

JOHN S. KIERNAN **PRESIDENT** Phone: (212) 382-6700

Fax: (212) 768-8116 jkiernan@nycbar.org

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By Facsimile

Honorable Mike Crapo Chair, Committee on Banking, Housing & Urban Affairs U.S. Senate 534 Dirkson Senate Office Building Washington, DC 20510

Honorable Sherrod Brown Ranking Member, Committee on Banking, Housing & Urban Affairs U.S. Senate 534 Dirkson Senate Office Building Washington, DC 20 510 Honorable Thad Cochran Chair, Committee on Appropriations U.S. Senate 113 Dirksen Senate Office Building Washington, D.C. 20510-2402

Honorable Patrick Leahy Vice Chair, Committee on Appropriations U.S. Senate 437 Russell Senate Building Washington, DC 20510

Dear Senators Crapo, Brown, Cochran and Leahy:

I write on behalf of the New York City Bar Association (the "Association") concerning the House of Representatives' passage of the Financial CHOICE Act¹ to repeal section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act")² requiring corporate disclosure of conflict minerals, and its adoption of the Huizenga Amendment³ to the Omnibus Appropriations Bill to defund enforcement of Securities and Exchange Commission ("SEC") regulations that implement the disclosure requirements of Section 1502. We likewise address H.R. 4248, a second bill that was recently introduced by Representative Huizenga to repeal section 1502.

The Association strongly supports the retention of section 1502 of the Act mandating the SEC to adopt rules requiring publicly-traded companies to disclose whether "conflict minerals"

¹ Financial CHOICE Act, H.R. 10, 115th Cong. (2017).

² Pub. L. 111–203, 124 Stat. 1376.

³ Huizenga Amendment to Make America Secure and Prosperous Appropriations Act of 2018, H. Amdt. to H.R. 3354, 115th Cong. (2017).

⁴ The term "Conflict Minerals" is defined in section 1502(e)(4) of the Act as columbite-tantalite, also known as coltan (the metal ore from which tantalum is extracted); cassiterite (the metal ore from which tin is extracted); gold;

used in their products come from the Democratic Republic of the Congo ("DRC") or an adjoining country.⁵ The Association opposes those provisions of the Financial CHOICE Act that aim to repeal Section 1502, H.R. 4248 which aims to repeal section 1502 in its entirety, or any other measures to undermine section 1502.⁶ Similarly, the Association strongly supports the retention of the SEC conflict minerals rule requiring that, if such minerals originate in the covered countries, companies must submit to the SEC an annual report describing the source and chain of custody of their conflict minerals (the "Rule").⁷ The Association opposes the Huizenga Amendment that would prohibit the use of funds "to implement, administer or enforce" the Rule, as well as any other efforts to erode the Rule.⁸

The Association is an independent non-governmental organization with more than 24,000 members in over 50 countries. Founded in 1870, the Association has a long history of dedication to human rights. This history includes engagement with Africa, notably through its Committee on African Affairs, which closely monitors and responds to legal developments in Africa, and the Africa Program of the Cyrus R. Vance Center for International Justice. In addition, the Committee on International Human Rights investigates and reports on human rights conditions around the world.

I. BACKGROUND

As early as 2009, then Senator Sam Brownback (R-KS), a strong conservative voice in Congress, proposed conflict minerals legislation as a way to strip militias in the Congo of one of their main funding sources. By enacting Section 1502 of the Act, the United States Congress in 2010 expressed its sense "that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo helps [sic.] finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributes [sic.] to an emergency humanitarian situation" in the region. Today, there exists extensive evidence that section 1502 has positively impacted this situation in eastern Congo. 11

wolframite (the metal ore from which tungsten is extracted); or their derivatives; or any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the DRC or an adjoining country.

⁵ The term "adjoining country" is defined in the Act as a country that shares an internationally-recognized border with the DRC, which presently includes Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.

⁶ The Association recognizes and appreciates that the Senate's Dodd-Frank reform bill, S. 2155, 115th Cong. (2017) contains no provisions seeking to undermine section 1502.

