RETAIL INDUSTRY LEADERS ASSOCIATION
Educate. Innovate. Advocate.

1700 NORTH MOORE STREET
SUITE 2250
ARLINGTON, VA 22209
T (703) 841-2300 F (703) 841-1184
WWW.RILA.ORG

November 1, 2011

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-3628

Re: File No. S7-40-10

Dear Secretary Murphy,

On behalf of the Retail Industry Leaders Association (RILA), I write to you today to provide our comments on the pending rule on Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

By way of background, RILA members include the largest and fastest growing companies in the retail industry, which together account for more than $1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores and distribution centers domestically and abroad.

While we fully support the original intent of Section 1502 in protecting the Congolese citizenry, we are concerned that putting this burden on the U.S. industry will result in additional harm to the Great Lakes region and to the Congolese people. Indeed, it appears that an unintended consequence of Section 1502 is that sourcing from the region has already precipitously dropped. This drop can be directly tied to the demand for responsible sourcing in conjunction with the lack of industry tools to do so.

Contracted to be Manufactured

The definition of "manufacturer" should be tailored only to include OEM's and those who design and specify bills of materials for products with control over the procurement or fabrication of the same products' bill of materials and specification of the constituent materials of the components. Although retailers in their private label programs may contract to have goods produced especially for them, this alone should not sweep retailers into the definition of a "manufacturer", within the meaning of the Act.

As noted in the joint RILA-Consumer Electronics Retailers Coalition (CERC) comments filed March 2, 2011 and in CERC's supplemental comments filed November 1, 2011, it is beyond the scope of the SEC's statutory authorization to include retailers within the definition of manufacturers through the phrase "or contracted to be manufactured". Even if the Commission believed that it had such authority or that the statute demanded such a construction, the proposed rules are unnecessarily broad as applied to retailers, as RILA and CERC have both pointed out in their written comments and in meetings with the Commission's staff. To the extent that the Commission determines that "or contracted to be manufactured" includes retailers within the meaning of the statute, RILA suggests that the following definition of "contracted to be manufactured" be added as a new 229.104(c)(4) [and renumbering existing proposed 104(c)(4) as 104(c)(5)]:

(4)Contracted to be manufactured. The term *contracted to be manufactured* means a contractual relationship between an issuer and a manufacturer whereby

(i) the issuer has a direct contractual relationship with the manufacturer of the product to be sold by the issuer,

(ii) the issuer has substantial control over the manufacturer and the material specifications of the product, and specifies the conflict mineral(s) to be used in the product,

(iii) the product will be manufactured exclusively for the issuer, and

(iv) the product will be sold by the issuer under its own brand name or a brand name owned by the issuer or exclusively licensed to the issuer by the owner of the brand.

Specification by an issuer of function, form, fit, quality or similar product attributes will not be deemed to constitute substantial control over the manufacturer or the material specifications of the product.

An issuer should not fall within the definition of "manufacturer" or "contracted to be manufactured," by merely attaching a brand label to a generic good, contracting for the exclusive distribution of goods, or specifying the form, fit or function of a product. In such cases retailers lack visibility or control over bills of materials or the procurement of materials or components. Retailers' private label programs typically do not specify materials or design (except for certain brand cosmetic elements); rather retailers' specifications typically specify that the manufacturer meet certain verifiable standards of performance and/or test certification in products. Retailers do not now receive, or have the systems to receive or control, information at a bill of materials level, or the source of those materials. This type of control would be necessary to begin to have an effect on sourcing components and on choice of the materials of which these components are comprised. Even with that control, however, the information necessary to trace materials down to the mine cannot exist without the capture of information at the mine that could be passed up the supply chain to smelters, component and subcomponent suppliers worldwide.

Due Diligence and Enforcement Guidance

Under the proposed rules, it is unclear what, if any, practical steps can be taken now or in the near future that would lead to a successful compliance program without more specific guidance on due diligence, audit standards and enforcement. Greater guidance is needed from the SEC on due diligence and on enforcement for any company to have an ability to know how to comply with the law.

RILA also agrees with CERC on this point and suggests the following definition be added to the rule:

a. The expectations and metrics for "reasonable" due diligence should depend on a business entity's position in the supply chain and the customary business relationships and practices of any entity so positioned.
b. To the extent internationally recognized standards of diligence pertain to these expectations, they should be considered non-exclusive safe harbors for auditing and enforcement purposes.

The proposed rule's Background and Summary states that the Commission does not believe it is appropriate to prescribe any particular guidance for conducting due diligence. While we agree that issuers must be permitted flexibility in determining their individual due diligence depending on their own supply chains, it does not follow that it would be inappropriate for the Commission to articulate guidance on appropriate due diligence. New Exchange Act Section 13(p)(1)(c) permits the Commission to determine that certain processes are unreliable. Retailers have no existing tools available to them to conduct due diligence to the minerals' smelters, much less the mine of origin. RILA therefore suggests the adoption of a reasonable person standard and a nonexclusive safe harbor based on internationally recognized standards or guidance, and offers the following additional language for insertion at the end of the existing proposed 229.104(b):

> (4) In performing due diligence to determine the source and chain of custody of the conflict minerals that may be contained in an issuer's products, or to determine that the conflict minerals came from recycled or scrap sources, the issuer shall exercise such care as a reasonable person engaged in the same or similar business to the issuer's business would exercise in the conduct of its own affairs. Issuers conforming to an internationally recognized standard of, or guidance for, conflict mineral supply chains, will be deemed to have performed adequate due diligence.

