ORAL ARGUMENT NOT YET SCHEDULED

**DOCKET NO. 12-1422**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, BUSINESS ROUNDTABLE

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Respondent.

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AMNESTY INTERNATIONAL USA; AMNESTY INTERNATIONAL LTD.,

Intervenors for Respondent

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On Petition for Review of a Final Order of the
U.S. Securities and Exchange Commission

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# INDUSTRY COALITION AMICI BRIEF IN SUPPORT OF PETITIONERS

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January 23, 2013

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to D.C. Circuit Rule 28(a)(1):

### (A) Parties and *Amici*

**Petitioners**

National Association of Manufacturers

Chamber of Commerce of the United States of America

Business Roundtable

**Amici for Petitioners**

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.

**Respondent**

United States Securities and Exchange Commission

**Intervenors for Respondent**

Amnesty International USA

Amnesty International Ltd.

### (B) Rulings Under Review

This petition challenges the Securities and Exchange Commission's final rule, *Conflict Minerals*, 77 F.R. 56,274 (Sept. 12, 2012) (to be codified at 17 C.F.R. Parts

240 and 249b); Exchange Act Release No. 34-67716 (Aug. 22, 2012), and the statutory provision pursuant to which it was adopted, Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, §1502, 124 Stat. 1376, 2213-18 (2010) (codified in relevant part at 15 U.S.C. §78m(p)).

### (C) Related Cases

The case under review has never previously been before this court. Counsel is aware of no related cases currently pending in any other court.

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae American Coatings Association, Inc. ("ACA") does not have any parent corporation and is not a publicly traded entity. Amicus curiae American Chemistry Council ("ACC") does not have any parent corporation and is not a publicly traded company. Amicus curiae Can Manufacturers Institute ("CMI") does not have any parent corporation and is not a publicly traded entity. Amicus curiae Consumer Specialty Products Association does not have any parent corporation and is not a publicly traded entity. Amicus curiae National Retail Federation ("NRF") does not have any parent corporation and is not a publicly traded entity. Amicus curiae Precision Machined Products Association ("PMPA") does not have any parent corporation and is not a publicly traded entity. Amicus curiae The Society of the Plastics Industry, Inc. ("SPI") does not have any parent corporation and is not a publicly traded entity. All amici are represented by Eric G. Lasker, Hollingsworth LLP, and Eric P. Gotting, Keller & Heckman, LLP.

# TABLE OF CONTENTS

**Page (s)**

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES .....i

RULE 26.1 CORPORATE DISCLOSURE STATEMENT..... iii

INTEREST OF AMICI.....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....6

I. The SEC Failed to Assess the Economic Effects of the Conflict Minerals Rule. .....6

II. The SEC's Failure to Assess the Economic Effects of the Conflict Minerals Rule Will Have Broad Consequences Throughout the U.S. Economy. .....10

A. Background For Case Studies 1-3 – Use of Metal Catalysts and Manufacturing Additives. .....11

1. Case Study 1: Use of Tin Catalysts to Chemically React With and Aid in the Production of Other Products. .....14

2. Case Study 2: Widespread Use of Metals in the Production of Plastic Resins and Other Chemical Products. .....17

3. Case Study 3: Additional Supply Chain Issues Involving Packaging Made From Catalysts and Additives .....20

B. Case Study 4: Imposition of Reporting Requirements on Non-Manufacturers .....22

CONCLUSION.....26

CERTIFICATE OF COMPLIANCE.....28

CERTIFICATE OF SERVICE .....29

ADDENDUM PURSUANT TO FED. R. APP. 28 AND CIRCUIT RULE 28(a)(7).....30

# TABLE OF AUTHORITIES

**Page(s)**

**CASES**

* *American Equity Investment Life Ins. Co. v. SEC*,
613 F.3d 166 (D.C. Cir. 2010).....4, 6

* *Business Roundtable v. SEC*,
647 F.3d 1144 (D.C. Cir. 2011).....3. 6, 7, 10, 26

* *Chamber of Commerce of the United States of America v. SEC*,
412 F.3d 133 (D.C. Cir. 2005).....6, 8, 9

*Motor Vehicle Manufacturers Assn. v. State Farm Auto. Ins. Co.*,
463 U.S. 29 (1983).....23

*Public Citizen v. Federal Motor Carrier Safety Admin.*,
374 F.3d 1209 (D.C. Cir. 2004).....8

**STATUTES**

15 U.S.C. § 78c(f).....1, 7

15 U.S.C. § 78m(p)(2)(B).....22

15 U.S.C. § 78w(a)(2).....1

15 U.S.C. § 80a-2(c).....1, 7

**OTHER AUTHORITIES**

17 C.F.R. § 240.13p-1.....1

40 C.F.R. § 370.14(c).....14

*Conflict Minerals Rule*, 77 Fed. Reg. 56,274, 56342
(Sept. 12, 2012)..... 1, 5, 7, 8, 9, 13, 22, 23, 25, 26

Authorities upon which we chiefly rely are marked with asterisks

## INTEREST OF AMICI

*Amici curiae* American Coatings Association, American Chemistry Council, Can Manufacturers Institute, Consumer Specialty Products Association, National Retail Federation, Precision Machined Products Association, and The Society of the Plastics Industry respectfully submit this *amici curiae* brief in support of the Petitioners, on behalf of themselves and their membership, to advise the Court of the broad scope of markets that will suffer arbitrary and capricious consequences from the United States Securities and Exchange Commission's ("SEC's") decisions in drafting its Conflicts Minerals rule, 77 Fed. Reg. 56,274 (Sept. 12, 2012), codified at 17 C.F.R. § 240.13p-1.[1]

Each of the members of the *amici curiae* coalition reiterates its support for efforts to end the humanitarian crisis in and around the Democratic Republic of the Congo and the intent of the legislation that authorized the SEC rule. As set forth herein, however, in drafting particular provisions in the rule governing, *e.g.*, *de minimis* uses of conflict mineral derivatives and retail sales of contract-to-manufacture goods, the SEC failed to apprise itself of the economic consequences of its action, either with respect to U.S. industry or the situation in the Congo. The SEC rule accordingly violates 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c) and should

[1] No entities other than the identified *amici curiae* have contributed to the funding of this amicus brief, which was drafted by counsel for *amici* identified herein. All of the parties in this matter have consented to the filing of this brief.

be sent back to the SEC for revised rulemaking conducted in accordance with the SEC's statutory obligations.

The following associations join this brief:

The American Coatings Association, Inc. ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. *See* ACA's website, http://www.paint.org.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a $760 billion enterprise and a key element of the nation's economy. *See* ACC's website, http://www.americanchemistry.com.

The Can Manufacturers Institute ("CMI") is the national trade association of the metal can manufacturing industry and its suppliers in the United States. *See* CMI's website, http://www.cancentral.com.

