February 2, 2017

I am writing in support of Acting Chair Piwowar's suggestion that the Commission issue additional guidance relating to the implementation of the conflict minerals provision set forth in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act").[1]

At the outset, I should say that I am extremely troubled by the violence being inflicted on innocent civilians by armed groups in the Democratic Republic of the Congo ("DRC") and central Africa, and believe that the violence requires an immediate, concerted and effective international response. It has been noted that the direct and indirect death toll from this violence may be the greatest the world has experienced since the Second World War. The lives of many more thousands of people are in jeopardy unless there will be an effective response.

For the reasons set forth below, however, I do not believe that the Commission's conflict minerals rule is the appropriate means to address this humanitarian crisis. This letter presents only a brief summary of my views; I would be pleased to discuss any of these matters with Acting Chair Piwowar or the Commission staff at their convenience.

1. Securities law disclosures are not an appropriate venue for promoting social or political goals that are not material to investors. Much has been written about the need for securities law disclosure documents to present material information to investors in a cogent and meaningful manner. The Commission has the responsibility of determining the appropriate balance between investors' needs for information, the burden on companies to prepare such information, and the rules that will cause disclosure documents to be as decision-useful as possible. Authors have written about the dangers of securities law overdisclosure, which can effectively hide material information within a mountain of other disclosures.[2] Because many investors consider disclosure documents to be too complicated and prolix to be comprehensible or useful, they may make investment decisions without the benefit of informed due diligence, thereby undermining the purpose of the entire disclosure regime.

   As the Acting Chair knows, the Commission has a three-part mission: to protect investors; maintain fair, orderly, and efficient markets; and to facilitate capital formation. The conflict minerals disclosures do not further any one of these purposes. Moreover, nothing in Section 1502 of the Dodd-Frank Act suggests that the purpose of the section related to any of the aspects of the SEC's mission. Instead, it was included to respond to the "sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein."

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[1] The Commission's final rule is set forth in Release No. 34-67716; File No. S7-40-10 https://www.sec.gov/rules/final/2012/34-67716.pdf

[2] See, for example, "Blinded by the Light: Information Overload and Its Consequences for Securities Regulation" by former Commissioner Paredes, at http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1287&context=law_lawreview

As compelling as the DRC crisis may be, the Commission fails in fulfilling its primary responsibilities by requiring disclosures not in furtherance of its mission. Including conflict minerals information within the scope of mandated securities law disclosures leads to a slippery slope regarding the disclosure of other matters which may also not necessarily be material to investors.[3] Over the past years, the Commission has been subject to considerable pressure to enhance disclosures in a number of areas. Without reviewing the merits of these efforts, it is clear to me that the Commission best discharges its responsibilities by asking whether the requested information would be material to investors, using the standards defined by the Supreme Court. Unless the answer to this question is "yes", the disclosure, in my view, has no place in mandated securities law disclosures.[4]

As stated above, I would support other, non-securities law-based, responses to the crisis in the DRC. These could include direct military intervention, prohibiting US companies from doing business with persons and entities engaged in the armed conflict (for example, by inclusion on the lists maintained by the Department of Treasury's Office of Foreign Assets Control[5]), or otherwise.

2. <u>The Commission's securities law disclosures may actually harm, rather than help, the situation in the DRC.</u>

   In this regard, I defer to others whose expertise is more extensive than my knowledge, but I note that I have read articles stating that:

   a. The conflict mineral disclosure obligation may cause companies to cease sourcing conflict minerals from central Africa (whether or not such sources are associated with the armed conflict), and instead to source the materials from Canada, South America, Australia and other countries. The loss of revenue may inflict significant harm on families, not tied to the armed groups, that are dependent upon the mining and sale of conflict minerals. As many have been noted, such mining in central Africa is artisanal, and many families in central Africa are subsisting on very few resources.

   b. The armed groups have, by some accounts, developed sources of revenue not dependent upon conflict minerals.

   c. The conflict mineral rule does not appear to have stemmed the violence in central Africa. Unfortunately, it continues.[6]

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[3] See "The Slippery Slope of Materiality" by former Commissioner Sommer. https://www.sec.gov/news/speech/1975/120875sommer.pdf

[4] The author strongly believes that the securities laws should not be a "coat closet" for hanging every potential item of disclosure that any investor group may consider to be of interest. Materiality should be the bedrock of any disclosure.

[5] https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx

[6] See, for example, http://www.voanews.com/a/united-nations-democratic-republic-of-congo-human-rights/3692054.html and http://www.un.org/apps/news/story.asp?NewsID=56074#.WJN3i1MrLAU Commissioner Piwowar made similar observations in his recent comments.

d. Conflict minerals are either sold outside the scope of transactions that would require disclosure (does anyone believe that an ounce of gold has no value on the world markets?), or to smelters or others that can effectively hide the source.

3. What should be done?

a. A more limited approach

I understand that, in adopting the conflict minerals rule, the Commission was effecting a statutory mandate. I believe, however, that the Commission should not have adopted any disclosure requirements that extended beyond the scope of those that were specifically required by Congress. In addition, in reviewing the conflict minerals rule, the Commission should reconsider including de minimis and other exemptions that would avoid unnecessarily burdening smaller reporting companies, foreign private issuers and certain other companies.[7] If the Commission truly believes that investors are best served by encouraging companies to "go public" and thereby to make the disclosures required by the Securities Act and Securities Exchange Act, the imposition of unnecessary burdens, which will either induce such companies not to go public or, if they are public, will expose them to added expense without commensurate investor benefit, will not serve the interests of investors.

b. A more robust approach

On May 30, 2013, the Division of Corporation Finance issued a series of "Frequently Asked Questions" relating to the SEC's conflict minerals rule, which is available at http://www.sec.gov/divisions/corpfin/guidance/conflictminerals-faq.htm . Item 3 of the Frequently Asked Questions provides as follows:

"(3) Question:
If the product that has conflict minerals necessary to its functionality or production is manufactured by a consolidated subsidiary of an issuer rather than directly by the issuer, is the issuer subject to the rule?