⁷ Section13(p) of the Securities Exchange Act of 1934.

⁸ Supra note 3.

⁹ Congo Conflict Minerals Act of 2009, S. 891, 111th Cong. (2009).

¹⁰ Dodd-Frank Act, Section 1502(a).

¹¹ The Association relies in large part and is thankful for the work done by The Enough Project, https://enoughproject.org.

Repealing Section 1502 or defunding the Rule would reverse this impact and undermine peace, security, and the reestablishment of the rule of law in this historically volatile region, contrary to the interests of the United States. It would also negatively impact some of the largest U.S. businesses as well as investor groups which currently support the law. There is significant support for Section 1502 from the majority of civil society and human rights groups in the region, who agree, in the words of one, that "any step to suspend section 1502 would undoubtedly lead to conflict minerals infiltrating the supply chain with devastating effects. Namely the reactivation of armed groups and the feeding of terrorist and mafia networks."

Evidence presented by U.S. and international human rights organizations operating in the region overwhelmingly credits Section 1502 with improvements in the rule of law in the mining sectors of the Congo, Rwanda, and other Great Lakes countries. These improvements in turn have contributed to advancements in humanitarian conditions in the Congo and a weakening of key insurgent groups. Moreover, they have also provided tangible benefits for U.S. corporations and investors.

II. POSITIVE IMPACT ON THE RULE OF LAW AND CONFLICT-FREE MINERALS TRADE

In 2010 when the Act passed, profit from the sale of conflict minerals mined in eastern Congo was the major enabler of conflict in that region. At that time, military groups controlled the majority of mines in eastern Congo. Since then, the Rule has helped make approximately 75% of conflict minerals peaceful. Approximately 79% of miners at tin, tantalum and tungsten mines surveyed in the Congo now work in conflict-free mines according to the International

¹² See infra notes 22-25

¹³ See, e.g., 11 Letters from Congolese Civil Society Groups in Support of the U.S. Conflict Minerals Law (posted April 4, 2017), ENOUGH PROJECT, https://enoughproject.org/blog/seven-letters-congolese-groups-support-us-conflict-minerals-law.

¹⁴ Letter from South Kivu Civil Society to SEC in response to reports of possible repeal of section 1502 (Feb. 18, 2017), https://www.sec.gov/comments/statement-013117/cll2-1597728-132417.pdf.

The Enough Project and Human Rights Watch are two organizations that have publicly released their findings. The Enough Project has been involved in work on conflict minerals since 2008, including several extensive research projects in mines and mining communities in eastern Congo. The Enough Project is also an active participant in the Public-Private Alliance for Responsible Minerals Trade, the Responsible Artisanal Gold Solutions Forum, and the OECD Multi-Stakeholder Group on the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. As a result, it has compiled substantial evidence in support of the Rule's retention in order to advance the goals of peace in the Congo and transparent supply chains benefiting companies, investors, and consumers. Enough Project Comment to the SEC in Support of Conflicts Mineral Rules Implementation (posted Feb. 24, 2017), ENOUGH PROJECT, https://enoughproject.org/reports/enough-project-comment-sec-support-conflict-minerals-rule-implementation-2. Similar reports exist from Human Rights Watch which also credits the law with peace gains in the region. See, e.g., Human Rights Watch Testimony at Senate Foreign Affairs Committee, Subcommittee on African Affairs and Global Health Policy on Dodd-Frank Section 1502 (Apr. 5, 2017), HUMAN RIGHTS WATCH, https://www.hrw.org/news/2017/04/05/human-rights-watch-testimony-senate-foreign-affairs-committee-subcommittee-african.

¹⁶ Enough Project Comment to the SEC in Support of Conflicts Mineral Rules Implementation, *supra* note 14.

Peace Information Service.¹⁷ As a consequence, the power of armed groups in the region has been reduced.

