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March 17, 2017

The Honorable Michael S. Piwowar
Acting Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Piwowar:

Re: January 31, 2017 Statement on the Commission's Conflict Minerals Rule

This letter is submitted on behalf of Business Roundtable, an association of chief executive officers of leading U.S. companies. Our member companies produce more than $6 trillion in annual revenues and employ nearly 15 million employees worldwide. The combined market capitalization of Business Roundtable member companies is the equivalent of nearly one-quarter of total U.S. stock market capitalization, and they annually pay $226 billion in dividends to shareholders, generate $412 billion in sales for small and medium-sized businesses and invest $103 billion in research and development.

We are submitting this letter in response to your January 31, 2017 request for public comments on the conflict minerals rule. We remain supportive of the underlying objective of addressing atrocities occurring in the Democratic Republic of the Congo (the DRC) and adjoining countries. We respectfully submit, however, that the conflict minerals rule requires disclosure of information that is not material to investors and that securities law disclosure is not the appropriate avenue to properly address this objective. Accordingly, we believe that the rule should be eliminated, and to the extent that the courts in the ongoing litigation or Congress allow any portion of the rule to stand, we request that the Commission revise the rule so that it is more narrowly tailored, as described in more detail below.

Disclosures Required by Conflict Minerals Rule Are Not Material

Materiality is a bedrock principle of public company disclosure under the federal securities laws. The standard for materiality articulated by the Supreme Court – "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available"[1] – benefits investors in at least three ways. First, by filtering out irrelevant information, it helps to ensure that investors are not buried in an "avalanche of trivial information."[2] Second, it requires public companies to evaluate the disclosure requirements based on their particular facts and circumstances. Finally, as changes occur in either the broader economy or within a public company, the information that is important to a reasonable investor changes, and the materiality standard requires public companies to reassess and adjust their disclosures accordingly.

As Congress, courts and the Commission have recognized, filtering out irrelevant information is critical to investors' ability to make informed investment and voting decisions. Public company disclosure should be focused on the operational and financial performance of the company – the items typically considered important by shareholders in considering how to vote or invest. While disclosures related to environmental or other societal concerns may address issues of *interest* to certain investors, that alone does not necessarily make such disclosures material under the federal securities laws. As you recently stated in connection with the Regulation S-K concept release, the materiality requirement "is an objective legal standard, not a subjective political one. While certain shareholders may have their own particular social interests, the reasonable investor standard prevents an individual investor from hijacking corporate resources to serve their own specific agenda."[3]

Immediately following the financial crisis, however, Congress – often at the urging of special interest groups – used the federal securities laws to bring public attention to societal concerns, mandating disclosure of information regardless of its materiality or relevance to company operational or financial performance.

The conflict minerals rule provides one of the most prominent recent examples of this conflation of the protection of investors with unrelated societal concerns. While drafters of the conflict minerals rule apparently meant to promote a compassionate social goal, it does not provide information that would be considered material to the investing and proxy voting decisions of reasonable investors. To the extent the disclosure of conflict minerals does provide material investment information for certain companies, these companies would be required to disclose such information under SEC guidelines.

In addition to the cost to companies and shareholders and the failure to provide material information to investors, the disclosures required by the conflict minerals rule also help contribute to "information overload," which former Commission Chair Mary Jo White described as "a phenomenon in which ever-increasing amounts of disclosure make it difficult for investors

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[1] *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.,* 426 U. S. 438, 449 (1976)).
[2] *Id.* at 231 (quoting TSC Industries, Inc. v. Northway, 426 U.S. at 448-449).
[3] "Statement at Open Meeting on Regulation S-K Concept Release" (Apr. 13, 2016).

to focus on the information that is material and most relevant to their decision-making as investors in our financial markets."[4] By obscuring material information, these disclosures undermine the strength of a critical cornerstone of the U.S. capital markets and harm investors.

Conflict Minerals Rule Has a High Cost and Is Not an Effective Avenue to Address the Humanitarian Issue

Compliance with the rule comes with a high price tag, estimated by the Commission at the time of adoption to be $3 billion to $4 billion initially and $207 million to $609 million annually thereafter.[5] In practice, many of our members have found that compliance with this rule costs their companies hundreds of thousands (and in the case of larger companies millions) of dollars each year in addition to the hours that management and other employees have had to divert their attention from other matters and, at times, costly new IT systems that have been required.

The results of these burdensome and costly efforts have thus far failed to achieve the expectations of the provision's proponents. Our members have experienced difficulty collecting timely and complete information from suppliers, especially those who are not directly supplying to the company and/or are not subject to the conflict minerals rule. In fact, of companies that filed a Form SD in 2015 and performed the related costly due diligence, approximately 67 percent reported they were unable to even confirm the source of the conflict minerals in their products.[6]

Worse yet, since adoption, evidence has not clearly indicated that the rule has alleviated the atrocities in the DRC and surrounding areas. While there are reports of beneficial effects of the rule on the region, other reports indicate the rule is exacerbating the problem in the DRC. For example, a recent report suggests that the rule has increased the probability of civilian looting by at least 143 percent and that it increased the probability of battles in territories containing unregulated gold.[7] Other reports have indicated that this rule, which was intended to aid the DRC, ultimately resulted in an "embargo-in-fact" of the country, as issuers sought to avoid the uncertainty and significant cost of doing business entailed by compliance with the rule, leading to an outflow of funds from both warlord-owned and legitimate businesses, and driving many people who might otherwise find employment in the mining industry to militias.[8]

