Michael F. Altschul
Senior Vice President
and General Counsel

March 1, 2011

VIA E-MAIL

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-40-10
Proposed Rules for Implementing the Conflict Minerals Provision of Section 13(p) of the Securities Exchange Act of 1934

Dear Ms. Murphy:

This letter is submitted on behalf of CTIA-The Wireless Association ("CTIA"), the international association for the wireless telecommunications industry. CTIA is a nonprofit membership organization that has represented the wireless communications industry since 1984. Membership in the association includes wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products.

We are submitting this letter in response to the December 15, 2010 request for public comments by the U.S. Securities and Exchange Commission ("SEC" or "Commission") on its Proposed Rules for Implementing Section 13(p) of the Securities Exchange Act of 1934 ("Proposed Rules"), issued pursuant to Section 1502 (the "Conflict Minerals Provision" or "Provision") of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Act"), and set forth in the Commission's accompanying release ("Proposing Release").

CTIA strongly supports Congress's ultimate goal of addressing the human rights violations in the Democratic Republic of Congo and adjoining countries ("DRC countries"). While specific practices differ among our member companies, our members have adopted human rights statements, created governance processes to address social responsibility issues, and supported the goals of the United Nations' Universal Declaration on Human Rights. CTIA's member companies are committed to providing consumers with products made in a socially responsible manner. Indeed, our member organizations have adopted many initiatives that further the goals of Section 1502.

CTIA thus supports efforts to curb violence in the DRC countries by enhancing supply chain transparency for conflict minerals. Enhanced transparency, however, achieves this goal only if it provides investors and consumers with useful and actionable information about the product's supply chain. We believe that the final rules accordingly must be tailored to advance the goals of the Conflict Minerals Provision.

Compliance with the Provision is costly, both for issuers determining whether their conflict minerals originated in the DRC countries, and even more so for those issuers who must subsequently furnish an audited Conflict Minerals Report.[1] The Provision will achieve its purpose if disclosure requirements are implemented such that meaningful disclosures are required by those issuers with the capacity to provide them. If the Provision sweeps too broadly in its application, or fails to tailor disclosure requirements to issuers on the basis of their position in the supply chain, these significant cost and resource burdens will not yield benefits that can outweigh the costs.

Moreover, the final rule should recognize that the further removed an issuer is from the source of conflict minerals, the less reliable the supply chain information it will be able to obtain independently. Similarly, the further removed the issuer is from the manufacturing process, the less influence it will have over sourcing decisions made upstream in the supply chain. Unless the final rule reflects these realities, a sizeable number of companies will be unable to determine the source of their conflict minerals, and therefore will be required to prepare Conflict Minerals Reports, or will provide Conflict Minerals Reports which do not have useful or actionable information. Sweeping distant downstream issuers into the ambit of the Proposed Rules will have little effect on the violence in the DRC countries, and may actually result in disclosure that thwarts Congressional intent and the goals of the statute. Tarring the many issuers that cannot independently determine the origin of their conflict minerals with the same brush as issuers that may knowingly use DRC Conflict Minerals reduces the ability of consumers and investors to alter their behavior in response to an issuer's disclosure. As a result, Conflict Minerals Reports may become ubiquitous yet indistinguishable, which will dramatically reduce or completely eliminate their intended effect.

The remainder of our letter offers suggestions for modifying the Proposed Rules in a manner that is consistent with the goals behind the legislation, and yet, more responsive to the realities that businesses will face in attempting to comply with its disclosure regime.

Congress Intended The Provision To Focus On Issuers Engaged In Manufacturing.

The statute directs the Commission to implement regulations requiring disclosure by "any person described in paragraph 2." In turn, paragraph 2 of Section 13(p) states that a person is described if "conflict minerals are necessary to the functionality or production of a product *manufactured by* such person." Under earlier versions of the Provision, a person was "described" if conflict

---

[1] In this regard, CTIA notes that the Commission did not specify the scope of the independent private sector audit of the Conflict Minerals Report. CTIA notes that the Commission's estimate of $25,000 for the private sector audit corresponds to an audit of whether the issuer's Conflict Minerals Report accurately describes the due diligence the issuer exercised. CTIA encourages the Commission to clarify that this is the intended scope of the private sector audit. If the private sector audit is interpreted to require audits of hundreds or thousands of suppliers or purchase contracts, CTIA believes the audit costs would be far higher than the Commission's estimate. Moreover, the Proposing Release underestimates the number of issuers that ultimately will be required to engage in due diligence and provide an audited Conflict Minerals Report.

minerals were necessary to the functionality or production of a product "*of* such person."[2] The addition of the phrase "manufactured by" to the definitional provision narrows the scope of persons required to report to the SEC to those who "manufacture."

