Committee on Securities Law
of the Business Law Section of the
Maryland State Bar Association

March 17, 2017

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: Acting Chairman Michael S. Piwowar

Re: Reconsideration of Conflict Minerals Rule Implementation

Ladies and Gentlemen:

This letter expresses the views of the Committee on Securities Laws (the "Committee") of the Business Law Section of the Maryland State Bar Association ("MSBA"), with respect to Acting Chairman Piwowar's directing the staff (the "Staff") of the Securities and Exchange Commission (the "Commission") to reconsider whether the 2014 guidance on the conflict minerals rule is still appropriate and soliciting public comments regarding reconsideration of the rule. The membership of the Committee consists of securities practitioners who are members of the MSBA and includes lawyers in private practice, business, and government, including former Commission employees. The Business Law Section and the Board of Governors of the MSBA have not taken a position on the matters discussed herein, and individual members of the MSBA and their associated firms or companies may not necessarily concur with the views expressed in this letter.

The Committee wishes to express its gratitude to Acting Chairman Piwowar for directing the Staff to reconsider this misguided rule. We urge the Commission to work towards withdrawing the rule entirely. At the very least, we urge the Commission to exempt smaller companies from the application of the rule.

The provisions of the conflict minerals rule were never appropriate as a disclosure-based requirement under the Securities Exchange Act of 1934 (the "Exchange Act"), nor was the Commission the appropriate regulatory body for its implementation and enforcement. The purpose of the federal securities laws is to protect investors, facilitate capital formation, and maintain fair, orderly, and efficient markets. None of these purposes are accomplished by the conflict minerals rule. Like the pay ratio rule and Section 13(r) of the Exchange Act, the conflict minerals rule is the result of special interest groups successfully lobbying

for disclosure rules to achieve social and political goals wholly divorced from the purpose of the federal securities laws and the Commission's mission. Specifically, the social and political goals of the mineral conflict rule are to end the trade and exploitation of conflict minerals as means to finance conflict in Congo and end resulting humanitarian crisis. Again, this is entirely outside of the purpose of the Exchange Act and the mission of the Commission.

Even if the rule is accomplishing, or could accomplish, some of the goals it was intended to, or is otherwise having a positive impact, that does not change the fact that it is not an appropriate use of the Exchange Act. The fact that the request for *en banc* rehearing of the D.C. Circuit in the lawsuit surrounding the conflict minerals rule came not from investor groups, but from Amnesty International, drives home this point. Further telling is that, to our knowledge, none of the comments received to date in response to Acting Chairman Piwowar's statement have addressed capital formation or the maintenance of fair, orderly, and efficient markets. Indeed, only a few mention investors at all, while many mention interest in the rule as a *consumer*. While the goals of the conflict minerals rule itself are laudable, trying to accomplish them through the facilities of the Exchange Act is, to be blunt, ludicrous. As a policy matter, it is a bad idea to have agencies with no background or expertise in the subject matter draft and enforce rules, such as the conflict minerals rule, that aim to accomplish such political and social goals.

The Commission has previously noted that "[s]ome investors and interest groups ... have expressed a desire for greater disclosure of a variety of public policy and sustainability matters, stating that these matters are of increasing significance to voting and investment decisions." But such groups misunderstand the purpose of the disclosure regime of the federal securities laws, which is to provide information material to an investment decision made by a "reasonable investor"- i.e. as an *investor*, based on one's economic interest. This is in contrast to the disclosure of *all* information a person may desire about a company in general. Information such as that required to be disclosed by the conflict minerals rule may be increasingly significant to voting and investment decisions of a small fraction of investors, but the reasonable investor would not consider the information to be material or relevant in making an investment or voting decision. For investors, investor groups, institutional investors, and investment funds that focus on one or another type of environmental, social, or governance concerns—and who make investment decisions accordingly—they can choose to request disclosure of such information from issuers in whom they are considering investing or have invested. To the extent issuers want to court these types of investors, they are free to voluntarily provide this information. Indeed, evidence suggests many larger companies will continue to comply with

the spirit of the conflict minerals rule even if it is withdrawn. By the same token, investors who make investment decisions on social responsibility matters can decline to invest in issuers that do not make these disclosures. Rules addressing societal goals and corporate social responsibility matters, however, are an inappropriate use of the Exchange Act. Rather, the disclosure requirements implemented under the Exchange Act should be guided by the bedrock materiality principle that has, until recently, always been the basis of the federal disclosure regime.

Further misguided is the notion embedded in the conflict minerals rule that the problems in the Congo and other countries that the rule is intended to address can be resolved through disclosure by Commission reporting companies only. Even assuming the social goals of the rule can be accomplished by disclosure alone, there is no reason to believe that disclosure solely by Commission reporting companies, as opposed to all companies using materials from the region, will accomplish such goals. In addition, the rule seems to assume that all Commission reporting companies are large, well-capitalized, and with sufficient excess cash, and thus the significant burdens of the rule are inconsequential. This is simply untrue. The rule sweeps in even the smallest Commission reporting companies, and for some the expenses of the rule do nothing but add to their losses.

Please understand that we do not intend to diminish the suffering of the people of the Congo and the other African countries affected by the trade of conflict minerals, or imply that the situation does not need to be addressed or that the United States and U.S. companies have no responsibility in this regard. As Acting Chairman Piwowar and many others predicted, however, the conflict minerals rule may be having the unintended but easily foreseen result of many companies avoiding sourcing the minerals governed by the rule from the Congo and other areas of Africa. That is, the rule may be hurting the very people it was intended to help. Our main point, in any event, is that there is simply no argument that the federal securities laws are the appropriate means for addressing this social issue. As the Commission Staff reconsiders the conflict minerals rule, we urge it to do so with a view towards the mission of the Commission and the purpose of the Exchange Act.

As securities lawyers, we have been concerned and frustrated by the misuse of the federal securities laws by special interest groups to address political and social concerns during the last few years. We hope that Acting Chairman Piwowar's actions with respect to the conflict minerals rule is the first step towards halting this discouraging trend.

We appreciate the Commission's consideration of the foregoing comments.

Very truly yours,

Committee on Securities Law of the Business Law Section of the Maryland State Bar Association

Penny Somer-Greif, Chair

Gregory T. Lawrence, Vice-Chair