Financial profit from the trade in conflict minerals was one of the key incentives for destabilizing actions by Rwandan forces in the Congo. The Rule and the certification of conflict-free mines in the Congo have caused the smuggling of conflict minerals to become less profitable. As a result, trade in these minerals, as well as the number of Rwanda-backed rebel forces in the Congo, has decreased. The United Nations has estimated that the number of members of the Forces Democratiques de Liberation du Rwanda ("FDLR"), the designated terrorist group with links to the Rwanda genocide, has dropped from 6,000 before 2007 to less than 1,000 in 2016.¹⁸

It is the strong view of human rights organizations operating on the ground that the repeal of section 1502 would incentivize a return to the mines by armed groups in eastern Congo and exacerbate the humanitarian crisis. ¹⁹ The repeal would contribute to the reversal of the decrease in the number of internally-displaced people in the Congo from 3.4 million in 2008 to 1.9 million at the end of 2016. ²⁰

It is true that the initial implementation of the Rule contributed to a temporary de facto embargo in 2011. However, this has changed. According to The Enough Project, the rule has now spurred record-breaking exports of clean, conflict-free minerals. The Congo's North Kivu province exported a record 1,121 tons of conflict-free tantalum and 1,550 tons of conflict-free tin in 2016.²¹ The Rule also spurred the first-ever minerals certification process, that of the International Conference on the Great Lakes Region; more than 200 mines have been certified since 2016.²²

III. KEY SUPPORT FROM CORPORATIONS, CONSUMERS, INDUSTRY AND INVESTOR GROUPS

Major U.S. companies, including Apple, Intel, HP, Alphabet (Google), and Microsoft have publicly expressed support for the Rule.²³

For Apple Inc.: *United States Securities and Exchange Commission Form SD Specialized Disclosure Report, Apple, Inc.* (May 5, 2017), http://investor.apple.com/secfiling.cfm?filingid=1193125-17-159397&cik=320193;

¹⁷ Analysis of the Interactive Map of Artisanal Mining Areas in Eastern DR Congo: 2015 Update, INT'L PEACE INFO. SVCS., http://ipisresearch.be/publication/analysis-interactive-map-artisanal-mining-areas-eastern-dr-congo-2/.

¹⁸ ENOUGH PROJECT, *supra* note 14.

¹⁹ *Id*.

²⁰ The De Facto Embargo is Over: Record-High Conflict-Free Minerals Exports from Eastern Congo, ENOUGH PROJECT (Feb. 16, 2017), https://enoughproject.org/blog/de-facto-embargo-over-record-high-conflict-free-minerals-exports-eastern-congo.

²¹ *Id*.

Number of Certified Conflict-Free Mines in Congo Increases by 31%: 204 Mines Certified, ENOUGH PROJECT (May 31, 2016), https://enoughproject.org/blog/number-conflict-free-mines-congo-increases-31-204-mines-certified.

²³ Stated in the companies' Form SD Specialized Disclosure Reports to the SEC:

Many U.S. businesses, particularly electronics companies, have benefited from the Rule. Because the Rule supports transparency into a company's supply chain, ELM Sustainability Partners, a leading independent advisory firm, has noted it thereby lowers a company's risks and stabilizes that supply chain. ELM points to other benefits to U.S. companies as well, including the ability to mitigate supply chain risks in fields unrelated to conflict minerals, improvements in U.S. Treasury Office of Foreign Assets Control (OFAC) compliance, and development of supply chain expertise and traceability to form the basis for new supply chain due diligence standards.²⁴

The Enough Project points out that the decrease in supply chain risks, especially for tin and tungsten, together with increased transparency in the minerals trade and their supply chains, have also created new investment opportunities in the Congo and surrounding region. It cites, for example, the U.S. companies KEMET Electronics, a global supplier of electrical components, and Alphamin Resources Corp., a tin mining company, which specifically point to Section 1502 and the Rule as reasons for their decisions to invest in the Congo and surrounding region.²⁵

Many industry representatives of companies most directly affected by the Rule remain in support of retaining section 1502. For example, the Information Technology Industry Council (ITI), the global voice of the information and communications technology sector (ICT) and the premier advocacy and policy organization for the world's leading innovation companies, in March 2017 voiced its support for the retention of the Rule and publicly opposed earlier attempts to repeal or suspend section 1502 and the Rule.²⁶