In contrast to the plain reading of the statute, the Proposed Rules also apply the Provision to issuers who only "contract to manufacture" their products. In its Proposing Release, the Commission states that applying the Provision to non-manufacturers allows the Provision's "or contracted to be manufactured" language to "have effect." However, that phrase, which appears only once in the Provision, does not appear in the section indicating which persons are covered. It instead only appears in Section 13(p)(1)(A)(ii) of the Act, which describes the disclosures required to be made in the Conflict Minerals Report. The plain reading of this part of the Provision is that this additional disclosure is intended to ensure that a manufacturer otherwise subject to the Act cannot intentionally evade the Act's disclosure scheme merely by distancing itself, through contracting, from the manufacturing process. Indeed, a letter submitted to the Commission by Congressmen McDermott and Durbin (and cited in the Proposing Release) focuses on just this concern, and provides valuable insight into Congress's intent with respect to the scope of the "contract to manufacture" language. The letter explains:

> We were also clear to include the term "or contracted to be manufactured" when outlining a *manufacturing company's responsibilities*. Many companies use component parts from any one of several suppliers *when assembling their products*. This *business model* for supply chain management can help drive down the price for parts through competition. Yet this *business model* also creates complexity, which has served as a rationale for not requiring responsibility to date - and which has enabled the black market for conflict minerals to grow. It is of paramount importance that *this business model choice not be used as a rationale to avoid reporting and transparency.*

(emphasis added). Accordingly, Section 1502 focuses on manufacturers, who must disclose information about products or subcomponents that they contract to manufacture. Therefore it is not necessary for the Commission to graft the "or contract to manufacture" phrase onto the definition of a "person described" in order to give meaning to the phrase's inclusion within Section 13(p)(1)(A)(ii) of the Provision.[3]

The Proposing Release also requests comment on whether the Commission should define the term "manufacture." In considering the term "manufacturing," the Commission should look to the North American Industry Classification System ("NAICS"), which is "the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting,

---

2 S. Amend. 3791, 111th Cong. (2010) (amendment to Sen. 3217) (emphasis added); S. Amend. 3844, 111th Cong. (2010) (amendment to Sen. 3217) (emphasis added).

3 Further, to do so would be to disregard rules of statutory construction that ascribe significance to Congress' omission of "or contract to manufacture" from all other references to "manufacture" within the Provision.

analyzing, and publishing statistical data related to the U.S. business economy."[4] NAICS categorizes enterprises based on their primary business activities, and under this system, clearly differentiates between manufacturers, information service providers, and retail issuers. For instance, "information services" (NAICS code 51XXX) is comprised of newspaper publishers, software publishers, motion picture/TV/radio industries, and telecommunications providers (including all of our wireless carrier members). By contrast, "manufacturing" (NAICS code 31-33XXX) is comprised of, among many other activities, communications equipment manufacturing and computer peripheral equipment manufacturing. Hence, the NAICS system correctly recognizes that there is a distinction between an entity which manufactures communication equipment and an entity which provides services using such communications equipment. The Commission should use this classification scheme to determine which issuers are subject to the Proposed Rules.

Alternatively, A Non-Manufacturer Does Not "Contract to Manufacture" A Product Unless It Exerts Control Over The Manufacturing Process.

If the SEC nevertheless applies the Provision to non-manufacturers, it should do so narrowly, and include only those non-manufacturing issuers that exercise direct and substantial control over the manufacturing process for, or materials used in, the component or product. Clearly, if the contract between the issuer and supplier only addresses, for example, the identity of the item(s), and the financial and logistical terms and conditions of the transaction, the transaction should not fall within the scope of issuer's reporting obligations. Accordingly, where a contract does not provide the issuer with control over specific component selection or the manufacturing process, this non-manufacturing issuer is not "contracting to manufacture", and should not be subjected to the Provision's required disclosures.

Focusing on this type of influence as the touchstone of whether an issuer is subject to the disclosure requirements of the Act will result in meaningful disclosure by those issuers that are likely to have control over the sourcing of raw materials or components that make up a finished product. Moreover, relying on the contract governing the manufacturer-issuer relationship would provide an accurate representation of the issuer's level of control.