The Consumer Specialty Products Association ("CSPA") is the premier trade association representing the interests of companies engaged in the manufacture, formulation, distribution and sale of consumer disinfectants, pest management products for home, garden and pets, cleaning products and polishes for use throughout the home and institutions, and aerosol products. *See* CSPA website, http://www.cspa.org.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide, including department stores, specialty, apparel, discount, online, independent, grocery and chain restaurants, among others. *See* NRF's website, http://www.nrf.com.

The Precision Machined Products Association ("PMPA") is an international trade association representing the interests of the precision machined products industry. *See* PMPA's website, http://www.pmpa.org.

The Society of the Plastics Industry, Inc. ("SPI") is the trade association representing the third largest manufacturing industry in the United States. The U.S. plastics industry provides more than $380 billion in annual shipments around the world. *See* SPI's website, http://www.plasticsindustry.org.

## SUMMARY OF ARGUMENT

In drafting its final rule implementing the Conflict Minerals provision (Section 1502) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), the SEC had a "statutory obligation to determine as best as it can the economic implications of the rule." *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011). As this Court has repeatedly explained, "the Commission has a unique obligation to consider the effect of the new rule upon 'efficiency, competition, and capital formation' ... and its failure to 'apprise itself – and hence the public and the Congress - of the economic consequences of a

proposed regulation' makes promulgation of the rule arbitrary and capricious and not in accordance with law." *Id.* (citing cases); *see also American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 176-79 (D.C. Cir. 2010).

By its own admission, the SEC has failed to fulfill this statutory obligation. The Commission acknowledged that it did not conduct any analysis of the specific costs or benefits of the numerous decisions made by the Commission in determining which products and markets would be within the scope of the SEC Rule's due diligence and reporting requirements. In its discussions of the "benefits and costs resulting from the Commission's exercise of discretion" the Commission instead stated: "We are unable to quantify the impact of each of the decisions we discuss below with any precision because reliable, empirical evidence regarding the effects is not readily available to the Commission, and commentators did not provide sufficient information to allow us to do so." Conflict Minerals Rule, 77 Fed. Reg. 56,274, 56342 (Sept. 12, 2012).

The SEC's failure to conduct these necessary analyses has resulted in a final rule that imposes a broad array of impracticable obligations and onerous costs throughout the U.S. economy, without any showing that the imposed requirements will further Congress' humanitarian objectives in the Congo. Thus, while Congress focused its attention on the intentional use of metals derived from

conflict minerals in computers, telephones, and jewelry,[2] the SEC Rule would broadly sweep in incidental, *de minimis* uses of the metals in such seemingly unrelated markets as house paints, food wrappers, toothpaste, and diapers, as well as packaging materials used for a broad spectrum of products marketed across the United States. The arbitrary and capricious nature of the SEC action is amply demonstrated by the untoward, real-world impacts that the SEC's unexamined, discretionary decisions would impose on *amici* member companies.

By failing to adopt a sensible *de minimis* exception, the SEC rule imposes wholly unreasonable and burdensome requirements on manufacturers who do not make significant use of conflict minerals in their products, but whose products may (or may not) contain trace elements of such minerals (which most often will not originate in the Congo) as a result of manufacturing processes (*e.g.*, the use of catalysts) employed by third party suppliers of ingredient materials at one stage, or more, in long upstream supply chains. In addition, by failing to adequately define what it means to be a "derivative" of a conflict mineral, the SEC rule arguably imposes reporting requirements for the presence of metals in forms chemically

[2] *See* Letter from Senators Barbara Boxer, John Boozman, Christopher A. Coons, Patrick J. Leahy, Frank J. Leahy, Frank R. Lautenberg, and Jeff Merkley (Oct. 18, 2011) ("The purpose of Sec. 1502 is to create transparency and accountability in the mineral supply chain in the DRC. Minerals from the DRC – which include tin, tantalum, tungsten and gold – are commonly used in products such as cell phones, laptops and jewelry."), *cited at* 77 Fed. Reg. 56285, note 77.

distinct from the base metals at issue in the underlying statute, thus dramatically expanding the economic scope of the SEC Rule to markets with only the most tenuous connection to mining activities in the Congo. And by requiring retailers to report on the use of conflict minerals in products that the retailer obtains by contract with third party manufacturers, the SEC broadly swept in an entirely new sector of the economy that is not included, and was never intended to be included, in the Congressional directive.

None of these requirements is specified in or mandated by the Conflict Minerals provision of the Dodd-Frank Act. None of these requirements were analyzed by the SEC for their impact on efficiency, competition and capital formation. And none of these requirements has been shown to be necessary or effective in advancing humanitarian goals in the Congo. The SEC Rule is arbitrary and capricious, and it should be set aside.

## ARGUMENT

### I. The SEC Failed to Assess the Economic Effects of the Conflict Minerals Rule.

This Court has repeatedly cautioned the SEC that it will be held to have acted arbitrarily and capriciously if it fails to adequately assess the economic effects of a new rule. *See Business Roundtable*, 647 F.3d at 1148; *American Equity Inv. Life Ins. Co.*, 613 F.3d at 167-68; *Chamber of Commerce of the United States of America v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005). In determining

whether an SEC rule may stand, this Court "must assure [itself] the agency has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made.'" *Business Roundtable*, 647 F.3d at 1148. If the Commission "fail[s] adequately to consider the rule's effect upon efficiency, competition, and capital formation, as required by Section 3(f) of the Exchange Act and Section 2(c) of the Investment Company Act of 1940, codified at 15 U.S.C. §§ 78c(f) and 80a-2(c), respectively," the rule will be set aside. *Id.* at 1146.

*Amici* appreciate that the Conflict Minerals Rule is an attempt to achieve social benefits by reducing the amount of money provided to armed groups engaged in human rights abuses rather than the economic or investor protection benefits that are the typical goal of most SEC actions. Contrary to the SEC's assertion, however,[3] the different nature of the intended benefit does not make the Conflict Minerals Rule any less amenable to economic analysis. For example, the Commission could have analyzed the market for conflict minerals mined by the armed groups in the Congo and considered the extent to which specific decisions in

[3] *See* 77 Fed. Reg. at 56,335 (contending that the Commission was "unable to readily quantify with any precision" the social benefits of the rule "because we do not have the data to quantify the benefits and because we are not able to assess how effective Section 1502 will be in achieving those benefits").

its rulemaking, *e.g.*, including the rejection of a *de minimis* exception, would impact those markets or the armed groups' potential revenues.

Certainly, an SEC requirement that imposes substantial costs on industry to identify and track down trace amounts of a mineral derivative that would provide, at most, only a negligible source of revenue in the Congo should be analyzed differently than an intentional use of substantial amounts of a conflict mineral in a large-scale manufacturing operation. There is no indication, however, that the SEC undertook any such economic analyses in its rulemaking process. To the contrary, the Commission acknowledged that it did "not attempt[] to quantify the benefits of the final rule." 77 Fed. Reg. 56,350. This acknowledgement confirms the flawed nature of the Commission's rule making process. *See Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1222 (D.C. Cir. 2004) (vacating FMCSA rule where agency had "not attempted to estimate … benefits").

