

MEMORANDUM

To: File

From: John Fieldsend
Special Counsel
Office of Rulemaking
Division of Corporation Finance
U.S. Securities and Exchange Commission

Date: August 11, 2010

Re: Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act Regarding Congolese Conflict Minerals

On August 11, 2010, Paula Dubberly, Felicia Kung, Steven Hearne, and John Fieldsend of the Division of Corporation Finance met with Erik Autor, a representative from the National Retail Federation. The participants discussed the Commission's required rulemaking in Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which relates to reporting requirements regarding conflict minerals originating in the Democratic Republic of the Congo and adjoining countries. A handout provided by Mr. Autor is attached to this memorandum.

Attachment

SEC. 1502. CONFLICT MINERALS.

(a) Sense of Congress on Exploitation and Trade of Conflict Minerals Originating in the Democratic Republic of the Congo- It is 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, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).

(b) Disclosure Relating to Conflict Minerals Originating in the Democratic Republic of the Congo- Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following new subsection:

(p) Disclosures Relating to Conflict Minerals Originating in the Democratic Republic of the Congo-

(1) REGULATIONS-

(A) IN GENERAL- Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2)(B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report--

Comment [a1] - The Securities and Exchange Commission.

(i) a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and

Comment [a2] - Committee staff described this language as applying only to, and including, the smelter. However, the committee included the clarifying report language and definition of chain of custody will have to be spelled out in implementing regulations.

(ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free. (DRC conflict free is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

Comment [a3] - The language described in clause (ii) is not a data request but rather a certification request. Therefore, the manufacturer, contractor or manufacturer will have to be spelled out in implementing regulations to verify results.

(B) CERTIFICATION- The person submitting a report under subparagraph (A) shall certify the audit described in clause (i) of such subparagraph that is included in such report. Such a certified audit shall

constitute a critical component of due diligence in establishing the source and chain of custody of such minerals.

(C) **UNRELIABLE DETERMINATION**- If a report required to be submitted by a person under subparagraph (A) relies on a determination of an independent private sector audit, as described under subparagraph (A)(i), or other due diligence processes previously determined by the Commission to be unreliable, the report shall not satisfy the requirements of the regulations promulgated under subparagraph (A)(i).

(D) **DRC CONFLICT FREE**- For purposes of this paragraph, 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.

(E) **INFORMATION AVAILABLE TO THE PUBLIC**- Each person described under paragraph (2) shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A).

(2) **PERSON DESCRIBED**- A person is described in this paragraph if-

(A) the person is required to file reports with the Commission pursuant to paragraph (1)(A); and

(B) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

(3) **REVISIONS AND WAIVERS**- The Commission shall revise or temporarily waive the requirements described in paragraph (1) if the President transmits to the Commission a determination that--

(A) such revision or waiver is in the national security interest of the United States and the President includes the reasons therefor; and

(B) establishes a date, not later than 2 years after the initial publication of such exemption, on which such exemption shall expire.

(4) **TERMINATION OF DISCLOSURE REQUIREMENTS**- The requirements of paragraph (1) shall terminate on the date on which the President determines and certifies to the appropriate congressional committees, but in no case earlier than the date that is one day after the end of the 5-year period beginning on the date of the enactment of this subsection, that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.

(5) **DEFINITIONS**- For purposes of this subsection, the terms 'adjoining country', 'appropriate congressional committees', 'armed group', and 'conflict mineral' have the meaning given those terms under section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(c) **Strategy and Map To Address Linkages Between Conflict Minerals and Armed Groups-**

(1) **STRATEGY-**

(A) **IN GENERAL**- Not later than 180 days after the date of the enactment of this Act, the Secretary of State, in consultation with the Administrator of the United States Agency for International Development, shall submit to the appropriate congressional committees a strategy to address the

Comment [a4]: See comment a2.

Comment [a5]: This provision is an attempt to prevent greenwashing. It is very vague and has drawn criticism from the business community.

Comment [a6]: See comments a7 and a8 below.

linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products.

(B) CONTENTS- The strategy required by subparagraph (A) shall include the following:

(i) A plan to promote peace and security in the Democratic Republic of the Congo by supporting efforts of the Government of the Democratic Republic of the Congo, including the Ministry of Mines and other relevant agencies, adjoining countries, and the international community, in particular the United Nations Group of Experts on the Democratic Republic of Congo, to--

(I) monitor and stop commercial activities involving the natural resources of the Democratic Republic of the Congo that contribute to the activities of armed groups and human rights violations in the Democratic Republic of the Congo; and

(II) develop stronger governance and economic institutions that can facilitate and improve transparency in the cross-border trade involving the natural resources of the Democratic Republic of the Congo to reduce exploitation by armed groups and promote local and regional development.

(ii) A plan to provide guidance to commercial entities seeking to exercise due diligence on and formalize the origin and chain of custody of conflict minerals used in their products and on their suppliers to ensure that conflict minerals used in the products of such suppliers do not directly or indirectly finance armed conflict or result in labor or human rights violations.

(iii) A description of punitive measures that could be taken against individuals or entities whose commercial activities are supporting armed groups and human rights violations in the Democratic Republic of the Congo.