In this regard, the Commission should recognize the commercial reality that many contracts between issuers and their suppliers do not deal with the manufacturing process of the subject products, instead focusing on quantity, dimensions, functionality, performance, and the like. In particular, where an issuer is a service provider that contracts with a product manufacturer for devices to provide to the public in connection with the communications services provided, the service provider typically exerts little control over the manufacturing process. In such a case, it is the product's functional ability to support the service, not the manufacturing or component specifications, that is of concern to the issuer. In fact, such service providers often are reluctant to become involved with the manufacturing process for the products they sell out of concern for potential products liability claims or evisceration of warranties from the manufacturer. Conversely, manufacturers often are understandably reluctant to disclose information regarding

---

4 *See* NAICS Introduction, *available at* http://www.census.gov/eos/www/naics/ (last accessed 2/15/11).

their manufacturing process or the sourcing of the components, as this information may constitute proprietary information or limit their ability to substitute materials in response to market changes.

Importantly, the Commission should not consider an issuer's labeling or branding of its products in defining the products subject to the reporting requirement. The Proposed Rules apply to "private label" retailers, i.e., companies that sell generic products that have been specifically manufactured for them through contract under their own brand name, but do not apply to "white label" retailers, i.e., companies that sell generically manufactured products without branding the products as their own. This type of marketing decision by a non-manufacturer is not a meaningful gauge of whether the issuer has influence over a product's manufacturing.

The Final Rules Should Avoid Redundant Reporting Obligations.

The Commission should strive to craft rules that reduce redundancies and uncertainties with respect to compliance. As discussed above, the SEC can help meet this objective by interpreting "contract to manufacture" within its proper context: the activities of manufacturers (or of entities that sub-contract for the manufacture of other entities' products). If the SEC does not take this approach, it nevertheless should avoid placing significant compliance burdens on entities from which incremental disclosure does not justify the significant costs. Because downstream non-manufacturing issuers are far removed from the process by which conflict minerals are obtained, these issuers generally cannot independently determine the source of their conflict minerals and hence will need to look to their suppliers to get such information. Since the same suppliers are used by many downstream non-manufacturing issuers, the Proposed Rules would effectively require these issuers to audit similar (or even identical) supply chains. Moreover, upstream suppliers will face duplicative reporting and diligence-related requests from many direct and indirect customers.

To address this problem, the final rules should permit non-manufacturing issuers to rely on the reasonable representations of their direct suppliers, provided they have a reasonable basis for such reliance.[5] In this regard, reliance on representations of manufacturing issuers subject to full reporting obligations under the Provision should be presumptively reasonable. Similarly, reliance on a manufacturing supplier's current or previous Conflict Mineral Report should also be presumptively reasonable, provided that supplier has contractually agreed to notify the issuer of the occurrence of any material change affecting such suppliers' sourcing of conflict minerals since the Conflict Mineral Report was issued.[6] If an issuer is dealing with a supplier not subject

---

5 CTIA notes that the Kimberley Process Certification Scheme, the process designed to certify the origin of rough diamonds from conflict free sources, relies on a "System of Warranties." Under this System of Warranties, buyers and sellers must guarantee on their sales invoices that the diamonds are conflict free, *based on* personal knowledge and/or *written guarantees provided by the supplier* of the diamonds. The Kimberley Process Certification Scheme has been endorsed by the United Nations and the Clean Diamond Trade Act, federal legislation passed in 2003.

6 Such updates received from suppliers could be periodically disclosed or referenced on the issuer's website.

to the Provision, then the issuer should be able to rely on that supplier's certifications. Moreover, where a supplier has represented to an issuer that it has made a commercially practicable effort to determine the country of origin of its conflict minerals, but has been unable to do so, an issuer should be able to rely on that representation to support its unknown source determination.

Alternative Methods of Satisfying the Diligence Requirements.

If the Commission insists on applying the provision to non-manufacturers, we propose that the rules provide an alternative means of compliance for non-manufacturing issuers to meet the reasonable country of origin inquiry and the obligation to conduct due diligence (collectively, the "diligence requirements") of the Proposed Rules. We propose that the diligence requirements should be deemed satisfied where an issuer's direct supplier contractually represents that the conflict minerals contained in its applicable products meet one of the following conditions, and the supplier agrees to provide certifications and conduct reasonable auditing activities to test such compliance:

