Garmin's Comments on Section 1502 of H.R. 4173 - Conflict Minerals

1. <u>De Minimis provision</u> 1502 (b)(2)(B)

Analysis: The definition of "Person Described" contains this language: "conflict minerals are necessary to the functionality or production of a product manufactured by such person". Most legislation and rulemaking establishes a threshold below which the regulations do not apply. This provides relief to companies using insignificant quantities.

Small quantity users of tin, gold, tantalum or tungsten will often be at an extreme disadvantage (in terms of resources to conduct full supply chain audits in a fashion that will meet an acceptable standard for due diligence) compared to the high volume users of these metals. In such cases, the cost and resource burdens would be tremendously high while the overall impacts under the rule would be insignificant.

#1 Recommendation: We propose a two-tiered de minimis threshold. The "tier 1" threshold would be established at the industry level, which is designed to keep 80-100% of the US market of the 4 minerals within the law's scope. The "tier 2" threshold would be applicable to low-level users within an industry that did not qualify for a "tier 1" exemption. The SEC would set the two thresholds, in terms of:

i. Tier 1 -- each industry's annual percentage usage of global production of each of the 4 minerals, and
ii. Tier 2 -- each person's annual percentage usage of global production of each of the 4 minerals.

Once the SEC defines these thresholds, users of small quantities would be excluded from reporting and due diligence requirements.

2. **<u>Lawsuit Protection</u>**

1502(b) referencing (p)(1)(E) of Sec. 13 of the Securities Exchange Act of 1934

Analysis: Even though Commerce is not required to put the names of "dirty" processing facilities into the public domain, US companies are required to do so. US companies publicly naming these processing facilities could potentially be exposed to lawsuits for defamation and trade libel if the company gets the facts wrong pertaining to such facilities.

#2 Recommendation: Assuming the SEC agrees that companies would be exposed to lawsuits as a direct result of complying with this provision of H.R. 4173, we would like the SEC to ask Congress to pass another bill that either:

- Removes the text in (p)(1)(A)(ii) of Section 13 of the Securities Exchange Act requiring that the company's report include "the facilities used to process the conflict minerals", or
- Gives US companies legal protection from such lawsuits.

3. **Timing of 1st Reporting Deadlines in Relation to Commerce Department Report**

1502(d)(3)(C)

Analysis:

A. The "listing of all known conflict mineral processing facilities worldwide" from the Commerce Department has a due date that is too late (Jan. 21, 2013 (30 months after enactment)).
   a. Companies whose fiscal year is Jan–Dec, face a Feb 2013 due date for their 1st year of SEC reporting on conflict minerals. This leaves an impossibly short time (1-4 weeks) for companies to complete a top-to-bottom review of their 2012 worldwide supply chain audit findings against Commerce's report on processing facilities.
   b. Companies whose fiscal year is July-June, face an Aug 2012 deadline for their first-year report to the SEC. This deadline is five months prior to the availability of Commerce's report.
   c. Small and medium-sized companies face an extra burden in scenarios (a) and (b), because of their more limited manpower to perform supplier audits. One way smaller companies may try to overcome their disadvantage is by using a supply chain audit strategy of confirming that their component suppliers did not source raw materials from the few "dirty" processing facilities. (See recommendation #9A-item 2.)

#3A Recommendation:

1. Fix the timing, so that companies have adequate time to use the Commerce report about processing facilities during the 12-18 months of auditing, leading up to the first reporting deadline. Either set an earlier date for the Commerce report or a later date for companies to meet the first year reporting requirements. And to account for any lateness of the Commerce report, set all persons' SEC and website conflict mineral reporting due dates to 12-18 months after the Commerce report is published.
2. Please recommend to the State Department that their "guidance for due diligence for commercial entities" allows companies to use a supply chain audit strategy of confirming that all their component suppliers did not source raw materials from the few "dirty" processing facilities.

B. The Department of Commerce report is not required to be made available to companies; only to "appropriate Congressional committees". Companies without the means to audit every processing facility in the world will need the Commerce report as soon as possible, and there is no language requiring Commerce or the Congressional committees to make it accessible to them.

#3B Recommendation: Provide clarification that Commerce's processing facility report will either be made public or sent to all companies who put in a request for this report.

