doing, the Commission's stay accomplishes the limited task that Section 705 of the APA is intended to achieve. If, at the conclusion of the litigation involving the rule, additional rulemaking is required, the Commission will undertake that rulemaking in compliance with all applicable requirements.

Thank you again for your input. Your letter has been included in the public comment file. Please do not hesitate to contact me at (202) 551-2100, or have a member of your staff contact Tim Henseler, Director of the Office of Legislative and Intergovernmental Affairs, at (202) 551-2010, if you have any additional concerns or comments.

Sincerely,

Mary Jo White

Mary Jo White
Chair

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[7] *Id.* at 23

[8] 77 Fed. Reg. 56,275-6.