For Intel: *United States Securities and Exchange Commission Form SD Specialized Disclosure Report, Intel Corporation* (May 18, 2017), https://www.intel.com/content/www/us/en/corporate-responsibility/conflict-free-sec-filing.html;

For HP: *United States Securities and Exchange Commission Form SD Specialized Disclosure Report, HP Inc.* (May 25, 2017), http://www8.hp.com/us/en/pdf/sustainability/conflictminerals.pdf;

For Microsoft: *Microsoft SEC Filings, Specialized Disclosure Report* (May 31, 2017), https://www.microsoft.com/en-us/Investor/sec-filings.aspx;

For Alphabet (Google): *United States Securities and Exchange Commission Form SD Specialized Disclosure Report, Alphabet, Inc.* (May 26, 2017), http://www.secinfo.com/d1yDA3.ku.htm - 1stPage.

²⁴ Letter from ELM Sustainability Partners to Michael S. Piwowar, Acting Chairman, SEC re. Comments on Reconsideration of Conflict Minerals Rule (Feb. 6, 2017), https://www.sec.gov/comments/statement-013117/cll2-1565701-131655.pdf

²⁵ In testimony before the House Subcommittee on Monetary Policy and Trade, in November 2015, KEMET CEO Per Olof- Loof stated: "The Dodd-Frank Act has certainly helped companies like KEMET to again, after decades of absence, be able to 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 [in the DRC]." Enough Project Comment to the SEC in Support of Conflicts Mineral Rules Implementation, *supra* note 14. Similarly, Alphamin COO, Trevor Faber said: "If it wasn't for Dodd Frank, we wouldn't be on the hill" where the large Bisie tin mine is situated in North Kivu province. *Id.*; Thomas Wilson, *In Remote DR Congo, Mountain of Tin Attracts Investors to the World's Largest Untapped Site*, MAIL & GUARDIAN AFRICA (May 4, 2016), https://mgafrica.com/article/2016-05-04-in-remote-dr-congo-mountain-of-tin-attracts-investors-to-the-worlds-largest-untapped-site-bloomberg/.

²⁶ ITI Comments on SEC Conflict Minerals Rules Directed to SEC Acting Chairman Michael Piwowar (Mar. 20, 2017), INFO. TECH. INDUS. COUNCIL, https://www.itic.org/news-events/news-releases/iti-comments-on-sec-conflict-minerals-rules.

Furthermore, it is worth noting that compliance with the Rule by U.S. companies will not place them at a disadvantage vis-à-vis foreign competitors. The EU Conflict Minerals Regulation was published in the Official Journal of the European Union and came into force in July 2017. While the effective date for compliance with the EU regulation is January 2021, it is arguable that prior compliance by U.S. corporations with section 1502, in fact, gives them a competitive advantage versus their European counterparts which only now have to consider and bring their businesses into compliance with the European regulations. In addition to Europe, a leading Chinese industry group developed its own guidelines based on standards for due diligence set by the Organisation for Economic Co-operation and Development. The industry group, associated with the Chinese Ministry of Commerce, has proposed a five-step process whereby companies are required to review their supply chains for specific risks associated with conflict, human rights abuses, and other serious misconduct, and take action to mitigate those risks. Companies are also expected to publish detailed, specific information on the action they have taken, to ensure information flows along the chain. The Rungham Portion of the place of the Rungham Portion of the Portion of t

Concerns about costs of compliance have proven unfounded. ELM Sustainability Partners has found that compliance costs are in fact 74-85% less than the initial SEC estimate. While the SEC projected \$3-4 billion for total company costs, ELM estimates them at \$600-800 million.³¹ Additionally, these costs have dropped significantly as new tools and processes have been developed that help to streamline compliance, and as supply chain due diligence requirements become elements of, or are recognized by, other certification standards.

It seems clear, therefore, that repealing section 1502 or weakening the Rule would reduce peace and security in the region, but would not reduce costs for U.S. businesses.