- The conflict minerals contained in the product originated from outside the Democratic Republic of the Congo or any adjoining country;
- The conflict minerals contained in the product are derived from recycled or scrapped materials[7];
- The conflict minerals contained in the product were sourced in substantial compliance with an internationally recognized "Conflict Free Smelter" program such as the EICC-GeSI Conflict-Free Smelter (CFS) Assessment Program; or
- The conflict minerals contained in the product were processed by a facility that has adopted and implemented a sourcing policy that is consistent with the OECD Guidance for Responsible Supply Chain Management of Minerals from Conflict-Affected and High-Risk Areas (or other similar internationally recognized responsible sourcing regime), such that there is reasonable assurance no Conflict Minerals processed therein benefit any "armed groups."[8]

Such an approach can help avoid redundant disclosures, as discussed earlier. Moreover, this approach avoids a scenario wherein non-manufacturing issuers far removed from the source of

---

7 The final Rules should encourage manufacturers to use recycled and scrap materials generally, and should recognize that recycled or scrap materials do not typically support the DRC countries' armed groups, who derive their revenue from exploiting the local extraction and transport of ores.

8 It is important to include conditions that allow for minerals from the DRC countries, as an outright ban would have significant negative economic consequences for legitimate mining activity, which provides crucial revenue to the DRC countries' governments and badly needed income for their citizens.

their conflict minerals will be unable to reliably provide information on the source and chain of custody or country of origin, thereby failing to provide investors and consumers with any meaningful information: as more and more issuers have no choice but to furnish similarly indefinite or "unknown source" Conflict Minerals Reports, the result will leave consumer and investors unable to separate the "wheat from the chaff," while simultaneously imposing a costly and time-consuming burden on issuers.

Additionally, by using a contractual process, all parties in the supply chain are more likely to require through contract their upstream suppliers (especially those that are smelters and mining companies) to use a single standardized verification and audit process for each mineral, such as the EICC-GESI process. This approach also correctly places the burden on those issuers who can provide accurate and useful information about the product, rather than issuers who solely "contracts to manufacture" the product. It also augments enforcement of the rules through the private sector supply chain contract mechanism, and brings into the compliance ambit, through the private sector contract architecture, non-issuers in the supply chain ecosystem that would not otherwise be subject to the SEC's final rule.

Requiring Issuers To Make Full Disclosures After The First Fiscal Year Following The Final Rules Is Impractical.

While efforts are under way in the private sector and among international organizations to provide issuers with better information about the supply for their products, they are not sufficiently developed to allow calendar year-end issuers to meaningfully comply with the Proposed Rules in 2012.

Requiring compliance with the Proposed Rules in 2012, so as to provide disclosures in 2013, means that, as a practical matter, issuers will be expected to begin tracing their conflict minerals before tracing programs are fully operational. This is especially true in the technology industry -- it takes approximately nine to twelve months from when raw ore is mined until it ends up in a finished product. Accordingly, to determine whether a product is "DRC conflict free" in 2012, most of our members would need to be able to verify their sourcing by April 2011 or earlier, giving no ability for supply chain tracing mechanisms to develop. Therefore, requiring disclosure of conflict mineral use in the first full fiscal year after issuing the final rules assumes a transparency of supply chains that is not available. Moreover, the timing of the Proposed Rules may have unintended consequences; namely, encouraging issuers to seek supply chains outside of the DRC countries in order to avoid being labeled as providers of non "DRC conflict free" products simply because the infrastructure is not in place to trace conflict minerals with requisite certainty. A de facto ban of this sort will impose hardship on legitimate miners and traders, and would undercut the Act's goal of promoting stability in this region. However, such results can be avoided if disclosure requirements are phased-in to permit issuers to make disclosures on the basis of supply chain information, rather than a lack thereof.

We recognize, however, that the Provision compels some disclosure beginning with the company's first full fiscal year beginning after April 2011. Accordingly, until supply chain tracing mechanisms such as smelter validation programs and "bagging and tagging" schemes are operational, issuers should be able to satisfy the disclosure requirement by stating that they are unable to determine the source of their conflict minerals due to a lack of infrastructure.

The phase-in also should address the disclosure obligations of those companies obtaining products and materials from companies that are not subject to reporting under the Act. For example, many of our member companies contract with foreign original equipment manufacturers or foreign suppliers. Because these companies are not obligated to establish tracing mechanisms, it will take additional time for our members to negotiate contractual provisions providing them with information on the source of their conflict minerals.

Phase-In Rules for Stockpiles And Existing Inventory Should Be Adopted.