4. **Un-level Playing Field for US Companies** 1502(d)(2)(C)(i)

Analysis: The law says nothing to require the federal government to publicly name names of those foreign and private companies whose products contain Congo conflict minerals (CCMs), but who have failed to publicly disclose their usage. The law only requires the Comptroller General to include in an annual report to the appropriate Congressional committees a "general review" of foreign and private companies whose products contain CCMs, and whether these entities are making information on CCM usage publicly available. This is inequitable since US publicly traded companies are forced to report much data on their own company website per (p)(1)(E) of Section 13 of the Securities Exchange Act of 1934.

With the current language requiring only a general review that will not be made public, the US Government is forcing US companies to become unilaterally uncompetitive in retail and internet outlets worldwide—their products sitting next to products labeled "DRC conflict free" and made by foreign and private companies not regulated by the same laws and disclosure regulations.

#4 Recommendation:

1. Responsibilities could be assigned to the President, Commerce and State to create a level playing field, involving sanctions against countries which do not participate.
2. The Comptroller General could publicly disclose the names of foreign companies that it investigates in the process of writing its report.
3. The Comptroller General's general review could be quickly followed up with a very rigorous review by an appropriate US Government department, publicly naming names of those foreign and private companies whose products contain CCMs, that have failed to publicly disclose their usage.
4. In order for US companies to compete on a level playing field, there should be a serious attempt in this law to mandate equal numbers and types of public disclosure requirements for foreign and private companies, as the law requires for US companies.

5. State Department Due Diligence Guidance for Commercial Entities 1502(c)(1)(B)(ii)

Analysis:

A. There is no requirement in the law that the State Department will create and deliver due diligence guidance to commercial entities. State is only required to submit to the Congressional Committees "a plan to provide guidance to commercial entities seeking to

exercise due diligence on and formalize the origin and chain of custody of conflict minerals used in their products and on their suppliers…" by January 2011.

#5A Recommendation: Clarify that the State Department must deliver due diligence guidance to commercial entities. Every commercial entity needs the government's formal and concrete guidance in order to develop an audit plan that will pass SEC muster and is ready for full implementation at the start of fiscal year 2012.

B. There is no deadline for the delivery of the actual guidance to commercial entities by State.

#5B Recommendation: Create a timely deadline for delivery of State's due diligence guidance to commercial entities. All the reporting requirements on commercial entities must hinge on delivery of this guidance by State, with a reasonable lead time prior to the first reporting deadlines imposed on those entities. A recommendation for a reasonable lead time is 18 months. Therefore if State is able to deliver this guidance by January 2012, then, in keeping with the new subsection (p) of Section 13 of the Securities Exchange Act of 1934, section (1)(A), the first reporting deadline should be adjusted as follows:

1. July 2013 for companies whose fiscal year runs July-June
2. Jan 2014 for companies whose fiscal year runs Jan–Dec

Note: These proposed reporting deadlines assume State delivers the due diligence guidance by Jan. 2012.

6. **Definition of "Under the Control of Armed Groups" may result in all mines in Central Africa being labeled as "Conflict Zone Mines".**

1502(c)(2)(B)

Analysis: The definition of "Conflict Zone Mines" is very broad due to the wide scope of the definition of "under the control of armed groups". The net effect is to define "Conflict Zone Mines" so broadly as to incorrectly put the "Conflict Zone Mine" label on most of the legitimate mines in the DRC and all eight adjoining countries.

Paragraph B of 1502(c)(2) defines Conflict Zone Mines as any mine "located in areas under the control of armed groups in the DRC and adjoining countries, as depicted on such Conflict Minerals Map". It is unclear if staff intended to imply the word "or" at the end of paragraph 1502(e)(5)(A). If yes, it would define "under the control of armed groups" as areas where armed groups control just one of the following:

- The mine, or
- The labor, or
- Any part of the trade route, in the DRC or any of the 8 adjoining countries, or
- Trading facilities, in whole or in part, in the DRC or any of the 8 adjoining countries.

Our reading is that the word "and" is implied at the end of paragraph 1502(e)(5)(A). If instead it was "or", a mine could be declared by the State Department map as a Conflict Zone Mine, even if its ownership and employees are not controlled by armed groups, as long as there is one armed group buying the minerals, or taxing or partially controlling a point of export before the minerals leave this 9-country region. (This 9-country region equals almost 40% of the land mass of the African continent.)

