JEB HENSARLING, TX, CHAIRMAN

United States House of Representatives
Committee on Financial Services
Washington, D.C. 20515

MAXINE WATERS, CA, RANKING MEMBER

August 28, 2017

The Honorable Walter J. Clayton III
Chairman
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Clayton:

We write to express our strong concern over then-Acting Chairman Piwowar's misinterpretation of the U.S. Court of Appeals ("Court") final decision in April on the constitutionality of Rule 13p-1 ("the Conflict Minerals Rule" or "Rule"), as well as the statement by the Division of Corporation Finance that recommends, pending future Securities and Exchange Commission ("SEC" or "Commission") action, that the SEC not seek enforcement action for companies that do not comply with the disclosure requirements regarding due diligence on the source and chain of custody of conflict minerals or file a conflict minerals report.[1]

This non-enforcement position is misguided and irresponsible, and we strongly urge you to have the SEC clarify immediately that it will be enforcing the Rule in accordance with Section 1502 of the Dodd-Frank Wall Street and Consumer Protection Act ("Dodd-Frank"), the Administrative Procedures Act, and the Court's final decision.

Commissioner Piwowar's position is not only based on arguments that have already been rejected by the courts, but it also places companies that may be misled into not complying with the Rule at risk of significant reputational risk should they interpret his statements in error as impacting their disclosure obligations. Furthermore, this position also stands in stark contrast to the guidance issued by the Division of Corporation Finance in 2014 on how companies should comply with the rule in the wake of a legal challenge that found one requirement of the SEC rule to be unconstitutional, while upholding the rest of the rule, including the scope of the due diligence requirements. Since the 2014 guidance was issued, companies had been implementing the supply chain due diligence requirements, demonstrating improvements year on year.

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[1] Acting Chairman Michael S. Piwowar, SEC, Statement on the Court of Appeals Decision on the Conflict Minerals Rule (April 7, 2017), *available at* https://www.sec.gov/news/public-statement/piwowar-statement-court-decision-conflict-minerals-rule. Also, Division of Corporation Finance, SEC, Statement on the Effect of The Court of Appeals Decision on the Conflict Minerals Rule (April 7, 2017), *available at* https://www.sec.gov/news/public-statement/corpfin-updated-statement-court-decision-conflict-minerals-rule

Importantly, the Court's final judgment in April held only that the SEC couldn't enforce the descriptor requirement. It is therefore inappropriate for Commissioner Piwowar or the Division of Corporation Finance to use the Court's decision as a basis for their position of non-enforcement of the due diligence reporting requirement.

For decades, the exploitation and trade in conflict minerals in the Democratic Republic of the Congo ("DRC") by armed groups and military units has helped finance conflict in eastern DRC that is characterized by extreme levels of violence, mass killings, and horrific sexual violence, including rape, mutilation, and sexual slavery. Congress explicitly recognized that aiming to eliminate the nexus between armed groups and illegal mining profits was one key to broader reform efforts in the DRC, and in 2010, Congress included Section 1502 in Dodd-Frank to help disrupt a major source of revenue for these armed groups and military units responsible for such atrocities. The SEC has adopted and implemented the Conflict Minerals Rule in order to achieve the intent of Congress and provide investors and consumers with the transparency mandated by the law.

At its core, the Conflict Minerals Rule requires public companies listed on U.S. exchanges whose products contain one of four minerals—tin, tantalum, tungsten, and gold—to carry out checks on their supply chains to determine whether they are sourcing these materials from the DRC or its neighbors, and if so, to report on the due diligence measures taken to determine if their sourcing arrangements are benefiting armed groups. By requiring companies to look beyond their first tier suppliers, the Conflict Minerals Rule is helping companies along the supply chain to not only understand their role in directly or indirectly financing conflict and human rights abuses, but also to recognize their potential value in helping to contribute to a secure, sustainable mining sector – one that benefits the people of eastern Congo and other conflict-affected and high-risk areas, while also creating more stable supply chains for their products.