Moreover, while the Court has recognized in other contexts that the SEC may have difficulty in quantifying exact costs associated with certain of its rulemaking, that "does not excuse the Commission from its statutory obligation to determine as best it can the economic implications of the rule it has proposed." *Chamber of Commerce*, 412 F.3d at 143. "[U]ncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself – and hence the public and Congress –

of the economic consequences of a proposed regulation before it decides whether to adopt the measure." *Id.* at 144.

Nor can the SEC rely on the statutory provisions of the Dodd-Frank Act to avoid its economic analysis obligations. To be sure, the Conflict Minerals provisions of the Dodd-Frank Act require that the SEC enact certain new disclosure and reporting obligations concerning conflict minerals that originated in the Congo. And those obligations will necessarily impose certain costs on affected issuers. But the statute places discretion with the SEC in determining the appropriate scope and nature of those requirements and which issuers should be included within its provisions. As the SEC readily admitted in its rulemaking, each of these discretionary decisions carries its own costs and benefits. *See* 77 Fed. Reg. 56,342 ("In addition to the statutory benefits and costs noted above, we believe that the use of our discretion in implementing the statutory requirements will result in a number of benefits and costs to issuers and users of the conflict minerals information.").

However, rather than properly analyzing these costs and benefits, as it is obligated to do under the Exchange Act and Investment Company Act of 1940, the SEC essentially threw up its hands:

> Below, we discuss the most significant choices we made in implementing the statute and the associated benefits and costs. We are unable to quantify the impact of each of the decisions we discuss below with any precision

> because reliable, empirical evidence regarding the effects is not readily available to the Commission, and commentators did not provide sufficient information to allow us to do so.

*Id.* "By ducking serious evaluation of the costs that could be imposed upon companies" by its numerous decisions in drafting up the Conflict Minerals Rule, "the Commission acted arbitrarily." *Business Roundtable*, 647 F.3d at 1152. In the next section of this brief, *amici* set forth some case study illustrations of the consequences of the SEC's arbitrary and capricious action.

## II. The SEC's Failure to Assess the Economic Effects of the Conflict Minerals Rule Will Have Broad Consequences Throughout the U.S. Economy.

In exercising its decision-making power, the SEC has imposed a variety of disclosure and reporting requirements regarding conflict minerals without any reasoned consideration of their economic costs and benefits or their effects on efficiency, competition and capital formation. Many of these requirements stem from agency determinations – such as the election not to include a *de minimis* exception and the expansion of the statutory language to impose disclosure and reporting requirements on certain non-manufacturing issuers – that were not required by Congress and that the Commission expressly acknowledged were made without any meaningful assessment of their economic consequences. As illustrated below, the SEC's failure to properly apprise itself of the economic implications of these decisions has resulted in a final rule that imposes undue

burdens and costs on broad swaths of the U.S. economy without any showing of corresponding social benefits.

A. Background For Case Studies 1-3 – Use of Metal Catalysts and Manufacturing Additives.

One of the concerns raised by the SEC rule involves metals covered by the disclosure and reporting requirements that may be used in manufacturing processes far up the supply chain. These metals serve a number of distinct roles.

In some cases, the metal acts as a catalyst, in which it facilitates chemical reactions that are necessary to create a desired product (*e.g.*, a plastic article or coating that is eventually incorporated into a consumer good). The catalyst is added during the manufacturing process and does not have an on-going technical effect in the final product. With some types of manufacturing processes, the catalyst may be washed away during the process so that it can be reclaimed, reprocessed and reused. In other types of manufacturing processes, however, trace amounts of a metal might remain in the product. The residual metal's presence would not be intentional, and there is no meaningful distinction in the action of a catalyst based on whether it is or is not completely washed away.

In other cases, a metal may serve as a manufacturing additive to enhance the performance characteristics of the product (*e.g.*, to stabilize a resin when it is molded at high temperatures). Here as well, only small amounts of the metal-based additive would be present in the product, which would not relate in most

instances to the technical use or operation of the product, but would remain due to the nature of the manufacture or processing of the material.

In all of these cases, the burden of the rule is the scope of the investigation that will be required to establish the presence or absence of a conflict mineral. The rule would require a time-consuming and expensive investigation of a company's products, which in some cases would number in the thousands, to determine whether one of the four metals could be present, even at minute levels, in some minor component of a finished product. Indeed, regardless of whether a metal is used as a catalyst or manufacturing additive, these substances are used in extremely low amounts, often in the parts per million ("ppm") range or, for some uses, parts per billion ("ppb"). To put that into perspective, 1 ppm is equivalent to one drop in two bath tubs full of water, while 1 ppb is the same as one drop in an Olympic-sized swimming pool. The application of these metals does not resemble at all the metal products that usually come to mind when discussing the conflict minerals issue, such as a metal computer part or a gold necklace. However, in the absence of a *de minimis* exception, the continued presence of these metals in residual amounts vastly expands the SEC rule's reach.

This is nowhere more evident than in the SEC's treatment of catalysts. During the rulemaking process, the SEC received numerous comments addressing the use of conflict minerals in the production of catalysts used in a wide range of

products, from solvents to fuels to polymers.[4] In its final rulemaking, the SEC determined that the use of such metallic catalysts would not trigger disclosure and reporting requirements if the catalyst was completely washed away in the production process and thus not contained in the product. The Commission explained that the "use of [a conflict mineral] as a catalyst in producing products which do not in themselves contain [the conflict mineral] will broaden the reach of the regulations beyond what Section 1502 [of the Dodd-Frank Act] envisaged." 77 Fed. Reg. 56,297; *see also id.*, 56,296 ("we appreciate commentators' concerns that the application of the provision to minerals that do not end up in the product is especially challenging"). However, the SEC determined that the same use of a conflict mineral as a catalyst would trigger disclosure and reporting requirements if any trace amounts of the catalyst remained in the reacted product. *Id.* In making this distinction, the Commission appears to have been guided by the assumption that manufacturers would be able to identify and source such trace remains of catalysts and, accordingly, would not be required to perform the practically impossible task of determining, *e.g.*, "whether his supplier's supplier's supplier used and washed away a conflict mineral." 77 Fed. Reg. 56,294.

It does not appear that the Commission undertook any analysis to test this assumption, however, and the assumption is false. Indeed, as the following case

[4] *See* 77 Fed. Reg. at 56,296 and note 238; *id.* at 56,297 and note 236.

studies show, the SEC's failure to adopt a *de minimis* exception for these metals – whether used as catalysts, additives, or both – substantially increases the costs and scope of the Conflict Minerals Rule.