This may result in killing the revenues of most of the legitimate mines along with the true Conflict Mines. This is contrary to the stated goals of supporting the DRC Ministry of Mines and strengthening "governance and economic institutions" while alleviating the human rights abuses in the DRC, per 1502(c)(1)(B).

#6 Recommendation: Please clarify whether there is an "and" relationship between 1502(e)(5)(A) and 1502(e)(5)(B). It is confusing that paragraph B ends with "or", yet paragraph A ends with neither "and" nor "or".

Please comment on possible ways to narrow the definition of "Under the control of armed groups" in 1502(e)(5). We think it should hinge upon an armed group meeting at least three of the criteria in 1502(e)(5). We will seek guidance from the State Department as to how they will use the definitions provided by the bill for purposes of making and maintaining its map, specifically "Conflict Zone Mines" and "under the control of armed groups".

7. Definition of "Indirectly Benefit Armed Groups" 1502(e)

Analysis: Section 1502 lacks a definition of "indirectly" in the phrase "minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country" which appears in (p)(1)(A)(ii) and (p)(1)(D) of modified section 13 of the Securities and Exchange Act of 1934.

#7 Recommendation: Provide a workable definition using measurable parameters.

8. Clarify Targets of Punitive Measures 1502 (c)(1)(B)(iii)

Analysis: Because the State Department is given the responsibility to provide a "description of punitive measures that could be taken against individuals or entities whose commercial activities are supporting armed groups and human rights violations" in the DRC, it is important to get clarification on whether foreign and private companies are included in the scope of "individuals or entities". If not, then it becomes an item that US companies will want to discuss with State.

#8 Recommendation: Clarify whether "individuals or entities" refers to foreign and private companies, in addition to the entities that regularly file reports with the SEC.

9. **Map Identification of Armed Groups; Definition for "Other Forces"** 1502(c)(2)(A)(iii)

Analysis:

A. Due to the phrase "where possible" in this section, the State Department's map does not have to positively identify which "armed groups or other forces" are "in control of the mines depicted". This does not set the bar high enough for the map's accuracy, and may result in a State Department map that doesn't distinguish between the armed groups and the private security personnel of the "clean" mines. This could call into question the validity of the entire map.

#9A Recommendation: We request that the regulations promulgated by the SEC will instruct the State Department that its conflict mine map must distinguish between "armed groups" as defined in 1502(e)(3) and private security forces of the "clean" mines.

B. Without a definition for "other forces", the State Department can theoretically produce a map that is flawed to the extent of labeling any "clean" mine with private security as a "conflict mine", solely because the mine owner has hired private security personnel to prevent the law-breaking armed groups from extorting or gaining control of the operation.

#9B Recommendation: Clarify that "other forces" does not include private security personnel at the clean mines or trading facilities, or along trade routes.

10. **Reporting Requirement Scenarios**
1502(b) referencing (p)(1) of Section 13 of the Securities Exchange Act of 1934

Analysis:

A. It is not clear if (p)(1)(A) requires:
   a. A separate SEC report to be submitted only by companies who used Congo conflict minerals (CCMs). Regardless, no deadline for this report is stated.
   b. A simple declarative sentence in the company's regular 10-K, stating usage or non-usage of conflict minerals from the Congo or adjoining countries.
   c. A statement and report from companies that are not able to conclusively say whether their conflict minerals originated in the Congo or adjoining countries.

#10A Recommendation: (a) State that companies who did not use CCM's are, or are not, required to create a separate SEC report. State a deadline for this report. (b) Confirm that a simple declarative sentence in the company's regular 10-K, stating usage or non-usage of conflict minerals from the Congo or adjoining countries, satisfies one of the requirements. (c) State what companies must do if they could not determine the presence of CCM's, perhaps because the Commerce Department's processing facilities report was not yet available.

B. It is not clear if (p)(1)(B) requires:
    a. Companies to certify independent audits only if the company determined that some of their gold/tantalum/tin/tungsten minerals originated in the Congo or adjoining countries.

#10B Recommendation: Simple clarification of the issue.