March 17, 2017

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

RE: Comments on SEC's Conflict Minerals Rule and Guidance Review

Dear Acting Secretary Piwowar,

On behalf of the National Retail Federation (NRF), we welcome the opportunity to provide the U.S. Securities and Exchange Commission (SEC) our thoughts and comments on the agency's Conflict Minerals Rule and Guidance (Rule). We believe it is extremely important for the SEC to reevaluate the Rule and the impact that it is having on both the Democratic Republic of the Congo as well as the industry as a whole. While the retail industry supports efforts to achieve the objectives of §1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Conflict Minerals Law), we remain concerned that the law has not had the intended effect and has resulted in substantial burdens for all who need to comply with its requirements.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy. Many of our members are directly affected by the Rule.

NRF's comments will largely reflect issues and concerns that we have raised in previous comments to the agency regarding the implementation of the law (comments filed on March 2, 2011 and November 1, 2011). We would also like to reference the joint *amicus* brief that was filed on September 18, 2013 (USCA Case #13-5252, Document #1457221), to which NRF was a signatory.

U.S. retailers have taken their responsibilities under the Conflict Minerals Law very seriously. Retailers have developed and instituted due diligence and compliance programs to meet their obligations under the Rule. However, despite dedicating significant resources, retailers continue to face substantial challenges in this effort. Conducting an analysis as to whether a company must file a conflict minerals disclosure is an extremely complex and costly endeavor. The downstream effects on foreign suppliers has also been problematic requiring redundant and costly audits to prove that conflict minerals do not exist in products that they produce.

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The Conflict Minerals Law has imposed a set of mandates on U.S. business that requires an unprecedented degree of analysis of a retailer's product assortment to determine if it might be "contracting to manufacture" particular products it must conduct supplier due diligence, including inquiries potentially back to the source of the minerals, and obtain certifications at all appropriate points in a product's supply chain. This imposes an obligation on retailers and their suppliers to achieve a degree of supply chain visibility that they do not possess, and cannot acquire with any reasonable degree of certainty. As we have stated in previous comments, retailers do not source the ores or metals in question from either mines or smelters. Retailers seldom specify the mineral make-up of the products they order. The retailers rely on their suppliers, their supplier's component manufacturers and their sub-suppliers to determine if, when and how tin, tantalum, tungsten or gold (3TG) may be necessary for the product the vendor is manufacturing. As such, retailers have no direct relationship, contractual or otherwise, with those entities procuring the ores or metals who are often multiple steps down the supply chain from the final product as sold in a store.

The Conflict Minerals Law forces companies to reach back in their supply chain, not to the component parts of their products or to the base metals contained in those components that most would consider as the raw materials in those products, but rather much further back – to the ores from which those base metals are smelted. Both the metals and the ores from which they are derived are fungible commodities that are part of a complex and convoluted global production and trading system, through which they are blended, combined, and substantially transformed into a multitude of other products that are sold world-wide, and over which U.S. retailers and consumer brand companies have no control. Many retailers are participating in the Conflict Free Sourcing Initiative to provide, at best, partial detail on what country the metals have originated in.

Given these supply chain complexities and the fact that there are many points along the chain of custody before the final product containing the metals in question reaches the retailer, as we expected, many retailers who are required to file with the SEC have concluded that they are unable to determine the source of any tin, tungsten, tantalum or gold that may be in their products. The cost for compliance with the rule, even with the stay that was issued in 2014 has been considerable and has been significantly more than the agency's original estimate of $71 million per annum in the proposed rule.

We believe that the evidence of the effectiveness of the Conflict Minerals Law remains incomplete. The SEC should undertake an effort to analyze the overall effectiveness of the law as well as the true financial cost of implementation and compliance. While we recognize the severity of the human rights issue that the law aims to address, there may be better options to apply it to those companies who directly import tin, tungsten, tantalum or gold (3TG). These companies will both have greater leverage with smelters, refiners and mines and are more likely to apply the appropriate resources to manage what is a more material business risk.

In addition, the SEC should also review how the European Union has addressed the issue of conflict minerals. We encourage harmonization among the EU and US efforts. Efforts to harmonize the laws between countries may promote greater compliance if mines, smelters and 3TG importers have only one set of rules to follow.