Answer:
Yes. An issuer must determine the origin of conflict minerals, and make any required disclosures regarding conflict minerals, for itself and all of its consolidated subsidiaries."

The Staff does not cite any authority for its position and, as this paper discusses, it is not clear that the Staff's position is supported, either statutorily or by the SEC's own rules.

[7] See, in this regard, the comment letter on the conflict minerals rule submitted by the Federal Regulation of Securities Committee in the American Bar Association's Business Law Section. https://www.sec.gov/comments/s7-40-10/s74010-273.pdf

The Statute – No Reference to Subsidiaries

Although Congress clearly sought to address humanitarian concerns in Section 1502 of the Dodd-Frank Act, the statute does not explicitly require reporting of the use of conflict minerals by subsidiaries. When Congress wants to refer to subsidiaries, it generally does so clearly. For example, the mine safety reporting provision set forth in Section 1503(a) of the Dodd-Frank Act provides that "Each issuer that is required to file reports pursuant to section 13(a) or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m, 78o) and that is an operator, **or that has a subsidiary that is an operator**, of a coal or other mine shall include, in each periodic report filed with the Commission under the securities laws on or after the date of enactment of this Act, the following information…" (emphasis added)

Similarly, Section 1504 of the Dodd-Frank Act, dealing with disclosure of payments by resource extraction issuers, adds Section 13(q) to the Securities Exchange Act of 1934, which provides that "Not later than 270 days after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commission shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, **a subsidiary of the resource extraction issuer**, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including—…" (emphasis added)

By contrast, Section 1502 of the Dodd-Frank Act, dealing with conflict minerals, is silent with respect to subsidiaries. Under the statutory construction doctrine of "expressio unius" that so many lawyers remember from law school, the expression or inclusion of one thing implies the exclusion of the other, or the alternative. Congress clearly included reference to subsidiaries in Sections 1503 and 1504 of the Dodd-Frank Act, but did not include a comparable reference in Section 1502. The implication of the foregoing is that because Congress did not refer to conflict minerals used by subsidiaries of reporting companies in Section 1502, it would be inappropriate to read such a reference into the statute.

The Commission's Implementing Rules – No Reference to Subsidiaries

Similarly, the SEC's final rules implementing the conflict minerals provisions, adopted on August 22, 2012, do not refer to subsidiaries.[8] This may not be an oversight. The Commission proposed its rules in December 2010, almost five months after the enactment of the Dodd-Frank Act, and following a pre-rulemaking solicitation of public comments. It adopted its final rules over two years following the passage of the Dodd-Frank Act, following another public comment period, and after numerous meetings with interested parties and a roundtable relating to conflict minerals. Notwithstanding this extensive and extended process, the SEC's proposed rules and final rules refer only to products manufactured or contracted to be manufactured by the registrant, and not to products manufactured or contracted to be manufactured by the

[8] http://www.sec.gov/rules/final/2012/34-67716.pdf

registrant or its subsidiaries. For example, Item 1.01 of Form SD provides that "If any conflict minerals, as defined by paragraph (d)(3) of this Item, are necessary to the functionality or production of a product **manufactured by the registrant** or **contracted by the registrant** to be manufactured and are required to be reported in the calendar year covered by the specialized disclosure report …." (emphasis added). Nowhere in the proposed rule or the final rule is there any reference to an obligation by a reporting company to disclose products manufactured or contracted to be manufactured by subsidiaries. Moreover, nowhere in the SEC's proposing release or final release does the term "subsidiaries" appear in the SEC's explanation of the rule. The single reference in the proposing release to the term "subsidiaries" appears in a question posed by the Commission relating to General Instruction I to Form 10-K. In the adopting release, there is only one obscure reference to the term "subsidiaries," in the context of a comment letter submitted by Senator Durbin and Representative McDermott, the principal sponsors of the legislation. The absence of reference to subsidiaries in the SEC's proposed or final rules is, therefore, quite important.

It is also noteworthy that the Commission's definition of the term "registrant' does not itself include subsidiaries. Exchange Act Rule 12b-2 provides that "The term "registrant" means an issuer of securities with respect to which a registration statement or report is to be filed."

When the Commission intends for its rules to apply to subsidiaries, it almost invariably clearly states so. For example, with respect to a registrant's obligation to describe its business, such as in an annual report on Form 10-K, Item 101(a) of Regulation S-K requires a registrant to "describe the general development of the registrant, **its subsidiaries** and any predecessor. Rule 102(c) requires a narrative description of the business done and intended to be done by the registrant and **its subsidiaries**. Property descriptions in Item 102 relate to properties of the registrant and **its subsidiaries**. By contrast, the conflict minerals rule makes no reference to subsidiaries.

On the basis of the foregoing, it would appear to be consistent both with Section 1502 of the Dodd-Frank Act, and with the Commission's conflict minerals rule, to interpret the rule so as to limit its scope to any conflict minerals necessary to the functionality or production of a product manufactured directly by the registrant, without regard to any conflict minerals that may be used by subsidiaries of the registrant.

I hope the foregoing is of assistance to the Commission and its staff.

Very truly yours,

Jeffrey W. Rubin