Statement of Benedict S. Cohen

Chief Counsel for Government Operations

The Boeing Company

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Chairman Schapiro, Commissioners, Director Cross and Deputy Director Dubberly, thank you for holding this Roundtable and offering me the opportunity to speak on behalf of the Boeing Company, the world's largest aerospace company and one of the United States' largest exporters.

Any discussion of the proposed rule must start with the recognition that the ongoing humanitarian catastrophe in the Democratic Republic of the Congo is intolerable, and that governments, international organizations, the business community, and Non-Governmental Organizations have the responsibility to work collaboratively to end it. Boeing has been a leader in seeking solutions to this crisis.

- We publicly endorsed congressional action to address human rights violations and atrocities in the DRC.
- We were the first, though by no means the last, major aerospace company to join the OECD's pilot program on implementation of their due diligence guidance--which as you know entails a binding commitment to comply with the guidance. Collectively, the aerospace industry has achieved a level of participation in the OECD pilot program second to none.
- Boeing also led the establishment of the Aerospace Industries Association's subcommittee on conflict minerals, a working group dedicated to establishing best practices in implementing both the SEC's final rule and the OECD guidelines.
- Boeing participates regularly in the EICC-GeSI workshops both here and overseas.
- We have established a wide-ranging internal working group spanning all affected stakeholders in the company to address our internal implementation challenges.
- And we will carefully consider participation in other industry or public-private initiatives to address this issue.

We are committed to fully complying with both the SEC rule and the OECD Guidelines, and to doing our part to address the horrific human rights violations that gave rise to section 1502 of the Act.

For the past ten months our supply-chain management professionals have carefully assessed the SEC's proposing release and the challenges we and other downstream manufacturers of complex end-products will face in implementing the final rule. In so doing, we have also consulted extensively with our peers in the aerospace community and the broader manufacturing community. Five broad conclusions arise from this assessment.

First, the rule should incorporate a multi-year phase-in period. This is a difficult request to make given the hundreds or even thousands of severe human-rights violations that occur daily in the region. But industry believes that objective constraints exist which neither the Commission, nor the OECD, nor registrants (either individually or collectively) can waive; these constraints virtually dictate such a phase-in period. First, the several elements of the compliance infrastructure which Congress and the OECD clearly contemplated are not yet mature, though they are maturing. The OECD guidelines were only finalized in May of this year, and the year-long OECD pilot program dedicated to establishing the parameters of OECD compliance got fully under way just last month. The Supplement to the Guidelines on gold, arguably the most challenging of the minerals, has yet to be released. The State Department conflict minerals map called for by section 1502 of the Act when released this summer was so heavily caveated as to be largely useless for due diligence. Likewise, various initiatives covering the mine-to-smelter segment of the supply chain, the certified smelter program, and the smelter-to-end-product manufacturer segment of the supply chain are in various stages of maturity, but none are currently mature.

Conversely, the internal compliance architecture for registrants and the vast universe of non-registrant suppliers who will nevertheless be required by end-product manufacturers to comply is still maturing. Large, sophisticated manufacturers like Boeing, with its tens of thousands of direct and indirect suppliers, will face significant challenges due to the depth, scope, and fluidity of our supply chains and the staggering complexity of our products. For example, we lack the ability to unilaterally impose new contract terms and flow-down requirements on our suppliers, and can only include such terms as we let new contracts or renew existing ones. Since normally contracts run for 3-5 years, we will not be able to ensure that all our supplier contracts contain appropriate flow-down clauses for a number of years. Likewise, smaller, less sophisticated and capable participants at all points in the supply chain will face converse challenges in attempting to familiarize themselves with and resource the new requirements. Yet if the Commission promulgates its final rule this year without a phase-in period, companies like Boeing will be reporting on our activities in fiscal year 2012 in the absence of critical compliance guidance—the equivalent of trying to simultaneously assemble and fly an airplane. Such an effort will impose large costs and unfair stigma on registrants without benefit to Congolese victims. Industry is prepared to undertake measurable steps during any phase-in period which will not only yield major policy benefits during the phase-in period but will ensure that when the rule is fully effective we will be fully task-organized to carry it out.