1. Case Study 1: Use of Tin Catalysts to Chemically React With and Aid in the Production of Other Products.

Consider the situation that confronts a typical coatings manufacturer under the SEC rule. *See generally* Pet's. Br., ADD-113. In producing a given paint, coating, or sealant, the manufacturer may use a variety of materials, such as polymers, which in turn may use a potential conflict mineral, such as a tin catalyst, in their own manufacturing processes. However, the coatings manufacturer has no meaningful way to determine whether the catalysts were washed away in the production process or remain in trace amounts. Coatings manufacturers generally rely on Material Safety Data Sheets ("MSDS") to identify the ingredients in such materials, but MSDS reporting requirements include *de minimis* triggers (*e.g.*, one percent for hazardous substances, *see* 40 C.F.R. § 370.14(c)) that far exceed any potential trace remains of a catalyst. While extensive and costly laboratory testing, such as atomic absorption analysis, could theoretically be used to identify trace amounts of tin in a product, making such testing part of the normal coatings manufacturing process would be prohibitively expensive and would, in any event, be unable to show whether the tin is in a form even covered by the rule – for example, how or when the tin was introduced into the product (*e.g.*, as a catalyst, a

contaminant, or a naturally-occurring element in other mined materials used in the product) or from where the tin was mined. Accordingly, the SEC Rule could be read to require the coatings manufacturer to go down the very same supplier-to-supplier-to-supplier audit trail for the use of catalysts that the Commission recognized was beyond the scope of the Congressional statute.

The task facing our hypothetical coatings manufacturer would be monumental. For any given paint, coating or sealant, a manufacturer might use a half-dozen or more materials which may have employed catalysts in the production process. The manufacturer will often have at least two approved suppliers for each of these materials (to ensure a secure supply chain and competitive pricing), some of whom might be distributors who do not manufacture the material themselves but obtain it from yet another party. The original manufacturers of these materials, themselves, may, in turn, make their products from other materials that were produced with catalysts, adding yet another link in the supply chain. And each of these suppliers and suppliers' suppliers may have limited knowledge of whether trace amounts of catalysts remain in their products (which again could be at ppm levels, well below any MSDS reporting threshold), and may have obtained

catalysts for their production processes from a variety of different suppliers (including intermediary distributors and catalyst manufacturers).[5]

While the catalyst manufacturers would know which metals, including tin, are used in their product, the sources of the tin (distributors or smelters) would be considered confidential business information, and accordingly not readily available. Moreover, the catalyst manufacturers may not have any first hand knowledge of the original mining source of the tin metal (only 1.5% of the world's tin is now mined in the Congo[6]), and would thus need to inquire with the smelters (or intermediary distributors). Complicating matters further, this auditing process would need to be continually repeated and updated because coatings manufacturers will often contract with new suppliers based upon pricing considerations and will

[5] To cite a specific example, polyurethane sealants are generally formulated from a mixture of a polyurethane pre-polymer, plasticizers, fillers, pigments, polyvinyl chloride ("PVC") powder, and additives. In addition to being used in the formulation of the final sealant product itself, tin catalysts may be used in the production of the polyurethane pre-polymer, the plasticizers, the PVC powder, and many of the additives. Moreover, the pre-polymer is produced through a reaction of polyol and isocyanate, each of which also may by manufactured with the use of a tin catalyst. In addition, the fillers and pigments will often contain mined materials such as calcium carbonate, china clay, or iron oxide, which may contain tin as a naturally occurring element.

[6] *See* Reuters, *Congo miners pin hopes on distance from rebel push* (Nov. 23, 2012), available at http://www.reuters.com/article/2012/11/23/us-congo-democratic-mining-idUSBRE8AM0N920121123.

frequently reformulate their products due to changes in raw material availability and product improvement.

The costs and burdens imposed by this auditing requirement are not limited to the audit process itself. Before a paint manufacturer, for example, can market a given formulation of a paint product, it needs to distribute the formulation to potential end-users so that they can assess the suitability of the paint for particular uses. For each new formulation, however, the paint manufacturer may need to hold off until they have completed a new audit for potential trace amounts of catalyst-derived conflict minerals. This requirement could add weeks or months of lead time to the marketing of new paint formulations, with significant adverse effects on the paint manufacturer's competiveness and ability to move quickly into new markets.

None of these economic factors was considered by the SEC.

2. Case Study 2: Widespread Use of Metals in the Production of Plastic Resins and Other Chemical Products.

Metals also are used as catalysts and additives to produce plastic resins and other chemicals that are components of countless downstream products. Resins are created by taking smaller, identical chemical molecules (called monomers) and linking them repeatedly to form larger molecules (called polymers). Catalysts help with these chemical reactions, while other additives may be necessary for the production and processing of the resin. These resins are then used to produce raw

materials like polyurethanes, vinyls, and polyesters that are seen in everyday items from plastic wrap to DVDs. Similarly, with respect to chemical intermediates, trace levels of metals facilitate necessary chemical reactions and give chemicals such as antimicrobials their active properties.

If the residual metals found in these raw materials are subject to the reporting requirements, the SEC rule could touch virtually every corner of the U.S. consumer market. In 2011, for example, the plastics industry generated $380 billion in shipments. *See* Society of the Plastics Industry, Size and Impact of the Plastics Industry on the U.S. Economy at S-3 (2012), available at http://www.plasticsindustry.org/AboutPlastics/content.cfm?ItemNumber=8251. That number jumps to $465 billion when upstream suppliers are included. *Id.* Just one industry group within the plastics industry – known as the plastic products sector (NAICS code 3261) – which processes resins into intermediate or final products (*e.g.*, molds) was the seventh largest U.S. manufacturing industry in 2010 in terms of shipments. *Id.* Moreover, the 240 company members of *amicus* CPSA, who are engaged in the manufacturing of selected end use consumer products (*e.g.*, antimicrobials, cleaning products, air fresheners, soap detergents, lubricants), have annual sales of over $80 billion in the U.S. *See* CPSA website at http://www.cspa.org/about-us/we-are-mission.html.

While not every plastic or chemical intermediate will contain a conflict mineral, a mere sampling of downstream products illustrates the potential breadth of the SEC rule in the absence of a *de minimis* exception. These products include housewares, lubricants, sealants, medical devices, food and drug packaging, printing inks, footwear, adhesives, films, blood bags, pipe, siding, flooring, windows, personal clothing, draperies, insulation, durable fibers, pesticides, cleaning products, and automobile parts.

Companies that make the raw materials for these finished products could face tremendous regulatory burdens similar to those seen in our hypothetical coatings manufacturer. Take, for example, a polyvinyl chloride ("PVC") producer. Looking upstream, the manufacturer could have to investigate the companies that are supplying the catalysts and additives used to make the PVC. Even for a single PVC manufacturer, this could involve not only multiple suppliers, but also a number of intermediaries. Moving downstream, the PVC manufacturer could receive numerous inquiries from companies who use the raw material, including converters who transform the bulk PVC into usable form (*e.g.*, piping), the finished product manufacturers, and, once again, any intermediaries involved in those parts of the supply chain. And this example does not even include the mining companies, traders, exporters, and smelters and refiners who sell and distribute the raw metal in the first place.