Similarly, RILA suggests the adoption of the following language at the end of proposed 229.104(a) that clarifies that issuers, when making country of origin inquiries, may rely on reasonable certifications furnished to them by the actual manufacturers of the products they sell:

> In the case of an issuer who is the seller of products it has "contracted to be manufactured"; a reasonable country of origin inquiry may be based on the issuer's reasonable reliance on certifications furnished to it by the manufacturer of the products.

The proposed rule states that a Government Accountability Office (GAO) third-party attestation or performance audit must be conducted if the country of origin is indeterminate. The Commission has stated that standards exist for this to occur. Yet currently, no standards for a reasonable inquiry into the origin of minerals exists. In addition, in discussions with representatives of independent certified public accounting firms, RILA members have been told that that those firms do not know what an audit engagement may require in order to meet the attestation requirement, there is currently no due diligence standard to which the GAO's audit standards can be applied.

Phase-In

To the extent the Act applies to retail companies, a phase-in approach is recommended to allow practical infrastructure to be built that would allow compliance. Due diligence efforts can only achieve what the existing infrastructure allows. A phase-in approach would link disclosure requirements to the state of due diligence that could be achieved taking into account the issuer and the state of infrastructure. Over time, improvements in infrastructure should make the available due diligence efforts increasingly robust.

A. Substantial time and effort would be required to establish, even only on a company level, the management systems, render them operational, and commission audits to prepare and support disclosures on SEC forms.
B. An audit standard for a reasonable inquiry of the origin of minerals would need to be created and published, and a marketplace of trained auditors to this standard would need to be created.
C. Although the electronics industry has spent considerable resources devoted to the issue of Conflict Minerals, data gathering tools still need to be created. The tool developed by the EICC is currently only a questionnaire on an Excel spreadsheet. In theory this questionnaire would be e-mailed to first tier suppliers, who in turn would need to make the same requests of second tier

component suppliers and so on up the supply chain. The EICC tool does not solve the following problems:

1. Suppliers duplicatively answering the questionnaire for each of their customers
2. Training of the supply chain on how to use the questionnaire
3. Does not answer the question of what supporting information on documentation suppliers may rely upon for their answers on what due diligence needs to be in place for each supplier down the supply chain to ensure accurate answers
4. Staff needed to manage answers to the questionnaire
5. The EICC does have a "roll-up" tool aggregating the data, but only on a supplier and not on a items basis which retailers would need
6. Does not answer the question of how the tool will fit into a compliance program designed to comply with the SEC rules

D. Data reporting systems would need to be integrated into retailers' existing systems to allow traceability of minerals on an SKU level; SKUs offered in any retailers' assortment are under constant change
E. A certification systems that could with a level of certainty trace the origin of minerals to smelters would need to mature
F. Steps A-E, above, would need to be repeated and rolled out within retail companies' disparate and unconnected supply chains (for example for issuers with more than one retail brand with a spate of sourcing operations), and within the supply chains of suppliers and sub component suppliers.
G. To avoid duplication of efforts, a system needs to be created that allows suppliers to each report only once with the resulting roll-up of information acceptable to retail customers. Such systems do not yet exist.

Cost

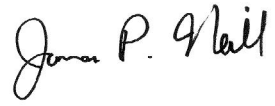
In the proposed rule, and again at the Roundtable hosted by the Commission on October 18, 2011, the staff asked for comments on the accuracy of its costs estimates. As we have noted in discussions with the staff, because RILA members do not now have tools available to them to perform the due diligence required by the proposed rules, and because they do not know which of the hundreds of thousands of products they sell may possibly contain conflict minerals, it is not possible to estimate with any certainty the actual costs of compliance. RILA members do believe, based on their own general knowledge of their businesses and supply chains, and from discussions with potential independent auditors and consultants, that the Commission's estimate of $43,040,161 (an average of $35,898 for each of the 1,199 issuers the Commission estimates would be required to file reports) for the engagement of professionals to conduct due diligence and the private sector audit alone, is inaccurate. RILA's view is shared by the National Association of Manufacturers, by researchers at Tulane University in a study released in October, 2011 at the request of one of the sponsors of Section 1502, and by the Small Business Administration in a letter dated October 25, 2011.

Summary

In summary, we suggest a narrower and clear definition of manufacturer, clearer guidance on what constitutes due diligence and SEC enforcement policy, an adequate and practical phase-in period for compliance tools to be developed and education of the supply chain, and a reexamination of SEC cost

estimates. RILA members are committed to identifying solutions to ease the suffering in the Congo and are prepared to work with the SEC towards this eventual goal.

Sincerely,



Jim Neill
Vice President, Product Safety