With this backdrop, we would like to highlight a couple of issues that continue to be a burden for the retail industry with regards to compliance. We remain concerned about the definitions of "Manufacturer", "Contract to Manufacture" and "Necessary to the Functionality or Production of a Product" and the application to the retail industry.

Definition of "Manufacturer" and "Contract to Manufactured"

Although the statute itself is clear that only ***manufacturers*** are subject to the obligation to report on the products that they either manufacture themselves or "contract to manufacture", there was considerable debate over whether and how the terms "manufacture" and "contract to manufacture" should apply to retailers who sell consumer products containing conflict minerals. Some suggested that retailers are not manufacturers and should be entirely exempt from the law. Others, including the sponsors of the original legislation, argued that while "pure retailers" who have no influence over a product's manufacture should be exempt, the law should apply to retailers who "issue [unique] requirements for products to be manufactured for them – including design, quality, product life-expectancy, and so on."[1] Ordinary rules of statutory construction do not permit inquiry into what sponsors of legislation meant to say in the statute, they only permit what the statute actually says. In this case the statute clearly applies only to persons who are (i) required to file reports with the SEC, and (ii) manufacture products. The SEC's decision to include non-manufacturing reporting companies cannot be justified by the plain terms of the statute.

Even if non-manufacturers are to continue to be covered by the rule, we continue to believe that, for a company to fall within the scope of the conflict minerals rule as a "manufacturer" of products containing conflict minerals or a party "contracting to manufacture" goods containing conflict minerals, that party must maintain substantial control over the manufacturing process. Substantial control should be limited to instances where the issuer has direct, close and active involvement in the specifications and sourcing of materials, parts, ingredients, or components to be included in that product that may contain metals smelted from conflict minerals. The mere act of placing an order for a finished product to be affixed with a private label of the party placing the order, or specifying only certain capabilities, appearance, configurations, or performance should not constitute "manufacturing" or "contracted to be manufactured" within the meaning of the statute.

Including retailers who do not exercise substantial control over the manufacturing process, especially smaller reporting companies, does not advance the goals of the law. Subjecting these retailers to the reporting requirements of the law imposes a substantial cost on those companies, without yielding any useful or accurate information. Without a clearer definition of "contract to manufacture", retailers are left to conduct an item by item review of the "level of actual influence" it had over the manufacturing of the item. This is a very costly and time consuming endeavor, even if that analysis results in a conclusion that no reporting is ultimately required. NRF has members who must undergo this analysis every year, which, for a retailer with a large assortment of products that ***may*** contain conflict minerals and that may have been contracted to manufacture, can easily take thousands of hours

[1] *See*, Letter from Senator Richard J. Durbin and Congressman Jim McDermott to SEC Chairman Mary L. Schapiro, Oct. 4, 2010.

of time and great expense. We strongly encourage the SEC to re-examine these definitions and the applicability of the rule to retailers.

Definition of "Necessary to the Functionality or Production of a Product"

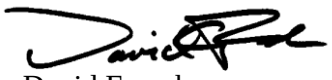
Under the conflict minerals statute, the reporting requirements apply only to those subject minerals that are "necessary to the functionality or production of a product." We believe that a definition of the phrase is necessary and appropriate to guide companies in determining whether a subject metal does or does not fall under the reporting requirements of the statute. If a metal produced from the subject minerals is a part of, or contained in a product, but is not necessary to the functionality or the production of that product, then the issuer should not be subject to the reporting obligation.

We believe that a metal produced from a subject mineral should only be considered necessary to the functionality of a product if it is (1) specified as a necessary raw material or intentionally added to the product, and (2) it is essential to the product's basic function, use or purpose. This definition would necessarily exclude minerals that are naturally occurring, are an unintentional by-product, or do not appear in the final product.

Conclusion

We appreciate the SEC taking the time to reevaluate the Conflict Minerals Law and guidance. Again, while we agree with the underlying principle as passed by Congress, we note the ongoing difficulty and burdens that companies are facing in their attempts to comply with the regulation. We urge the SEC through this review period to identify and adopt changes that will facilitate enforcement, compliance, and achieve the objectives of the law, while avoiding unreasonable and insurmountable burdens on U.S. business. If you have any questions, please contact Jonathan Gold, NRF's Vice President for Supply Chain and Customs Policy.

Sincerely,



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