Congress of the United States
Washington, DC 20510

October 4, 2010

The Honorable Mary L. Schapiro
Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Schapiro:

As authors of the Congo Conflict Minerals provision enacted in the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203), we write to clarify Congressional intent behind the provision and to help inform the Securities and Exchange Commission rule-making process.

Section 1502 of the new law is based on a Durbin bill, which was adopted by unanimous consent and a McDermott bill, H.R. 4128, which went through two mark-ups and was adopted by voice vote in the 72-member House Foreign Affairs Committee. These two bills were combined and incorporated into the Wall Street reform legislation.

We want to provide you with a clear explanation of the intent of the provisions and also our response to troubling statements in the press that some companies are attempting to undermine the intent of the legislation through the SEC rule-making process.

Before addressing the legislation itself, it may be helpful to describe what compelled Congress to act.

It has been 16 years since Rwanda's "Hutu Power" and "Interahamwe" extremists, fresh from committing the Rwandan genocide, crossed the border into the Democratic Republic of the Congo (DRC). Since then, they and other armed groups have perpetrated horrific violence in the DRC – violence often funded through the illicit sale of minerals. In all of those years there is one dynamic that the private sector, international government officials, human rights researchers, the U.S. State Department and other actors agree on – when the price of black market natural resources in the DRC goes down, the rate of violence drops with it.

In a war that has already claimed more than five million lives and continues to result in the death and rape of countless new victims, it is essential that we:

1. reduce the demand for (and therefore price of) black-market conflict minerals;
2. formalize the DRC mining sector; and
3. end the exploitation of transit routes for conflict minerals in the DRC.

The policy goal of Section 1502 is therefore to require transparency of all such conflict mineral sourcing in the DRC and its adjoining countries. Greater transparency will help achieve these three goals. If the SEC issues rules that do not require all companies whose products contain conflict minerals from the DRC and its adjoining countries to be transparent, then the black market mineral trade will likely continue to fund more violence.

We anticipate efforts from industry to weaken the reporting requirements and policy intent of Section 1502, specifically:

1. the meaning of the term "necessary to the functionality" (15 U.S.C. 78m amended (p)(2)(a));
2. the definition of the term "manufactured" (15 U.S.C. 78m amended (p)(2)(a));
3. the meaning of the phrase "and the efforts to determine the mine or location of origin with the greatest possible specificity" (15 U.S.C. 78m amended (p)(1)(A)(ii)); and
4. the meaning of the term "due diligence" and what is in a private sector audit.

The first issue is the term "necessary to the functionality." In trade law, Congress often includes de minimis rules to simplify the importing process. De minimis rules rely on either a percentage or a by-weight basis per unit that allow an importer to make a declaration or follow a rule on a particular good if it includes only "de minimis" amounts of a prohibited ingredient. Congress carefully considered including a de minimis rule in Section 1502 to accommodate the issues of naturally occurring or unintentional natural inclusion, but a de minimis rule would have created an overly generous loop-hole in the law. Unfortunately the weight of the conflict minerals so essential to many products is very small, and the percentage by weight or dollar value of the conflict minerals as a proportion of unit cost is often also very small.

Since it is the policy of Section 1502 to require transparency of all sourcing of conflict minerals from the DRC and its adjoining countries, we used the phrase "essential to the manufacture of" to include all uses of conflict minerals coming from DRC – except those that are "naturally occurring" or "unintentionally included" in the product. We intentionally did not use a de minimis rule. All uses of conflict minerals that originate from DRC and adjoining countries that are not naturally occurring (e.g., vegetables) or are a purely unintentional byproduct (e.g., tuna cans) need to be subject to reporting and transparency.

A second area of concern has been over which companies are manufacturers and which are not. We were careful not to include companies that only sell manufactured products in the requirements for which entities must report. While we were clear to exempt pure retailers from reporting, there are many retailers that also engage in manufacturing. These retailers issue requirements for products to be manufactured for them – including design, quality, product life-expectancy, and so on. In our view, pure "white label" products, where retailers have no influence in their manufacture, should not be subject to reporting. However, products that the retailer contracts to be manufactured or for which the retailer issues unique product requirements must be included. If retailers that contract the manufacture of goods or influence product design are exempt from reporting, then a large, non-transparent use of the black market for DRC conflict minerals would remain, directly subverting the policy intention of the law.

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.

Third, industry may ask the SEC to limit reporting requirements and due diligence to the conflict mineral processing facility (often called a "smelter"). All conflict minerals require sophisticated processing in order to be used in manufactured products, so the processing facility is central to tracking the source and flow of raw conflict minerals. Some companies would like to limit reporting to the representations made by processing facilities.

This is not sufficient. Some processing facilities are beyond the reach of United States law and may not be compelled to provide reliable information. Many companies buy raw conflict minerals and process them themselves for use in their products and for sale to other firms. Also, over time, firms will change their roles in the supply chain. Therefore, a strict rule relying on the word of processing facilities is not enough. While information provided by processing facilities is important, it would not cover many companies and cannot be the limit of manufacturers' responsibilities.

Instead, companies must be able to track whether their conflict minerals come from the DRC and adjoining countries and, if so, where. This needs to be verifiable. If a processing facility provides faulty information to a company, then the company must take sufficient measures to address this problem. A manufacturer must ensure that the information it provides about the source of its minerals is accurate.

Finally, there has been some question about what constitutes due diligence and the role of private sector auditors. As was debated and ultimately negotiated in H.R. 4128, the Conflict Minerals Trade Act, due diligence requires managing the supply lines and assembly process such that conflict minerals used in products have a known and verifiable origin, regardless of the manufacturing company's business model. If manufacturing is outsourced, suppliers must provide legally required representations of the source of its minerals.

Private sector auditors are commonly used to verify all manner of activities within companies – from financial accounting to environmental responsibility. In Section 1502, the requirements of private sector auditors are common sense. Auditors should not have a financial relationship with the audited company, and they should have expertise in conflict minerals and sourcing. The audit itself, as stated in the legislation, verifies the contents of the report and assesses the validity of its conclusions.

To conclude, the conflict minerals provisions in Section 1502 have a clear intent. All companies registered with the SEC need to determine the sourcing of conflict minerals in their products and disclose those sourced from the Democratic Republic of Congo or adjoining countries. If the

conflict minerals in their products are sourced from the DRC or its adjoining countries, then companies must report the origin of the minerals, the products that contain conflict minerals, and steps taken to ensure that such sourcing is not supporting violence. Our shared goal – to end violence funded by the sale of conflict minerals – will be achieved if the legislation is implemented as it was written. Consistent, quality reporting from industry should create transparency that brings these transactions out of the shadows.

Thank you for your attention to this important matter. Our foreign policy advisors Toby Whitney and Chris Homan will contact your staff in the next week to follow up on this issue and will be happy to provide any further information or background you may need.

Sincerely,

Richard J. Durbin
United States Senator

Jim McDermott
United States Congressman