1) The Rule and Guidance implementing Section 1502 have had a positive impact

Former Acting Chairman Piwowar questioned the effectiveness of the Conflict Mineral Rule and the importance and necessity of SEC enforcement long before the court's final decision in April.[2] He had directed the SEC to reconsider the Rule and the agency's guidance as early as January, based in large part, according to his public statement, on personal observations made during a trip to Africa, including what he "heard first-hand from the people affected by this misguided rule.[3]" However, it is important to note that his trip to Africa didn't include a visit to the DRC itself, and it strikes us as rash and

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[2] Acting Chairman Michael S. Piwowar, SEC, Statement on the Commission's Conflict Minerals Rule (Jan. 31, 2017), *available at* https://www.sec.gov/corpfin/statement-on-sec-commission-conflict-minerals-rule.html

[3] Acting Chairman Michael S. Piwowar, SEC, Statement on the Reconsideration of Conflict Minerals Rule Implementation (Jan. 31, 2017), *available at* https://www.sec.gov/news/statement/reconsideration-of-conflict-minerals-rule-implementation.html

irresponsible to rewrite the Conflict Minerals Rule based on "facts on the ground" that don't include any facts from the country in which the law was intended to effect the most significant change.

The fact is the Conflict Mineral Rule has spurred intense efforts to operationalize and expand regional, national, and industry due diligence systems. For example, a regional mineral certification system and mining validation program run by the International Conference on the Great Lakes Region ("ICGLR"), the regional body comprising twelve African states, including Congo, has validated 420 mines as conflict-free in eastern Congo as of April 2017.[4] Also, private sector-led responsible sourcing programs are expanding, such the "bag and tag" traceability and due diligence program run by the International Tin Supply Chain Initiative—which expanded its coverage of mining sites in eastern DRC, with 496 active sites covered in the first quarter of 2017 compared with 322 in December 2015—and the Better Sourcing Program due diligence system.[5]

In its report dated May 23, 2016, the UN Group of Experts on the DRC[6] noted that "the traceability system for tin, tantalum and tungsten is becoming increasingly embedded in the country's mining governance." Together, these efforts have opened up opportunities for 'conflict-free' trading from the DRC and have helped ensure that U.S. and other international companies buy minerals from the region in a responsible way.

The Rule has also generated regional momentum for implementing monitoring systems in the minerals sector. Save Act Mine ("SAM"), a group of mineral traders in North Kivu, Congo, who had previously turned a blind eye to the conflict minerals trade, formed a coalition that promotes the implementation of due diligence and the development of conflict-free supply chains because they understand that without clean supply chains, they will fail to sell their minerals to the United States market.[7] In addition, U.S. tech companies created the Conflict Free Smelter Program, an auditing system for minerals smelters worldwide, providing additional transparency for a key point in minerals supply chains. As of August 10, 2017, 79 percent of smelters/refiners worldwide (253 out of 322 total) for the four conflict minerals have passed audits by the Conflict Free Smelter Program or associated programs, and an additional 17 smelters/refiners are in the process of being audited—for a total of 270 participants (over 80 percent).[8]

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[4] Uwe Naeher and Yasmine Nzuma, "Summary of Joint Missions and CTC Mine Site Audits in Eastern DRC," Federal Bureau of Geosciences and Natural Resources (BGR), Kinshasa, June 2017, *available at* https://enoughproject.org/wp-content/uploads/2017/06/Bulletin-ECQ-Mai_2017-FR.pdf

[5] iTSCI Overview: Quarter 1 of 2017, *available at* https://www.itri.co.uk/index.php?option=com_mtree&task=att_download&link_id=55723&cf_id=24

[6] Letter dated 23 May 2016 from the Group of Experts on the Democratic Republic of the Congo addressed to the President of the Security Council, *available at* http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/466

[7] Save Act Mine, SEC comment: https://www.sec.gov/comments/statement-013117/cll2-1645775-148404.pdf

[8] http://www.conflictfreesourcing.org/conflict-free-smelter-program/

Understandably, many businesses see the benefits of the Conflict Minerals Rule. KEMET electronics, a leading global supplier of electronics components, cited Dodd-Frank 1502 and the corresponding SEC Rule as a reason for their decision to invest in Congo and the surrounding region. In his November 2015 testimony before the House Subcommittee on Monetary Policy and Trade,[9] KEMET CEO Per Olof-Loof stated, "The Dodd-Frank Act has certainly helped companies like KEMET to again, after decades of absence, be able embrace the DRC, allowing us to develop a competitive and secure supply chain, improving both our competitiveness and the life of the people in the village."