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[4] Mary Jo White, Chair, Sec. and Exch. Comm'n, speech at the 14th Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law: The Importance of Independence (Oct. 3, 2013), www.sec.gov/News/Speech/Detail/Speech/1370539864016#.VEasLvnF98E.
[5] 77 Fed.Reg. at 56,334.
[6] U.S. Gov't Accountability Off., GAO-16-805, SEC Conflict Minerals Rule: Companies Face Continuing Challenges in Determining Whether Their Conflict Minerals Benefit Armed Groups (2016).
[7] Dominic P. Parker & Bryan Vadheim, *Resource Cursed or Policy Cursed? US Regulation of Conflict Minerals and Violence in the Congo*, 4 J. Assoc. Envtl. and Res. Economists 1, 3 (2017).
[8] Sudarsan Raghavan, *How a Well-Intentioned U.S. Law Left Congolese Miners Jobless*, WASH. POST, Nov. 30, 2014; David Aronson, *How Congress Devastated Congo*, N.Y. Times, Aug. 7, 2011.

In addition, in striking down the critical disclosure requirement under the conflict minerals rule, the U.S. Court of Appeals for the D.C. Circuit held that the requirement to state whether products have "not been found to be 'DRC conflict free'" violated the First Amendment because it was not adequately shown that the compelled speech would further the government's humanitarian goals.[9] In its reasoning, the Court concluded that "the idea that the forced disclosure regime will decrease the revenue of armed groups in the DRC and their loss of revenue will end or at least diminish the humanitarian crisis there . . . is entirely unproven and rests on pure speculation."[10]

Requiring companies to disclose whether their products have "not been found to be 'DRC conflict free'" was arguably the core of the conflict minerals rule – branding companies forced to draw this conclusion with the implication of impropriety. This shaming mechanism has been struck down by the D.C. Circuit as unconstitutional, leaving only costly due diligence requirements that yield immaterial (and, as noted above, largely inconclusive) information to investors.

Change Is Necessary

While we support the underlying objective of addressing atrocities occurring in the DRC and surrounding areas as a social issue, we do not believe that the conflict minerals rule has provided material disclosure to investors or clearly effective results for the impacted region. Further, the D.C. Circuit fundamentally has changed how the rule operates, providing even less justification for the cost of compliance. As a result, change is warranted.

We respectfully submit that Congress or the courts should eliminate the requirement for the rule, as the federal securities laws are not the proper or effective vehicle for pursuing such policy objectives; and that other policy mechanisms, such as regional and international diplomatic initiatives and a strengthening and refining of the mandate of the existing peacekeeping mission in the region, are much better suited to achieve the laudable and important policy goals underlying the rule. However, until such time, we believe the rule must be revised.

In light of the changes to the rule required by the courts and the new evidence regarding the consequences of its adoption, we request that the Commission engage in rulemaking, including robust economic analysis, to more narrowly tailor the required disclosures.

First, and most critically, the Commission should avoid imposing a new, highly significant and wholly unjustified audit expense on issuers by making permanent the existing suspension of any requirement for an Independent Private Sector Audit (IPSA) for filers who do not choose to voluntarily assert in their reports that one or more of their products are "DRC conflict-free." As

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[9] *Nat'l Ass'n of Mfrs. v. Sec. and Exch. Comm'n*, 800 F.3d 518 (D.C. Cir. 2015).
[10] *Id*. at 525.

the Commission noted in its rulemaking releases and its decision to suspend the IPSA requirement following the D.C. Circuit ruling, the IPSA requirement is inextricably connected to the rule provisions mandating assertions concerning filers' products' conflict status. Now that such mandatory assertions have been struck down as unconstitutional, there is no principled basis for mandating an IPSA for filers who choose not to characterize the conflict status of their products. Moreover, we believe that imposition of such an IPSA requirement, while conferring no benefit, has the potential to impose extremely significant costs. One major industrial company has advised us that it believes that an IPSA by itself would generate indefinitely recurring costs in the hundreds of thousands of dollars.

Second, we believe that a more sensible approach to this disclosure requirement would be to incorporate the principle of materiality such that disclosure is required only when it is material to a company's operational and financial performance. Ultimately, a disclosure mandated by the securities laws should have the purpose of providing reasonable investors with the material information necessary to make investing and proxy voting decisions. Required disclosures meant to achieve social objectives are inappropriate in the securities law context and, in the case of the conflict minerals rule, have increased compliance costs that ultimately are paid by investors while also potentially undermining rather than advancing the intended societal goal.

Until further rulemaking is complete, we also urgently request that the Commission extend the stay that it has had in place since 2014 to avoid uncertainty and the imposition of new and extremely costly compliance measures such as the IPSA for which no legal or policy justification exists.

Sincerely,

John Hayes
Chairman, President and Chief Executive Officer
Ball Corporation
Chair, Corporate Governance Committee
Business Roundtable