Second, it will be critical for the Commission's final rule to retain the "reasonable country of origin" threshold determination. Such a standard fully comports with the language and structure of section 1502 and the intent of its drafters, who understood that perfect certainty with respect to the origin of all conflict minerals in a modern supply chain is unattainable at virtually any price. Rather, it reflects the understanding that registrants can indeed comply with the letter and spirit of the Act by making a reasonable, risk-based, good-faith determination based on the totality of their circumstances. Such a determination could rest on such factors as the existence of flow-down clauses in the company's supplier contracts, company policies and use of

consensus best practices, and participation in industry-wide, public-private, or international initiatives. Such approaches are routinely used to achieve other vital government and social objectives, including protection of customer safety and health, quality assurance, environmental protection, and protection of national security and classified technology. In the context of conflict minerals, the collective effect of industry-wide deployment of these and other compliance techniques, in combination with ongoing governance initiatives in the DRC and adjoining countries, will yield genuine relief to the victims of violence.

Third, the Commission's final rule should include, for some period time, an intermediate category of indeterminate country of origin. The Commission clearly has the legal authority to adopt such a category under the Supreme Court's *Chevron*[1] decision, because in section 1502 Congress addressed only one category of registrant: those who knew that their products contained conflict minerals which originated in the DRC or adjoining countries, who are required to file a conflict minerals report as specified in section 13(p)(1)(A)(i), (ii), and (B). Congress did not address the treatment of registrants who are genuinely unable to state with sufficient reasonable certainty to make a reasonable country of origin finding. Under *Chevron,* such silence provides the Commission with the delegated authority to adopt a reasonable rule that serves the overarching purposes of the Act. Clearly, a regulation that for an indefinite period rewarded companies for not knowing their supply chain would be patently unreasonable and an abuse of discretion. However, it would be a reasonable exercise of the Commission's discretion to provide a time-limited indeterminate-origin category subject to mandated steps that a registrant would have to follow to attain the ability either to make a reasonable country of origin determination or to ascertain that its products did contain DRC-derived conflict minerals subjecting it to the conflict minerals report requirement. Such a rule would serve the humanitarian policy purposes animating section 1502 by promoting progressively greater understanding of registrants' supply chains. Significantly, this approach was endorsed by the OECD in its own submission to the SEC.

Fourth, the Commission should ensure that its compliance regime is consistent with the OECD Guidelines. Nothing in the Guidelines is inconsistent with any requirement of section 1502; the Department of State, presumably in the exercise of its responsibility under section 1502(c)(1)(B)(ii) to "provide guidance to commercial entities seeking to exercise due diligence", has endorsed the Guidelines in their totality, as have the affected Governments in the region and dozens of other countries. Although important aspects of their implementation are a work in progress, they clearly now represent and will continue to represent consensus best practices agreed by the stakeholders.

Fifth, the final rule must reflect the reality that no manufacturer of complex end-products can, as a practical matter, "map" the conflict minerals embedded in the thousands of suppliers in its supply chain to the mine or achieve a "chain of custody" such that it could positively know the origin of the conflict minerals in each of the millions of piece parts in its end-products. In part, this simply reflects the decades-old

[1] *See Chevron, U.S.A., Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 832 (1984).

trend towards enhancing the flexibility and resilience of the supply chain—a trend whose importance was illustrated by industry's response to the Fukushima nuclear disaster. Our supply chains must be able to shift at a moment's notice to address small-scale disruptions like a fire at a critical supplier's facility, as well as large-scale disruptions like Fukushima—and of course to reflect changes in price or quality of inputs. As a result, any supply-chain "map" of conflict minerals would be out of date as soon as it was released. In addition, the infeasibility of such mapping also reflects the length of the supply chain from the mine to the manufacturer of a highly complex end-product such as an airliner or fighter jet, as well as the staggering number of piece-parts involved in such products.