Positive impacts of the Rule have not been limited to individual companies. The Rule has also been the driver of improvements across supply chains. For example, significant momentum was generated in the tech industry for an auditing system for mineral smelters and refiners worldwide, the key choke point in minerals supply chains. Before the Rule was implemented, no smelters had been audited; today, 75% of the world's smelters for tin, tantalum, tungsten and gold have now passed independent audits on conflict minerals (246 out of 325 smelters).³²

According to major corporations, the conflict minerals law has also created an expectation both inside corporate headquarters and among consumers that products will be

 $^{^{27}}$ Regulation 2017/821 of the European Parliament and Council of 17 May 2017, 2017 O. J. (L. 130) 1, http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN.

²⁸ *Id.* at 16.

²⁹ Lizzie Parsons, *Responsible Mineral Supply Chain Efforts in China: Progress and Challenges*, GLOBAL WITNESS (Oct. 27, 2017), https://www.globalwitness.org/en/blog/responsible-mineral-supply-chain-efforts-china-progress-and-challenges/.

³⁰ *Id*.

³¹ See ELM Sustainability Partners, supra note 23.

³² See ENOUGH PROJECT, supra note 14.

"conflict-free." The Rule thus has been beneficial to both investors and consumers. According to an investor group with assets under management in excess of \$3.75 trillion, "conflict minerals disclosure is material to investors and has informed and improved investors' ability to assess social (i.e., human rights) and reputational risks in a company's supply chain as well as their ability to assess a company's long-term mitigation of risks related to the supply of minerals, liability, and other material risks." ³⁴

As the Enough Project has highlighted:

The current Conflict Minerals Rule's disclosures are consistent and accessible to all investors, thereby improving efficiency in U.S. markets in allocating capital to issuers with the best overall prospects for long-term shareholder value....Company disclosures on sourcing practices, combined with analysis provided by groups like Responsible Sourcing Network on the quality of such disclosures, has imparted important transparency into relevant and material human rights risks....[I]t is critical for the SEC to pursue robust enforcement of the [Rule].

Individual consumers have also expressed demand for conflict-free products. The Enough Project reports that over two dozen schools and universities in the U.S. and internationally have passed resolutions favoring the purchase of products by companies working to source conflict-free minerals.³⁵

IV. BROAD CONGOLESE SUPPORT FOR THE RULE

The Enough Project has exhaustively detailed the reasons why suspending or weakening the Rule would be counterproductive to national security and humanitarian interests and detrimental to U.S. business interests. It has also compiled statements by many leaders and activists supporting the Rule; they support the Rule because they have seen direct positive impacts, because they believe in transparency and the rule of law, or both. Below is a sample of this support:

A letter signed by 13 Congolese human rights groups states:

The introduction of the Dodd-Frank Act was a way of reducing the number of violent Acts committed by. . .warlords and enabled the suspension of

³³ See Todd C. Frankel, Why Apple and Intel Don't Want to See the Conflicts Mineral Rules Rolled Back, WASHINGTON POST (Feb. 23, 2017), https://www.washingtonpost.com/business/economy/why-apple-and-intel-dont-want-to-see-the-conflict-minerals-rule-rolled-back/2017/02/23/b027671e-f565-11e6-8d72-263470bf0401 story.html?utm term=.2082ad3a1b6f.

³⁴ Letter from Investors and Investor Groups to Acting Chairman Piwowar re. Comments on Reconsideration of Conflict Mineral Rule Implementation (Feb. 17, 2017), https://www.sec.gov/comments/statement-013117/cll2-1590241-132174.pdf.

