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Challenging the Conflict Minerals Rule – A Review of the Docket – Petitioners' Brief and *Amicus* Briefs

On October 22, 2012, the United States Chamber of Commerce and the National Association of Manufacturers (Petitioners) filed an Amended Petition for Review with the US Court of Appeals, District of Columbia Circuit. The Petitioners requested that the new Conflict Minerals Rule be modified or set aside in whole or in part. After the initial filing, the Business Roundtable joined the Petitioners and two Amnesty International entities jointed the Respondent (SEC) in the challenge.

Petitioner's Brief

As contemplated by the briefing schedule, on January 16, 2013, the Petitioners filed their Opening Brief in their bid for a review of the SEC's Conflict Minerals Rule (Rule). In their brief, the Petitioners addressed each of the grounds for review that they described in their Statement of Issues that was filed on November 21, 2012.

The Petitioners argued that:

- The SEC failed to do the proper cost/benefit analysis of the Rule and imposed the Rule's high cost of compliance without determining that the Rule would provide the intended benefit.
- The SEC did not exercise appropriate agency judgment and acted arbitrarily when it imposed more stringent requirements and rejected less burdensome ones.
- The SEC was wrong to conclude that it could not create a *de minimis* exception to the Rule.
- The SEC required an unreasonably stringent "reasonable country of origin inquiry" when it provided that the Rule covers conflict minerals that companies have "reason to believe... *may* have originated" in the covered countries.
- The SEC was wrong to extend the Rule to those who contract with others for the manufacture of products.
- The SEC acted arbitrarily when it included a shorter phase-in period for larger companies when they often depend on disclosure from smaller companies which are given a longer phase-in period.
- The Rule violates the First Amendment by compelling companies to make misleading and stigmatizing public statements indicating that their products contribute to human rights abuses.

Amicus Brief of Experts on the Congo

An *amicus* brief filed on January 23, 2013 by several Democratic Republic of Congo (DRC) experts offers insights into the overall impact of the Rule. Professor Marcia Narine (Visiting Assistant Professor of Law, University of Missouri, Kansas City), Ambassador Jendayi Frazer (Distinguished Service Professor, Carnegie-Mellon University and Director of the Center for International Policy and Innovation) and Dr. J. Peter Pham (Director of Michael S. Ansari Africa Center at the Atlantic Council) filed the *amicus* brief in support of the petition for review although the experts made it clear that their support for the petition arises not out of sympathy with the Petitioners' commercial interests but because of the negative impact of the Rule on the Congolese people.

In their brief, the experts argue that the SEC failed to consider whether the Rule would actually weaken armed groups in the DRC. They then argue that the SEC compounded that error by choosing to draft the Rule and provide guidance that expands the scope of the Rule and increases the cost of compliance resulting in a de facto embargo on minerals sourced from the DRC. The experts go on to conclude that the Rule is having an unintended negative impact on the legitimate

mining industry in the DRC and surrounding countries – harming the very people that the Rule was intended to help.

The *amicus* brief provides detailed background on the extractive minerals industry in the DRC and describes changes in the market for these minerals since Section 1502 of the Dodd-Frank Act was passed in 2010. The most compelling observation is that many companies have decided not to source any conflict minerals from the DRC or its neighboring countries because of the costs and burdens of sourcing from there – even in a "responsible" way. The experts also conclude that traceability and tagging efforts are being undercut by corruption, smuggling and other workarounds.

Amicus Brief of Industry Groups

An *amicus* brief in support of the Petitioners was also filed by several industry groups on January 23, 2013. The industry groups making that filing are:

- American Coatings Association, Inc.
- American Chemistry Council
- Can Manufacturers Institute
- Consumer Specialty Products Association
- National Retail Federation
- Precision Machined Products Association
- The Society of the Plastics Industry, Inc.

According to these industry groups, this brief is intended to advise the court on the range of markets that will be negatively impacted by the Rule and the "arbitrary and capricious consequences" that will be suffered. Although the groups expressed support for the overall goal of ending the humanitarian crisis in the DRC region, they argue that the SEC did not consider fully the economic consequences of the Rule it drafted. Specifically, the brief argues that the SEC did not conduct analysis of specific costs and benefits of the Rule, especially when it considered which products and markets would be covered by the Rule.

The industry groups' objection to the Rule focuses on areas in which they claim that the SEC exercised some discretion in its rulemaking. They specifically focus on the fact that incidental and *de minimis* uses of the metals are within the scope of the Rule. The groups also observe that a lack of definition around the term "derivative" could conceivably impose reporting requirements on companies that use metals in forms that are chemically distinct from the base metals that are subject of the Rule. They argue that this possible inclusion would greatly expand the scope of the Rule. In fact, this very question of coverage is being widely discussed by companies that are actively seeking to determine their diligence and reporting obligations. Finally, the industry groups also contend that putting reporting obligations on retailers when they have merely contracted with third party manufacturers expands the Rule to a group of companies in a way not intended by Congress.

This *amicus* brief proposes that the Rule be sent back to the SEC for revised rulemaking.

The SEC's Brief is due on Friday, March 1st. Oral argument has been set for May 15, 2013. Additional *amicus curiae* are expected by March 28, 2013 when final briefs are due.

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