### 3. Case Study 3: Additional Supply Chain Issues Involving Packaging Made From Catalysts and Additives

As demonstrated by the previous case studies, the fact that catalysts and additives are used early in the manufacturing process means that multiple companies throughout the supply chain will need to determine whether their products do, or do not, contain a conflict mineral. Even if the manufacturer finds that there are no conflict minerals present, reaching that conclusion without a *de minimis* level exception will necessitate extensive supply chain inquiries.

This problem is further amplified because the SEC rule also could be read to include a product's packaging. Thus, products that would clearly fall outside the scope of the rule – such as food, beverages, or wooden children's toys – now may be considered because packaging is necessary to bring them to market. As a result, yet more levels of investigation are brought into the mix, targeted to materials that, at most, contain catalysts or additives in ppm levels and thus are not likely to affect trade in conflict minerals. To illustrate this point, we provide several examples from the world of food packaging.

Our first example involves a food company who markets potato chips in plastic packaging, such as the typical plastic bag seen in the grocery store or vending machine. The plastic bag actually is a multi-layer film, comprised of different layers, each of which may be bound together with an adhesive. Each layer is composed of a different type of plastic. Each plastic layer is made with a

resin and a variety of additives that give the plastic its technical properties, such as providing structural integrity and preserving freshness. Each resin itself is manufactured using a number of additives. Furthermore, each adhesive is a product manufactured with a resin and additives. What the film layers, adhesives, resins, and the additives are made of is all confidential trade secret information, which is stringently protected by the companies.

Despite the extremely low use levels, the SEC rule would require the food company to conduct a country-of-origin inquiry regarding components of its supplier's plastic bag that may or may not contain conflict minerals. Because the SEC has determined that the use of a conflict mineral necessary to the manufacture of an upstream product is necessary to every downstream good manufactured using that product, the resin producer that makes the bulk pellets, the manufacturer who transforms the pellets into a film, the manufacturer of the adhesives, the manufacturer that prints and sells the bag to the food company, and the food company itself, will all need to conduct a supply chain investigation and, for the SEC filers, submit a report.

Our second example involves a food manufacturer who markets a canned food item, such as soup or canned vegetables. The supply chain for these products typically involves: a supplier who provides cans to the food company that have an internal protective coating; a coatings manufacturer who works with the can

supplier; and, because a typical food coating may have numerous components, the manufacturers of those components who supply the coatings company.

Food companies use many different coatings based on the type of food that will be packaged in the can, the size of the can, and the anticipated temperatures that the can will experience during processing to preserve its contents. Accordingly, inquiries must be made to the suppliers of those materials as well, and any of their suppliers. Indeed, the variety of coatings necessary for many types of food (*e.g.*, fruits and vegetables, meats and fish, soda and beer, and infant formula) will require extensive investigation by the food company. The SEC did not anticipate that this type of product would be brought within the scope of the conflict minerals reporting requirement and, unintentionally, has placed a tremendous burden on industry with little benefit to the humanitarian goals of the Conflict Minerals Rule.

### B. Case Study 4: Imposition of Reporting Requirements on Non-Manufacturers

Section 1502 of the Dodd-Frank Act imposes reporting requirements only on issuers that themselves manufacture products containing conflict minerals. *See* 15 U.S.C. § 78m(p)(2)(B) (issuers subject to reporting requirements only if "conflict minerals are necessary to the functionality or production of a product *manufactured by such person*") (emphasis added); *see also* 77 Fed. Reg. 56,291 (acknowledging commentators' assertion that "the statute does not include an

issuer that contracts to manufacture its products and that the sole intent behind including the phrase in the provision was to keep manufacturers from intentionally evading reporting requirements by contracting the manufacturing of their products to third parties").

Nonetheless, in constructing its Conflict Minerals Rule, the Commission expanded the scope of the statutory reporting requirement beyond the definition Congress drafted. In so doing, it swept in a broad group of non-manufacturing issuers, including retailers, who enter into contracts with third parties to manufacture products for sale by the issuer, even if the issuer does not specify the use of conflict minerals in such products or, indeed, have any knowledge whether conflict minerals would be contained in, or necessary to the functionality or production of the product in the ordinary course. *See* 77 Fed. Reg. 56,292 (rejecting suggestion that rule would apply "only to issuers that explicitly specify that conflict minerals be included in their products"). The Commission's departure from the plain language and intent of the Congressional statute is arbitrary and capricious. *See Motor Vehicle Mfrs. Assn. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider …").

The Commission's extension of the Conflict Minerals Rule to non-manufacturing retailers ignores the different position that retailers hold with

respect to products they contract to sell. Unlike many manufacturers, retailers sell a diverse array of wholly unrelated products, in some cases tens of thousands of separate product stock keeping units ("SKUs"). Retailers sometimes re-label products in order to offer a distinguishable or more favorably-priced good, which in the retail industry are known as private-label goods. For general merchandise retailers, such goods may constitute scores or even hundreds of items among the many thousands of individual products available for sale in a large store.[7]

Moreover, retail issuers inherently have less knowledge about the manufacturing process than those who actually manufacture the products. While the Conflict Minerals Rule provides that an issuer must exercise some degree of influence over the manufacture of the contracted product, it clearly encompasses arrangements in which the issuer will not have any direct knowledge of or involvement in the manufacturing process. As the SEC cautions:

> [A]n issuer with generic products that include its brand name or a separate brand name and that has involvement

[7] As an example of this practice, a general merchandise retailer may sell Chino trousers manufactured by several apparel brand companies. It may decide to request the manufacturers also put the retailer's brand on certain trousers and specify the cloth, cut, and color. Under no reasonable interpretation should that action convert the retailer into a manufacturer of trousers. Indeed, in this scenario, the retailer may have made no specifications or have any knowledge as to the zipper or any snaps that were included by the manufacturer that may contain minute quantities of tin. Yet, the SEC rule would treat this retailer as a manufacturer.

> in the product's manufacture beyond only including such brand name would need to consider all of the facts and circumstances in determining whether its influence reaches such a degree so as to be considered contracting to manufacture that product.

77 Fed. Reg. 56,292. This challenge is compounded by the lack of any *de minimis* exception and the ramifications of that separate SEC decision (as highlighted in the examples above). Further, one of the SEC Rule's enforcement mechanism – shareholder lawsuits – allows other individuals to second-guess good faith determinations made by retailers attempting to comply with the Rule's vaguely-defined standard, dramatically increasing the potential financial impact on retailers who previously could have no basis to believe that their sale of private-label goods would somehow transform them in the SEC's eyes into product manufacturers.