³⁵ *Id.* The Enough Project and STAND, a student-led movement, have coordinated efforts to lead The Conflict-Free Campus Initiative. *See* ENOUGH PROJECT, https://enoughproject.org/get-involved/cfci.

illegal arms sales; sales which had facilitated the proliferation of unauthorized weapons.... Mr. President [Trump], we wish most expressly to assure you that if you decide to call into question the Dodd-Frank Act, this will once again lend legitimacy to the presence and proliferation of armed groups in the East of the DRC, something which Congolese civil society condemns in the strongest terms.³⁶

Several African groups, including the International Conference on the Great Lakes Region and a collection of 41 Congolese civil society organizations, have expressed support for the conflict minerals law. In a letter to the Securities and Exchange Commission dated March 13, 2017, DRC Mines Minister Martin Kabwelulu said: "The suspension of Section 1502 of the Dodd-Frank Act "in the long run, will jeopardize the stability and security of the DRC" by encouraging an "escalation in the activities of non-state armed groups." ³⁷

Bishop Nicolas Djomo, Diocese of Tshumbe, the Democratic Republic of Congo, in his May 2012 testimony before the House Subcommittee on Monetary Policy and Trade, stated:

We urge the U.S. business community 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.³⁸

The Association urges you to vote to retain section 1502 of the Act and the Rule and prevent the passage of the Financial CHOICE Act, H.R. 4248, the Huizenga Amendment or any other measures to undermine the integrity of section 1502 or the Rule. Such action will serve the best interest of your constituents, the American public, and U.S. businesses, and will help to protect innocent victims of wars that for too long have ravaged the lives of the people of the Democratic Republic of Congo.

Respectfully,

John S. Kiernan

³⁷ Thomas Wilson, *Congo Sees Trump Roll-Back of Dodd-Frank Stoking Insecurity on the Congo*, BLOOMBERG (Mar. 20. 2017), https://www.bloomberg.com/news/articles/2017-03-20/congo-sees-trump-roll-back-of-dodd-frank-law-stoking-insecurity.

³⁶ See supra note 13.

³⁸ The Costs and Consequences of Dodd-Frank Section 1502: Hearing Before the Subcomm. on Int'l Monetary Policy and Trade of the House Comm. on Fin. Servs., 111th Cong. 21 (May 10, 2012), https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg75730/html/CHRG-112hhrg75730.htm.

CC:

Honorable Rex W. Tillerson

U.S. Secretary of State, Department of State

Honorable Wilbur Ross

U.S. Secretary of Commerce, Department of Commerce

Honorable Steven Mnuchin

U.S. Secretary of the Treasury, Department of the Treasury

Commissioner Jay Clayton

U.S. Securities and Exchange Commission

Commissioner Kara Stein

U.S. Securities and Exchange Commission

Commissioner Michael Piwowar

U.S. Securities and Exchange Commission

Honorable Orrin Hatch

Chair, Committee on Finance

Honorable Ron Wyden

Ranking Member, Committee on Finance

Honorable Bob Corker

Chair, Committee on Foreign Relations

Honorable Benjamin L. Cardin

Ranking Member, Committee on Foreign Relations

Honorable Jeff Flake

Chair, Subcommittee on Africa and Global Health Policy, Foreign Relations

Honorable Cory A. Booker

Ranking Member, Subcommittee on Africa and Global Policy, Foreign Relations

Honorable Shelley Moore Capito

Chair, Financial Services and General Government Subcommittee, Appropriations

Honorable Christopher Coons

Ranking Member, Financial Services and General Government Subcommittee, Appropriations

Honorable Chuck Schumer

Senate Minority Leader

Honorable Mitch McConnell Senate Majority Leader

Honorable Jeb Hensarling Chair, Financial Services Committee U.S. House of Representaives

Honorable Maxine Waters Ranking Member, Financial Services Committee

Honorable Ed Royce Chair, Foreign Affairs Committee

Honorable Eliot Engel Ranking Member, Foreign Affairs Committee

Honorable Christopher Smith Chair, Africa, Global Health, Global Human Rights, and International Organizations Subcommittee, Foreign Affairs

Honorable Karen Bass Ranking Member, Africa, Global Health, Global Human Rights, and International Organizations Subcommittee, Foreign Affairs

Honorable Rodney Frelinghuysen Chair, Committee on Appropriations

Honorable Nita Lowey Ranking Member, Committee on Appropriations

Honorable Tom Graves, Chair, Subcommittee for Financial Services and General Government, Appropriations

Honorable Mike Quigley, Ranking Member, Subcommittee for Financial Services and General Government, Appropriations