(2) MAP-

(A) IN GENERAL- Not later than 180 days after the date of the enactment of this Act, the Secretary of State shall, in accordance with the recommendation of the United Nations Group of Experts on the Democratic Republic of the Congo in their December 2008 report--

(i) produce a map of mineral-rich zones, trade routes, and areas under the control of armed groups in the Democratic Republic of the Congo and adjoining countries based on data from multiple sources, including--

(I) the United Nations Group of Experts on the Democratic Republic of the Congo;

(II) the Government of the Democratic Republic of the Congo, the governments of adjoining countries, and the governments of other Member States of the United Nations; and

(III) local and international nongovernmental organizations;

(ii) make such map available to the public; and

(iii) provide to the appropriate congressional committees an explanatory note describing the sources of information from which such map is based and the identification, where possible, of the armed groups or other forces in control of the mines depicted.

(B) DESIGNATION- The map required under subparagraph (A) shall be known as the 'Conflict Minerals Map', and mines located in areas under the control of armed groups in the Democratic Republic of the Congo and adjoining countries, as depicted on such Conflict Minerals Map, shall be known as 'Conflict Zone Mines'.

(C) UPDATES- The Secretary of State shall update the map required under subparagraph (A) not less frequently than once every 180 days until the date on which the disclosure requirements under paragraph (1) of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b), terminate in accordance with the provisions of paragraph (4) of such section 13(p).

(D) PUBLICATION IN FEDERAL REGISTER- The Secretary of State shall add minerals to the list of minerals in the definition of conflict minerals under section 1502, as appropriate. The Secretary shall publish in the Federal Register notice of intent to declare a mineral as a conflict mineral included in such definition not later than one year before such declaration.

(d) Reports-

(1) BASELINE REPORT- Not later than 1 year after the date of the enactment of this Act and annually thereafter until the termination of the disclosure requirements under section 13(p) of the Securities Exchange Act of 1934, the Comptroller General of the United States shall submit to appropriate congressional committees a report that includes an assessment of the rate of sexual- and gender-based violence in war-torn areas of the Democratic Republic of the Congo and adjoining countries.

(2) REGULAR REPORT ON EFFECTIVENESS- Not later than 2 years after the date of the enactment of this Act and annually thereafter, the Comptroller General of the United States shall submit to the appropriate congressional committees a report that includes the following:

(A) An assessment of the effectiveness of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b), in promoting peace and security in the Democratic Republic of the Congo and adjoining countries.

(B) A description of issues encountered by the Securities and Exchange Commission in carrying out the provisions of such section 13(p).

(C)(i) A general review of persons described in clause (ii) and whether information is publicly available about--

(I) the use of conflict minerals by such persons; and

(II) whether such conflict minerals originate from the Democratic Republic of the Congo or an adjoining country.

(ii) A person is described in this clause if--

(i) the person is not required to file reports with the Securities and Exchange Commission pursuant to section 13(p)(1)(A) of the Securities Exchange Act of 1934, as added by subsection (b); and

(ii) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

Comment (a7): Provision limited to publicly traded corporations.

Comment (a8): Provision limited to manufacturers. This could however apply to some supply chain labels if they maintain close and active involvement in the manufacturing process. Since there is no statutory definition of the term "manufacturers" it will have to be defined in implementing regulation.

(3) REPORT ON PRIVATE SECTOR AUDITING- Not later than 30 months after the date of the enactment of this Act, and annually thereafter, the Secretary of Commerce shall submit to the appropriate congressional committees a report that includes the following:

(A) An assessment of the accuracy of the independent private sector audits and other due diligence processes described under section 13(p) of the Securities Exchange Act of 1934.

(B) Recommendations for the processes used to carry out such audits, including ways to--

- (i) improve the accuracy of such audits; and
- (ii) establish standards of best practices.

(C) A listing of all known conflict mineral processing facilities worldwide.

(e) Definitions- For purposes of this section:

(1) ADJOINING COUNTRY- The term "adjoining country" with respect to the Democratic Republic of the Congo means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) APPROPRIATE CONGRESSIONAL COMMITTEES- The term "appropriate congressional committees" means--

(A) the Committee on Appropriations, the Committee on Foreign Affairs, the Committee on Ways and Means, and the Committee on Financial Services of the House of Representatives; and

(B) the Committee on Appropriations, the Committee on Foreign Relations, the Committee on Finance, and the Committee on Banking, Housing, and Urban Affairs of the Senate.

(3) ARMED GROUP- The term "armed group" means an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country.

(4) CONFLICT MINERAL- The term "conflict mineral" means--

(A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(5) UNDER THE CONTROL OF ARMED GROUPS- The term "under the control of armed groups" means areas within the Democratic Republic of the Congo or adjoining countries in which armed groups--

(A) physically control mines or force labor of civilians to mine, transport, or sell conflict minerals;

(B) tax, export, or control any part of trade routes for conflict minerals, including the entire trade route from a Conflict Zone Mine to the point of export from the Democratic Republic of the Congo or an adjoining country; or

(C) tax, export, or control trading facilities, in whole or in part, including the point of export from the Democratic Republic of the Congo or an adjoining country.