To give only a few examples: Boeing's defense business—which represents only one half of the Company's total business—acquired well over 190 million piece parts from almost 8000 *direct* suppliers last year; our commercial aircraft business had almost 2000 direct suppliers. Each of our major first-tier direct suppliers may have thousands of direct suppliers itself, and many of those indirect suppliers will have a comparable number of suppliers—resulting in a direct and indirect supply chain numbering in the tens of thousands. Our defense business performed over 600,000 purchase order transactions last year, and competed over a quarter of those—meaning that we likely had a new supplier and/or new subtiers resulting from those competitions. Each of our 747 aircraft incorporates some six million parts; our new 787 Dreamliner contains some 3.5 million parts. Each F/A-18 fighter jet we make contains over 98,000 part numbers (and a much larger number of piece parts). There is little commonality between the parts used on our defense or commercial end products (e.g., there is little commonality in the parts procured for 747s and 737s, and even less commonality in the parts procured for 747s and, for example, F/A-18s). Any requirements involving this large a number of companies and parts would cost the aerospace industry hundreds of millions if not billions of dollars.[2]

Importantly, the OECD Guidelines explicitly recognize both the complexity of modern supply chains and the limited leverage end-product manufacturers have on remote tiers of the supply chain. The Supplement on Tin, Tantalum, and Tungsten specifically cites "the fact that internal control mechanisms based on tracing minerals in a company's possession are generally unfeasible after smelting, with refined metals entering the consumer market as small parts of various components in end products. By virtue of these practical difficulties, downstream companies should establish internal controls *over their immediate suppliers* and may coordinate efforts through industry-wide

[2] It is important to note that these hours will have to be expended by some actor or actors in the supply chain. It is possible that much of this expenditure and effort would be undertaken by our major subcontractors (e.g., engine manufacturers or manufacturers of landing gear), but those expenses would be passed on to us and ultimately our customers—in the case of the F/A-18, the Department of Defense.

initiatives to build leverage over sub-suppliers, overcome practical challenges and effectively discharge the due diligence recommendations contained in this Guidance."[3]

In closing, I would like to acknowledge the leadership Senator Durbin and Congressman McDermott have shown on a critical humanitarian crisis, and to again thank the Commission for its invitation to participate in this roundtable.

[3] *See* Supplement on Tin, Tantalum and Tungsten at 29; *see also* Supplement at 33 (C.5 Specific Recommendation 1, referring to "[c]ompanies which, due to their size or other factors, may find it difficult to identify actors upstream from their direct suppliers") and 36 (accord). A similar risk-based approach for complex enterprises was adopted in the most recent revision of the *OECD Guidelines for Multinational Enterprises* at 24 (2011) ("Where enterprises have large numbers of suppliers, they are encouraged to identify general areas where the risk of adverse impacts is most significant and, based on this risk assessment, prioritise suppliers for due diligence….The *Guidelines* recognize that *there are practical limitations on the ability of enterprises to effect change in the behavior of their suppliers. These are related to product characteristics, the number of suppliers, the structure and complexity of the supply chain, the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain*") (emphasis added). A similar acknowledgement, in a more traditional area of SEC expertise, occurs in the U.K. Ministry of Justice Bribery Act 2010 Guidance for Commercial Organizations, which states that "[w]here a supply chain involves several entities or a project is to be performed by a prime contractor with a series of subcontractors, an organisation is likely only to exercise control over its relationship with its contractual counterparty. Indeed, the organisation may only know the identity of its contractual counterparty…. The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of a supply chain is by employing…risk based due diligence and the use of anti-bribery terms and conditions…in the relationship with their contractual counterparty, and by requesting that counterparty to adopt a similar approach with the next party in the chain." *Id.* at 16