The unprecedented visibility issuers gained into their supply chains as a result of compliance with the Rule has also allowed them to make changes in the management of traditional risks to supply chain disruption and improved supply chain management. For example, the increased visibility has alerted companies to the potential presence of countries and entities sanctioned by the U.S. Department of the Treasury Office of Foreign Assets Control ("OFAC"). In fact, in the first round of reports submitted in 2014, 68 companies disclosed that, as they searched their supply chains for conflict minerals, they uncovered that at least one of their suppliers used gold refined by North Korea's central bank.[10] U.S. sanctions law bars importing materials from North Korea even if they come from deep within a supply chain and are in a completely different form by the time they reach the end user.

2) Arguments for reconsidering the rule and guidance are unsupported by the facts

a. The Rule does not impose an undue burden on companies

Despite the claim by the former Acting Chairman that legitimate "mining operators are facing such onerous costs to comply with the rule that they are being put out of business," as well as repeated industry claims that implementation costs are prohibitive and impose an "undue burden," the fact is that company compliance over the past 3 years paints a different picture.

On February 6, Elm Sustainability Partners, an independent advisory firm and recognized leader in conflict minerals, published detailed information[11] demonstrating that implementation costs related to U.S. conflict minerals reporting requirements for businesses have been substantially lower than expected and U.S. companies have in fact seen "tangible business benefits." According to Elm, compliance costs are 74-85% less than the initial SEC estimate. While the SEC projected $3-4 billion for total company costs in its final rule release, Elm estimates costs at $600-800 million for all companies. The study also notes that if the Rule is eliminated, cost savings for U.S. businesses will be "far less than 100% of the current implementation costs." Additionally, these costs have dropped significantly as innovative tools and processes

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[9] https://financialservices.house.gov/uploadedfiles/hhrg-114-ba19-wstate-ploof-20151117.pdf
[10] https://www.globalwitness.org/documents/17915/Digging_for_Transparency_hi_res.pdf (see box on page 25)
[11] https://www.sec.gov/comments/statement-013117/cll2-1565701-131655.pdf (box on page 3)

have been developed that streamline compliance, many of which have been made available to issuers and suppliers at no cost.

We also agree with the Most Reverend Nicholas Djomo Lola, President of the Catholic Bishops' Conference of the Congo and Bishop of the Diocese of Tshumbe in the DRC, who, in testimony before the House Financial Services Committee in 2012, urged U.S. companies "to account for the gruesome social costs of the illicit mining as they calculate their costs for compliance with Section 1502. These calculations are not just cost estimates on a spreadsheet. There is a social balance sheet that places value on the lives that can be saved."[12]

b. There is no de facto embargo on eastern Congo's minerals

We also take issue with former Acting Chairman Piwowar's claim that the disclosure requirements of Section 1502 have caused an ongoing de facto boycott of minerals from the DRC region. This claim is outdated and ignores the steadily increasing conflict-free minerals trade in the DRC.

While the initial delay of implementation of the law and subsequent Rule may have contributed to the decision by some companies to stop or postpone their purchase of minerals from Central Africa, this has turned around significantly in recent years. In fact, increased scrutiny of certain mines and mineral trading routes has already created opportunities for transparent and conflict-free sourcing from eastern DRC, and in some areas, conflict-free mining is now happening in large volume.

Despite a steep drop in legal tin, tantalum, and tungsten exports after 2010, an analysis of export and production data from the region indicates that legal exports have steadily increased since then. For example, although zero tons of tantalum were exported from South Kivu in 2010, exports reached five tons in 2014. The North Kivu province, the most conflict-mineral-rich province in Congo, reported record-high conflict-free export numbers for both tin and tantalum in 2016. [13]

Congo: North Kivu Exports (in tons)

	2014	2015	2016	**% change**
Tin	.38	.34	1.6	**440%**
Tantalum	.8	.95	1.1	**38%**

Source: North Kivu Ministry of Mines.