The potential economic impact of the Commission's "contract to manufacture" decision is dramatic. In 2011, retail trade constituted 6.1% of U.S. GDP. *See* U.S. Department of Commerce, Bureau of Economic Analysis, *Annual Industry Accounts: Advance Statistics on GDP by Industry for 2011*, at 12 (May 2012), *available at* http://www.bea.gov/scb/pdf/2012/05%20May/0512_industry.pdf. Each publicly-held issuer in the retail trade sector will need to review its complete private label product line to identify all products that could fall within the scope of the Commission's excessively broad interpretation of reporting requirements. And the

further separation between such retailers and the manufacturing process will make each individual product review that much more onerous.

The Commission, by its own admission, undertook no economic analysis of the impact of its decision to include those who only "contract to manufacture" within the scope of issuers covered by the rulemaking. *See* 77 Fed. Reg. 56,342, 56345-46. It made no effort to determine the number of non-manufacturing entities that would be captured by its decision, nor did it make any assessment of the unique burdens that the reporting requirements would impose on retailers with broad product lines and no direct knowledge of manufacturing processes at issue. The Commission also failed to assess the extent to which imposing reporting requirements on non-manufacturing issuers would simply replicate information that was already being filed with the SEC by the manufacturers that actually make the finished products. The SEC's failure to "apprise itself of the economic consequences" of its contract to manufacture reporting provision highlights, yet again, the arbitrary and capricious nature of its Conflict Minerals Rulemaking process. *Business Roundtable*, 647 F.3d at 1148.

## CONCLUSION

For the reasons set forth herein, *amici curiae* urge the Court to grant the Petition and set aside the Conflict Minerals Rule.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief contains 6,520 words and therefore satisfies the type-volume limitation of Fed. R. App. P. 29(d).

This amici brief has been joined by all of the industry groups supporting the Petitioners. I have been advised that there is a separate amici brief being submitted in support of Petitioners by a number of professors addressing conditions in the Republic of Congo. The issues addressed in this other amici brief are materially distinct from those addressed herein and, accordingly, consolidation of the two briefs is not feasible.

s/ Eric G. Lasker
Eric G. Lasker

**CERTIFICATE OF SERVICE**

I hereby verify that on this 23rd day of January, 2013, I electronically filed the foregoing notice of intent to file amici brief with the Clerk on the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Pursuant to D.C. Circuit Rules 25 and 31, and the Court's Orders of November 27, 2012, five (5) paper copies of the foregoing brief and accompanying addenda will be hand delivered to the Clerk of the Court

s/ Eric G. Lasker
Eric G. Lasker

**ADDENDUM PURSUANT TO FED. R. APP. 28 AND CIRCUIT RULE 28(a)(7)**

Except for the following, all applicable statutes and regulations are contained in the Brief for the Petitioners:

15 U.S.C. § 78c(f) ..... A1

15 U.S.C. § 78w(a)(2) ..... A3

15 U.S.C. § 80a-2(c) ..... A5

40 C.F.R. § 370.14(c) ..... A7

# 15 U.S.C. § 78c(f)

pany or a company controlled by the parent company, if none of the securities issued by the finance subsidiary are held by an entity that is not controlled by the parent company.

**(b) Power to define technical, trade, accounting, and other terms**

The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this chapter, consistently with the provisions and purposes of this chapter.

**(c) Application to governmental departments or agencies**

No provision of this chapter shall apply to, or be deemed to include, any executive department or independent establishment of the United States, or any lending agency which is wholly owned, directly or indirectly, by the United States, or any officer, agent, or employee of any such department, establishment, or agency, acting in the course of his official duty as such, unless such provision makes specific reference to such department, establishment, or agency.

**(d) Issuers of municipal securities**

No issuer of municipal securities or officer or employee thereof acting in the course of his official duties as such shall be deemed to be a ''broker'', ''dealer'', or ''municipal securities dealer'' solely by reason of buying, selling, or effecting transactions in the issuer's securities.

**(e) Charitable organizations**

**(1) Exemption**

Notwithstanding any other provision of this chapter, but subject to paragraph (2) of this subsection, a charitable organization, as defined in section 3(c)(10)(D) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(D)], or any trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organization, shall not be deemed to be a ''broker'', ''dealer'', ''municipal securities broker'', ''municipal securities dealer'', ''government securities broker'', or ''government securities dealer'' for purposes of this chapter solely because such organization or person buys, holds, sells, or trades in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of or for the account of—

(A) such a charitable organization;

(B) a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)]; or

(C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)], or the settlors (or potential settlors) or beneficiaries of any such trust or other instrument.

**(2) Limitation on compensation**

The exemption provided under paragraph (1) shall not be available to any charitable organization, or any trustee, director, officer, employee, or volunteer of such a charitable organization, unless each person who, on or after 90 days after December 8, 1995, solicits donations on behalf of such charitable organization from any donor to a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(10)(B)], is either a volunteer or is engaged in the overall fund raising activities of a charitable organization and receives no commission or other special compensation based on the number or the value of donations collected for the fund.

**(f) Consideration of promotion of efficiency, competition, and capital formation**

Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

**(g) Church plans**

No church plan described in section 414(e) of title 26, no person or entity eligible to establish and maintain such a plan under title 26, no company or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(14)], and no trustee, director, officer or employee of or volunteer for such plan, company, account, person, or entity, acting within the scope of that person's employment or activities with respect to such plan, shall be deemed to be a ''broker'', ''dealer'', ''municipal securities broker'', ''municipal securities dealer'', ''government securities broker'', ''government securities dealer'', ''clearing agency'', or ''transfer agent'' for purposes of this chapter—

(1) solely because such plan, company, person, or entity buys, holds, sells, trades in, or transfers securities or acts as an intermediary in making payments in connection with transactions in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of, or for the account of, any church plan, company, or account that is excluded from the definition of an investment company under section 3(c)(14) of the Investment Company Act of 1940 [15 U.S.C. 80a–3(c)(14)]; and

(2) if no such person or entity receives a commission or other transaction-related sales compensation in connection with any activities conducted in reliance on the exemption provided by this subsection.

(June 6, 1934, ch. 404, title I, § 3, 48 Stat. 882; Aug. 23, 1935, ch. 614, § 203(a), 49 Stat. 704; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Pub. L. 86–70, § 12(b), June 25, 1959, 73 Stat. 143; Pub. L. 86–624, § 7(b), July 12, 1960, 74 Stat. 412; Pub. L. 88–467, § 2, Aug. 20, 1964, 78 Stat. 565; Pub. L. 91–373, title IV, § 401(b), Aug. 10, 1970, 84 Stat. 718; Pub. L. 91–547, § 28(a), (b), Dec. 14, 1970, 84 Stat. 1435; Pub. L. 91–567, § 6(b), Dec. 22, 1970, 84

15 U.S.C. § 78w(a)(2)

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO
USCA Case #12-1422 Document #1416911 Filed: 01/23/2013 Page 40 of 45



Section 922(a), referred to in subsec. (d), means section 922(a) of Pub. L. 111–203.