The final rules should clarify that any materials or products which an issuer has in its possession, or which constitute finished products already in an applicable supplier's inventory, on or before the date on which the disclosure requirements are effective are exempt from the regulations. Since such a provision does not affect products that are already within the supply chain (and thereby does not support or financing of armed groups in the DRC countries), the legislative intent of the Act is preserved. In addition to manufacturers' inventory, suppliers within the global marketplace possess significant stockpiles of conflict minerals and metals derived from them. The minerals were mined long before supply chain diligence efforts were instituted or required, yet these will likely be the raw materials supplied to manufacturers for some period of time after the reporting requirements become effective. An after-the-fact inquiry into the origin of such minerals are metals may be impossible as a practical matter and would not further the intent of the law.

Since it would be impossible for issuers to know whether products they have on hand at the date on which they must begin compliance contain conflict minerals, a "grandfathering" of existing inventory/possession is necessary to allow issuers to gain the needed visibility into their supply chains. This "grandfathering" should extend to raw materials that exist in the global supply chain, because products manufactured in the period following the enactment of conflict minerals rules will use at least some materials for which supply chain diligence was not initially conducted and that cannot accurately be constructed retroactively. Otherwise, *all* issuers using products containing conflict minerals would have to make an "unable to determine the source" disclosure, and, consequently furnish a Conflict Minerals Report in the first year they are required to make full disclosures.

Conflict Minerals Disclosure Should Not Be A Part Of The SEC's Periodic Reporting System; Website Disclosure Should Be Sufficient.

The Proposed Rules require that disclosures regarding an issuer's conflict minerals use be contained in the body of an issuer's annual report, and that the Conflict Minerals Report be furnished as an exhibit to the annual report. There is nothing in the legislation suggesting that conflict minerals information should be provided as a part of the periodic disclosure system established under the Securities Exchange Act of 1934 to provide information to investors. Accordingly, we see no reason to import into the investor disclosure scheme the conflict minerals disclosures required for a different purpose. The conflict minerals disclosures are highly specialized and distinct, in both their subject matter and methods of preparation, from the financial and operational information that is required to be reported under the Exchange Act. Accordingly, the SEC should divorce the disclosure requirements from the annual report on

Form 10-K. We suggest that the Commission instead require an issuer's determination regarding the origin of its conflict minerals and its supporting disclosures to be posted on the issuer's website within 180 days of fiscal year-end. Because the Proposed Rules do not contemplate Exchange Act liability for the contents of the Conflict Minerals Report, requiring exclusive website disclosure should not be problematic. Moreover, requiring exclusive website disclosure is consistent with the Commission's stated goal of encouraging issuers to develop their websites as effective information and analytical tools,[9] and its concern with ensuring that conflict minerals disclosures are publicly available in a manner that is not overly burdensome.[10]

This proposal also reflects the fact that the deadline for filing the Form 10-K does not provide issuers with sufficient time to make the necessary inquiries or perform the required due diligence to support the disclosures it must make relating to its use of conflict minerals in the prior fiscal year. A large accelerated filer must file its Form 10-K within 60 days of its fiscal year-end. It often takes large accelerated filers the full time allotted to prepare their 10-K filing. This is true even in light of the fact that the information necessary for completion of the Form 10-K is largely available to the company without the need to rely on third parties. By contrast, much of the information required for the Conflict Minerals Report must be obtained from third parties located around the world, who are subject to different standards of public disclosure and reporting than in the United States. As a result, it will be nearly impossible for many companies to provide the disclosures required by the Provision as part of its annual report. A deadline of 180 days following the fiscal year is a much more realistic timeframe for issuers to collect and analyze the necessary information, and have the required conflict minerals audit performed. There is no reason to burden issuers with an unrealistic timing requirement, particularly when the statute contains no required deadlines.

Thank you very much for considering our comments. We would be happy to discuss our concerns and recommendations, or any other matter that you believe would be helpful. Please contact Michael Altschul at 202-736-3248 or maltschul@ctia.org.

Sincerely,

Michael Altschul

---

9 Commission Guidance on the Use of Company Web Sites, 73 CFR 45,862, Release No. 34-58288 (August 1, 2008), *available at* http://www.sec.gov/rules/interp/2007/34-58288fr.pdf ("SEC Web Site Release").

10 *See* Proposing Release at 29 (reasoning that including brief conflict minerals disclosures under separate headings in the annual report would facilitate locating the disclosure "without over-burdening investors"). Indeed, it would appear to be even simpler for an investor to click on a link on a company's website entitled "Conflict Minerals Disclosure" than to seek out the company's annual report, and then find the section entitled "Conflict Minerals Disclosure" within that document.