In fact, the Conflict Minerals Rule has helped drive armed groups out of many mining areas containing three out of the four conflict minerals. As of 2016, the International Peace Information Service ("IPIS") found that over three-quarters (79 percent) of

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[12] https://financialservices.house.gov/uploadedfiles/hhrg-112-ba20-wstate-ndjomo-20120510.pdf
[13] : https://enoughproject.org/files/NKivu_Document.pdf (analysis here: https://enoughproject.org/blog/de-facto-embargo-over-record-high-conflict-free-minerals-exports-eastern-congo)

miners at tin, tantalum, and tungsten mines surveyed in eastern Congo now work in mines where no armed group involvement has been reported.

The increasingly lucrative, more regulated minerals trade stands in stark contrast to several years ago when conflict minerals were a major source of funding for armed groups in Congo's decades-long conflict and when, according to the U.N. Group of Experts on Congo in 2010, "in the Kivu provinces, almost every mining deposit [was] controlled by a military group."

c. The Rule does not undermine U.S. national security interests

We are particularly struck by the claim in the former Acting Chairman Piwowar's public statement that the effect of the Rule in the DRC region "may undermine U.S. national security interests." This assertion that the Rule is encouraging "those with less benign interests" to enter the region is baseless.

The Conflict Minerals Rule is not the cause of instability in the region. On the contrary, the Rule has increased U.S. influence and direct management in certain in-region mining operations, meaningfully improving stability in some communities and the strategic minerals ore source, which directly serves the national security interests of the United States.

Any weakening of the Rule—including a policy of non-enforcement which has already caused some companies to erroneously assume compliance is no longer mandatory—will only help fuel the conflict in and around the DRC by emboldening warlords, increasing the rate of violence and rape throughout the region, and further destabilize Central African countries.

In his March 13 comment letter to the SEC, the Congolese Minister of Mines wrote, "practically, the suspension or review of Section 1502 of 'Dodd-Frank' entails a high probability of re-emerging risks that will jeopardize the DRC stability and, in turn, the US security interests."[14]

Additionally, a substantially altered or weakened Rule would also put companies and investors at considerable risk for financial and reputational damage if companies are found to be sourcing minerals from armed groups and other entities that undermine U.S. national security interests.

3) We need to do more, not less

Section 1502 and the corresponding Conflict Minerals Rule were not intended to be the sole solution in the effort to support peace in the war-torn region of eastern DRC, and we must do more to support mining communities and improve justice and security measures. But we should not give up on efforts that are already showing positive impacts and revert to a brutal status quo ante that even critics of the Rule don't endorse.

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[14] https://www.sec.gov/comments/statement-013117/cll2-1643029-147090.pdf

The U.N. Group of Experts on the DRC has reported that Section 1502 "has had a massive and welcome impact so far, requiring chain participants all over the world to take due diligence and conflict financing seriously. This should not and must not be thrown away or weakened. [....] Retreat now will confuse all players in the market, unfairly and unwisely diminishing the efforts of those who are implementing due diligence, and playing into the hands of the cynical and those with other agendas who have thus far refused to implement due diligence in the hope that it will simply go away."[15]

The International Conference on the ICGLR, also recently warned that a disappearance of the Rule could help fund armed groups and contribute to a surge in unrest, including a generalized proliferation of terrorist groups, trans-boundary money laundering and illicit financial flows in the region.

Businesses, investors, and consumers understand that it is unacceptable to fund warlords, and the tools are now available to allow companies to act responsibly. As a part of a broader regional and international effort, a responsible minerals trade will help lay a sustainable foundation for greater security and economic opportunity in the DRC region.

Using a misreading of the court decision, inaccurate claims about the Rule's effectiveness, and outdated information regarding compliance costs to justify an abandonment of the Conflict Minerals Rule is indefensible, and we strongly urge you to ensure that the due diligence reporting requirements of the Rule remain in place and are enforced, as mandated by Congress in the statutory requirements within Section 1502.

Sincerely,

Maxine Waters
Ranking Member
House Financial Services Committee

Gwen Moore
Ranking Member
House Financial Services
Subcommittee on Monetary Policy and Trade

[15] https://www.sec.gov/comments/statement-013117/cll2-1643029-147090.pdf