CODIFICATION

Section was enacted as part of the Investor Protection and Securities Reform Act of 2010, and also as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and not as part of the Securities Exchange Act of 1934 which comprises this chapter.

EFFECTIVE DATE

Section effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111–203, set out as a note under section 5301 of Title 12, Banks and Banking.

DEFINITIONS

For definitions of "Commission" and "securities laws" as used in this section, see section 5301 of Title 12, Banks and Banking.

### § 78v. Hearings by Commission

Hearings may be public and may be held before the Commission, any member or members thereof, or any officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

(June 6, 1934, ch. 404, title I, § 22, 48 Stat. 901.)

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

### § 78w. Rules, regulations, and orders; annual reports

#### (a) Power to make rules and regulations; considerations; public disclosure

(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof. No provision of this chapter imposing any liability shall apply to any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission, the Board of Governors of the Federal Reserve System, other agency enumerated in section 78c(a)(34) of this title, or any self-regulatory organization, notwithstanding that such rule, regulation, or order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

(2) The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this chapter, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this chapter, the reasons for the Commission's or the Secretary's determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this chapter.

(3) The Commission and the Secretary, in making rules and regulations pursuant to any provision of this chapter, considering any application for registration in accordance with section 78s(a) of this title, or reviewing any proposed rule change of a self-regulatory organization in accordance with section 78s(b) of this title, shall keep in a public file and make available for copying all written statements filed with the Commission and the Secretary and all written communications between the Commission or the Secretary and any person relating to the proposed rule, regulation, application, or proposed rule change: *Provided, however*, That the Commission and the Secretary shall not be required to keep in a public file or make available for copying any such statement or communication which it may withhold from the public in accordance with the provisions of section 552 of title 5.

#### (b) Annual report to Congress

(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 78c(a)(34) of this title shall each make an annual report to the Congress on its work for the preceding year, and shall include in each such report whatever information, data, and recommendations for further legislation it considers advisable with regard to matters within its respective jurisdiction under this chapter.

(2) The appropriate regulatory agency for a self-regulatory organization shall include in its annual report to the Congress for each fiscal year, a summary of its oversight activities under this chapter with respect to such self-regulatory organization, including a description of any examination conducted as part of such activities of any such organization, any material recommendation presented as part of such activities to such organization for changes in its organization or rules, and any action by such organization in response to any such recommendation.

(3) The appropriate regulatory agency for any class of municipal securities dealers shall include in its annual report to the Congress for each fiscal year a summary of its regulatory activities pursuant to this chapter with respect to such municipal securities dealers, including the nature of and reason for any sanction imposed pursuant to this chapter against any such municipal securities dealer.

(4) The Commission shall also include in its annual report to the Congress for each fiscal year—

(A) a summary of the Commission's oversight activities with respect to self-regulatory organizations for which it is not the appropriate regulatory agency, including a descrip-

15 U.S.C. § 80a-2(c)

empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate the participation of its members in activities listed above.

(51)(A) ''Qualified purchaser'' means—

(i) any natural person (including any person who holds a joint, community property, or other similar shared ownership interest in an issuer that is excepted under section 80a–3(c)(7) of this title with that person's qualified purchaser spouse) who owns not less than $5,000,000 in investments, as defined by the Commission;

(ii) any company that owns not less than $5,000,000 in investments and that is owned directly or indirectly by or for 2 or more natural persons who are related as siblings or spouse (including former spouses), or direct lineal descendants by birth or adoption, spouses of such persons, the estates of such persons, or foundations, charitable organizations, or trusts established by or for the benefit of such persons;

(iii) any trust that is not covered by clause (ii) and that was not formed for the specific purpose of acquiring the securities offered, as to which the trustee or other person authorized to make decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a person described in clause (i), (ii), or (iv); or

(iv) any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than $25,000,000 in investments.

(B) The Commission may adopt such rules and regulations applicable to the persons and trusts specified in clauses (i) through (iv) of subparagraph (A) as it determines are necessary or appropriate in the public interest or for the protection of investors.

(C) The term ''qualified purchaser'' does not include a company that, but for the exceptions provided for in paragraph (1) or (7) of section 80a–3(c) of this title, would be an investment company (hereafter in this paragraph referred to as an ''excepted investment company''), unless all beneficial owners of its outstanding securities (other than short-term paper), determined in accordance with section 80a–3(c)(1)(A) of this title, that acquired such securities on or before April 30, 1996 (hereafter in this paragraph referred to as ''pre-amendment beneficial owners''), and all pre-amendment beneficial owners of the outstanding securities (other than short-term paper) of any excepted investment company that, directly or indirectly, owns any outstanding securities of such excepted investment company, have consented to its treatment as a qualified purchaser. Unanimous consent of all trustees, directors, or general partners of a company or trust referred to in clause (ii) or (iii) of subparagraph (A) shall constitute consent for purposes of this subparagraph.

(52) The terms ''security future'' and ''narrow-based security index'' have the same meanings as provided in section 3(a)(55) of the Securities Exchange Act of 1934 [15 U.S.C. 78c(a)(55)].

(53) The term ''credit rating agency'' has the same meaning as in section 3 of the Securities Exchange Act of 1934 [15 U.S.C. 78c].

(54) The terms ''commodity pool'', ''commodity pool operator'', ''commodity trading advisor'', ''major swap participant'', ''swap'', ''swap dealer'', and ''swap execution facility'' have the same meanings as in section 1a of title 7.

**(b) Applicability to government**

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned directly or indirectly by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

**(c) Consideration of promotion of efficiency, competition, and capital formation**

Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is consistent with the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

(Aug. 22, 1940, ch. 686, title I, § 2, 54 Stat. 790; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; Aug. 10, 1954, ch. 667, title IV, § 401, 68 Stat. 688; Pub. L. 86–70, § 12(d), June 25, 1959, 73 Stat. 143; Pub. L. 86–624, § 7(c), July 12, 1960, 74 Stat. 412; Pub. L. 91–547, § 2(a), Dec. 14, 1970, 84 Stat. 1413; Pub. L. 95–598, title III, § 310(a), Nov. 6, 1978, 92 Stat. 2676; Pub. L. 96–477, title I, § 101, Oct. 21, 1980, 94 Stat. 2275; Pub. L. 97–303, § 5, Oct. 13, 1982, 96 Stat. 1409; Pub. L. 100–181, title VI, §§ 601–603, Dec. 4, 1987, 101 Stat. 1260; Pub. L. 101–550, title II, § 206(a), Nov. 15, 1990, 104 Stat. 2720; Pub. L. 104–290, title I, § 106(c), title II, § 209(b), title V, §§ 503, 504, Oct. 11, 1996, 110 Stat. 3425, 3434, 3445; Pub. L. 105–353, title III, § 301(c)(1), Nov. 3, 1998, 112 Stat. 3236; Pub. L. 106–102, title II, §§ 213(a), (b), 215, 216, 223, Nov. 12, 1999, 113 Stat. 1397, 1399, 1401; Pub. L. 106–554, § 1(a)(5) [title II, § 209(a)(1), (3)], Dec. 21, 2000, 114 Stat. 2763, 2763A–435, 2763A–436; Pub. L. 109–291, § 4(b)(2)(A), Sept. 29, 2006, 120 Stat. 1337; Pub. L. 111–203, title VII, § 769, title IX, §§ 985(d)(1), 986(c)(1), July 21, 2010, 124 Stat. 1801, 1934, 1936.)

AMENDMENT OF SECTION

*Unless otherwise provided, amendment by subtitle B (§§ 761–774) of title VII of Pub. L. 111–203 effective on the later of 360 days after July 21, 2010, or, to the extent a provision of subtitle B requires a rulemaking, not less than 60 days after publication of the final rule or*

40 C.F.R. § 370.14(c)

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motor vehicle use on land.), the threshold level is 100,000 gallons (approximately 378,500 liters) (all grades combined). This threshold is only applicable for diesel fuel that was in tank(s) entirely underground and was in compliance at all times during the preceding calendar year with all applicable Underground Storage Tank (UST) requirements at 40 CFR part 280 or requirements of the state UST program approved by the Agency under 40 CFR part 281.

(b) The threshold level for responding to the following requests is zero.

(1) If your LEPC requests that you submit an MSDS for a hazardous chemical for which you have not submitted an MSDS to your LEPC; or

(2) If your LEPC, SERC, or the fire department with jurisdiction over your facility requests that you submit Tier II information.

### § 370.11 [Reserved]

### § 370.12 What hazardous chemicals must I report under this part?

(a) You must report any hazardous chemical for which you are required to prepare or have available an MSDS under OSHA HCS that is present at your facility equal to or above the applicable threshold specified in § 370.10. (Specific exemptions from reporting are in § 370.13.)

(b) The EPA has not issued a list of hazardous chemicals subject to reporting under this part. A substance is a hazardous chemical if it is required to have an MSDS and meets the definition of hazardous chemical under the OSHA regulations found at 29 CFR 1910.1200(c).

### § 370.13 What substances are exempt from these reporting requirements?

You do not have to report substances for which you are not required to have an MSDS under the OSHA regulations, or that are excluded from the definition of hazardous chemical under EPCRA section 311(e). Each of the following substances are excluded under EPCRA section 311(e):

(a) Any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration.

(b) Any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use.

(c) Any substance to the extent it is used:

(1) For personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public. Present in the same form and concentration as a product packaged for distribution and use by the general public means a substance packaged in a similar manner and present in the same concentration as the substance when packaged for use by the general public, whether or not it is intended for distribution to the general public or used for the same purpose as when it is packaged for use by the general public;

(2) In a research laboratory or hospital or other medical facility under the direct supervision of a technically qualified individual; or

(3) In routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.

### § 370.14 How do I report mixtures containing hazardous chemicals?

(a) For a mixture containing a hazardous chemical, use the following table to determine if a reporting threshold is equaled or exceeded, and to determine how to report:

| If your mixture contains a hazardous chemical | To determine if the threshold level for that hazardous chemical is equaled or exceeded you must | If the threshold level for that hazardous chemical is exceeded then you must |
|---|---|---|
| (1) That is an EHS ..... | Determine the total quantity of the EHS present throughout your facility at any one time, by adding together the quantity present as a component in all mixtures and all other quantities of the EHS (you must include the quantity present in a mixture even if you are also counting the quantity of that particular mixture toward the threshold level for that mixture). | Report the EHS component—submit an MSDS for the EHS (or include the EHS on the list of chemicals submitted in lieu of the MSDSs), as provided under §370.30, and submit Tier I (or Tier II) information for the EHS, as provided under §370.40 or report the mixture itself—submit an MSDS for the mixture (or include the mixture on the list of chemicals submitted in lieu of the MSDSs), as provided under §370.30, and submit Tier I (or Tier II) information for the mixture, as provided under §370.40.<br>If you report the mixture itself, then provide the total quantity of that mixture. |
| (2) That is not an EHS .... | Determine either: The total quantity of the hazardous chemical present throughout your facility at any one time by adding together the quantity present as a component in all mixtures and all other quantities of the hazardous chemical (you must include the quantity present in a mixture even if you are also applying that particular mixture as a whole toward the threshold level for that mixture) or the total quantity of that mixture present throughout your facility at any one time. | Report the non-EHS hazardous chemical component—submit an MSDS for the non-EHS hazardous chemical (or include the non-EHS on the list of chemicals submitted in lieu of the MSDSs), as provided under §370.30, and submit Tier I (or Tier II) information for the non-EHS hazardous chemical as provided under §370.40 or report the mixture itself—submit an MSDS for the mixture (or include the mixture on the list of chemicals submitted in lieu of MSDSs), as provided under §370.30, and submit Tier I (or Tier II) information for the mixture, as provided under §370.40.<br>If you report the mixture itself, then provide the total quantity of that mixture. |

(b) For each specific mixture, the reporting option used must be consistent for both MSDS and inventory reporting, unless it is not possible to do so. This means that if you report on a specific mixture as a whole for MSDS reporting, you must report on that mixture as a whole for inventory reporting too (unless it is not possible). MSDS reporting and inventory reporting are discussed in detail in subpart C of this part.

(c) To determine the quantity of an EHS or a non-EHS hazardous chemical component present in a mixture, multiply the concentration of the hazardous chemical component (in weight percent) by the weight of the mixture (in pounds). You do not have to count a hazardous chemical present in a mixture if the concentration is less than or equal to 1%, or less than or equal to 0.1% for a carcinogenic chemical.

## Subpart C—Reporting Requirements

### §370.20 What are the reporting requirements of this part?

The reporting requirements of this part consist of MSDS reporting and inventory reporting. If you are the owner or operator of a facility subject to the reporting requirements of this part then you must comply with both types of reporting requirements. MSDS reporting requirements are addressed in §§370.30 through 370.33. Inventory reporting requirements are addressed in §§370.40 through 370.45.

### How to Comply With MSDS Reporting

### §370.30 What information must I provide and what format must I use?

(a) You must report the hazardous chemicals present at your facility that meet or exceed the applicable threshold levels (threshold levels are in §1A370.10) by either:

(1) Submitting an MSDS for each hazardous chemical present at your facility that meet or exceed its applicable threshold level; or

(2) Submitting a list of all hazardous chemicals present at your facility at or above the applicable threshold levels. The hazardous chemicals on your list must be grouped by Hazard Category as defined under §370.66. The list must contain the chemical or common name